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### Introduction

From my grandfather I inherited two small paintings. His own grandfather, Sam Nesbitt, had given them as a wedding present to his second wife, Maria Bibby, in the 1930s. By then in their seventies, both were remarkable. Sam had made money canning the savoury produce of southeastern Ontario and sat in the provincial legislature. Unusually for the time, Maria had graduated from the University of Toronto and been a spinster educator for most of her adult life. For present purposes, their premarital bond is notable. Maria was already Sam's sister-in-law, the sister of his late first wife. Some fifty years earlier—during their adult lifetime—their alliance would have been prohibited as incestuous. As it was, the Anglican Church denied them the dignity of a proper wedding; they made do with the Presbyterians. As I relate presently, the federal legislation that made their marriage legally possible passed over fierce religious opposition. But not long afterwards, such unions were generally accepted. The paintings have become for me a tangible reminder of the adaptability of social understandings of marriage.

Changes to the state's law of marriage occur against a matrix of overlapping and competing normative orders. Federal and provincial law regulates marriages, as do religious law and systems of moral, economic, scientific, social, psychiatric, and aesthetic norms. Where the state's marriage rules are incompatible with norms of other kinds, which should prevail? This question arose in the late nineteenth century regarding the merits of the prohibition against a man's marrying his dead wife's sister. More recently, gaps between religious marital practices and state laws have become salient in the context of religious arbitration for family disputes and the regulation of polygamy. The conflict has been explored most thoroughly

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respecting the capacity of same-sex couples to marry civilly. The litigation and lobbying attested to a conflict between the state's rules and the social practice of committed same-sex couples. They testified further to a disjuncture between the practices of those couples, supported by some liberal religious institutions, and the practices and beliefs of other, more conservative religious communities.

The same-sex marriage legislation, the *Civil Marriage Act* (Bill C-38),<sup>1</sup> prompted the articulation of two opposing responses to the question of conflicting marriage norms. Two claims of legal supremacy configured the field. Both claim authority from the tradition of marriage: one a religious tradition, the other a secular tradition. The first claim is that civil marriage continues, if imperfectly, to mirror marriage as a religious sacrament. It follows that religious norms regulating marriage should control or significantly influence the rules regulating civil marriage. In marriage, religion is supreme. The other claim is that civil marriage is fully distinct from religious marriage and that the supreme law of civil marriage is the *Canadian Charter of Rights and Freedoms*.<sup>2</sup>

Without directly assessing the merits of Bill C-38, this paper tests these supremacy claims against the historical regulation of Canadian civil marriage. It fleshes out the competing claims by reference to the parliamentary debates, identifying significant formal and substantive similarities. Then it views those claims in light of historical reforms in the law of civil marriage, the amendment to the prohibited degrees in the 1880s and the introduction of federal divorce legislation in the 1960s. If it is too strong to say that the paper is indifferent to the substantive rules in issue, it bears emphasis that it concerns itself with the tradition of marriage regulation to which these amendment processes testify. On one level, negatively, the objective is to demonstrate that the religious and the *Charter* supremacy claims are unfaithful to the pluralistic historical practice of the state's law of marriage. On another level, positively, the ambition is to identify elements of the complex tradition within Canadian legal order of regulating civil marriage in the face of political and religious controversy. The tradition of civil marriage law, a "culture of argument,"<sup>3</sup> is one of pluralism and change.

### **Competing (but similar) supremacies**

Two speeches from debate in the House of Commons on the second reading of Bill C-38 furnish an adequate basis for the present discussion. The speeches are by the prime minister and the leader of the opposition. It is appropriate to begin with the more venerable of the two supremacy claims, the religious one. Before proceeding, potential objections call for treatment.

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<sup>1</sup> S.C. 2005, c. 33.

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>3</sup> James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985) at 35 [White, *Heracles' Bow*].

Critics confident they can separate law and politics may protest that these invocations of supreme law are not legal arguments, but political strategies. To respond, it is unnecessary to argue, along Dworkinian lines, that the entrenchment of a bill of rights uttering broad terms of political morality obviates such a distinction. One might reply instead that, motivation aside, the two politicians framed their arguments in legal language and thus invited a legal analysis. If a political leader justified his policy in economic terms, it would surely be worth hearing an economist on the soundness of the economic analysis. A further objection might arise from within the legal field. A critic might argue that the discourses of supremacy are not worth examining because no serious jurist subscribes to them. A response here might observe that if the prime minister's *Charter* discourse is a sharp, possibly exaggerated, instance, it is nonetheless kindred to a line of argument adopted by a number of contemporary legal scholars.<sup>4</sup> Moreover, the form of *Charter* argument challenged here surfaces when mooted issues other than same-sex marriage. Recall the rather unobvious debates over the permissibility of arbitrating family matters by reference to religious norms: authoritarian appeals to the *Charter*—again ones premised on the fully civil character of marriage, ones emphasizing equality to the virtual exclusion of religious freedom—set up camp in the public square. And one can predict that another marriage matter, polygamy, is likely to inspire new instantiations of this basic form.<sup>5</sup> It should be conceded that legal scholars practise the religious discourse in its strong form somewhat less frequently. The law reviews honour it less. But it earns its place in this paper by aiding to clarify the contours and assumptions of the *Charter* discourse framed in real or anticipated response to it. Each supremacy claim is illuminated by the other's light.

As is well known, Stephen Harper opposed opening marriage to same-sex couples. The relevant argument concerns the connection between civil marriage and religious marriage. His object oscillates between civil marriage, a creature of the state, and religious marriage, a sacrament governed by revealed texts and religious authorities. When he says that "New Canadians" know that marriage and family are not creatures of the state but pre-exist it, and that the state has responsibility to uphold and defend them, the object is religious marriage. He conjoins both in a single sentence, saying that a law which declares the traditional definition of (civil) marriage unconstitutional will jeopardize New Canadians' "deeply held

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<sup>4</sup> See, from the pens of law professors speaking *qua* legal scholars, "Open Letter to The Hon. Stephen Harper from Law Professors Regarding Same-Sex Marriage," online: University of Toronto, Faculty of Law <<http://www.law.utoronto.ca/samesexletter.html>>.

<sup>5</sup> See the proposal that when developing policy responses to polygamy, the "objective of achieving *equality* and *full respect* for all persons ... must remain paramount and take precedence even over other important values, such as respect for religious freedom." Angela Campbell, "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis" in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Research Directorate, Status of Women Canada, 2005) at 36.

cultural traditions and religious belief in the sanctity of marriage as a union of one man and one woman.” The proposed bill is a “clear threat to religious freedom.” All religious faiths, whether Catholic, Protestant, Jewish, Hindu, Sikh, or Muslim, have traditionally believed that “marriage is a child-centred union of a man and a woman.” Civil and religious marriage appear inseparable when he says that “undermining the traditional definition of marriage is an assault on multiculturalism” and the practices of cultural communities. The sense that religions have a genuine stake in the definition of civil marriage leads him to call for compromise: social peace requires the balancing of “equal rights, multicultural diversity and religious freedom.” This is an effort to engage three *Charter* provisions: equality (section 15), multicultural heritage (section 27), and freedom of religion (section 2(a)). It seeks to characterize the dispute not as a clash between one group’s equality right and other groups’ lesser interests, but as a conflict of rights. Curiously, the constitutionally protected freedom of religion appears to entail not just (negatively) noninterference, but (positively) the sustainment in the federal statute book of a particular civil law. Detecting a cultural impediment in the formulation of the demand for same-sex marriage, Mr. Harper asseverates that one side’s vanquishing the other in a “difficult debate on social issues” is not the “Canadian way.” It is apparently more Canadian to accord each side less than total victory. Although Mr. Harper refers to the *Charter*, his thrust is the religious character and substance of marriage as predating and appropriately influencing civil marriage.<sup>6</sup>

Proponents of this claim lost the parliamentary battle insofar as Bill C-38 secured same-sex couples the right to marry. But if they can moderate their ambitions, subscribers to these religious concerns should take satisfaction in their enduring influence on the form of the debate and the legislative text that Parliament passed.<sup>7</sup> They also ensured that the duty of provincial marriage commissioners to perform civil marriages repugnant to their consciences remains controversial.

The prime minister of the day, Paul Martin, took a sharply different tack, referring more than two dozen times to the *Charter*. Admittedly, the supremacy of the *Charter* is not *prima facie* incompatible with the supremacy of religion.<sup>8</sup> Its preamble mentions the supremacy of God, and section 2(a) guarantees “freedom of conscience and religion.” Perhaps the second claim reinforces the first. But the prime minister’s contention that the *Charter* is the supreme law of marriage downplays freedom of religion. It

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<sup>6</sup> *House of Commons Debates* (16 February 2005) at 3580, 3584 (Hon. Stephen Harper).

<sup>7</sup> See the preambular references to freedom of religion under the *Charter* and the freedom of religious officials to refuse to perform marriages not in accordance with their religious beliefs, a point reiterated in s. 3.

<sup>8</sup> On contemporary human rights and Western Christianity, see Alain Supiot, *Homo juridicus: Essai sur la fonction anthropologique du Droit* (Paris: Éditions du Seuil, 2005) at 277-85. See, more locally, George Egerton, “Entering the Age of Human Rights: Religion, Politics, and Canadian Liberalism, 1945-50” (2004) 85 *Can. Hist. Rev.* 451; George Egerton, “Writing the Canadian Bill of Rights: Religion, Politics, and the Challenge of Pluralism - 1957-1960” (2004) 19:2 *C.J.L.S.* 1.

insists upon a bright line between civil marriage and religious norms. It focuses on the equality guarantee in section 15, which judges have read as forbidding discrimination on the basis of sexual orientation. Less abstractly, the second claim is really that civil marriage is purely secular and that section 15 of the *Charter* defeats any discriminatory rule of marriage. The prime minister states that the members of the government have heard from courts across the country, including the Supreme Court of Canada. A separate but equal approach of civil unions would violate the *Charter* equality provisions. He finds himself, anthropomorphically, “staring in the face of the Charter of Rights with but a single decision to make. Do we abide by the Charter of Rights and protect minority rights or do we not?” In any case, he notes, it has been confirmed that extending the right of civil marriage to gays and lesbians will not infringe on religious freedoms: Bill C-38 “is about civil marriage, not religious marriage.”<sup>9</sup> This thesis of the sharp separability of civil from religious marriage enjoys the imprimatur of the Supreme Court of Canada. In the *Reference re Same-Sex Marriage*, the judges affirm that “[m]arriage, from the perspective of the state, is a civil institution.”<sup>10</sup>

In a trite sense, this supremacy claim is true. The constitution declares itself the “supreme law of Canada.”<sup>11</sup> The constitution also stands supreme over bankruptcy law and child car seat regulations. What is distinctive in this authority claim is the sense that the *Charter* is the lodestar for norms regulating contemporary marriage. One turns immediately to the *Charter*, rather than as a matter of last resort. Here the silences in the speech of the prime minister of the day are telling. He refers little to any non-*Charter* policy reasons for the bill, such as fairness, modernity, tolerance, and protection of children. Bill C-38 regularizes the remedy of a *Charter* breach, but unlike prior exercises of the federal regulatory power over marriage, it is not a broadly motivated policy intervention in family relations. Even acknowledging the *Charter*’s resonance on cultural as well as legal registers, this sense of its predominance is startling and novel.<sup>12</sup>

At first blush, the religious and *Charter* discourses of supremacy appear sharply opposed. Yet it is productive to examine three similarities. The first is substantive and methodological. Both discourses assume a single normative source for the regulation of marriage. One assumes religion, the other assumes the *Charter* right to equality. Methodologically, these norms are located in a single elevated place, “issuing *downwards*.” Neither

<sup>9</sup> *House of Commons Debates* (16 February 2005) at 3577, 3575 (Hon. P. Martin).

<sup>10</sup> [2004] 3 S.C.R. 698 at para. 22. See also *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161 at para. 53 (C.A.) [*Halpern*]: “This case is solely about the legal institution of marriage. ... We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.”

<sup>11</sup> *Constitution Act, 1982*, *supra* note 2, s. 52(1).

<sup>12</sup> The claim that s. 15 is the chief source of the norms and values underlying Bill C-38 is troublesome. On the private law genealogy of same-sex marriage, see Robert Leckey, “Private Law as Constitutional Context for Same-Sex Marriage” 2 J.C.L. [forthcoming in 2007].

discourse leaves space for norms to grow spontaneously upwards from custom or informal practice, “independent of any dominant will.” Both discourses are positivist in this sense, deriving from a positivist understanding of law as rules “imposed upon society by a sovereign will.”<sup>13</sup> In both cases the norms impose a binary logic of obedience or disobedience. This is especially clear in the prime minister’s framing of the choice to abide by the *Charter* or not.

A second similarity is the ascription of internal uniformity. Consider the two discourses’ smoothness and purported unanimity. Mr. Harper refers to the traditional beliefs of Catholics, Protestants, Jews, Hindus, Sikhs, and Muslims respecting the opposite-sex essence and reproductive centrality of marriage. He mentions “deeply held cultural traditions” and practices within multicultural communities. There is no recognition that the cultural traditions, beliefs, and practices of one community on the list might vary considerably from those of another, and indeed might collide with them. What is superficially a feature of marriage shared by two cultures might, on the kind of inspection not undertaken, turn out to rest upon incompatible justifications. It is, notably, problematic to lump together as both “a union of one man and one woman” marriage as the man’s subjugation of the woman and as the joining of two complementary equals.<sup>14</sup> Absent compatible justifications and doctrines, the coincidence of social facts in the definition of marriage does not constitute a Rawlsian overlapping consensus.<sup>15</sup>

Nor does Mr. Harper contemplate the possibility that traditional cultural practices and beliefs might conflict with core values of the modern democratic liberal state sufficiently that it is unwise for civil institutions to follow such beliefs uncritically. Prior rejection of the religious tradition of subordinating women indicates that a religious consensus alone fails to guarantee a religious norm’s appropriate weight in secular law. The state can adopt practices derived from religious traditions only after testing them against other norms in a process of mediation. In the religious discourse, no effort is made to catalogue and assess the ways in which the rules of civil marriage already depart from the traditions and beliefs of some religious and cultural communities. Neither, crucially, is there any sense that, within a given cultural community, its cultural traditions may already be the object of

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<sup>13</sup> Carleton Kemp Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964) at 1. The positivist label applies better to religious rules derived from revealed texts than from solely custom.

<sup>14</sup> The former understanding of marriage enjoys a respectable pedigree in Christian theology, much of which has argued “that women must be subordinate to men in domestic relationship and in church and that men exercise their maleness precisely by dominating women.” Mark D. Jordan, *Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage* (Chicago: University of Chicago Press, 2005) at 13 [Jordan, *Blessing Same-Sex Unions*]. For a comparative survey highlighting the legal inequality still widely evident within marriage in many countries, see Arlette Gautier, “Legal Regulation of Marital Relations: An Historical and Comparative Approach” (2005) 19 *Int’l J. L. Pol’y & Fam.* 47.

<sup>15</sup> John Rawls, *Political Liberalism*, exp. ed. (New York: Columbia University Press, 2005) at 144-50.

internal contestation, variation, and reinterpretation, of “cultural dissent.”<sup>16</sup> The discourse of religious supremacy perceives the non-state communities it addresses as having an integrity, coherence, and monistic character.<sup>17</sup> It is serenely uncomplicated by any sense of cultures as “internally diverse,”<sup>18</sup> “internally riven and contested,”<sup>19</sup> or containing “plurality and conflict, tradition, and subversion.”<sup>20</sup> It regards the beliefs and practices of cultures as static. By contrast, Christian history, to give one example, can be viewed as “a long series of quarrels among Christians about an innumerable range of topics, large and small, notably including sex and marriage.”<sup>21</sup>

Ironically, a speech ostensibly intended to reflect values of diversity and pluralism elides difference and presumes uniformity on the part of religious and cultural groups. This discourse claims to hear religious groups singing. What it hears, though, is not an occasionally chaotic cacophony but a convenient unison. Given the value attributed to cultural preservation over cultural redefinition, a cynic familiar with the literature on the tense relationship between multiculturalism and feminism might even speculate that the chorus is one in which tenors and basses predominate over sopranos and contraltos.

Though it is less patent, the prime minister’s discourse of supremacy is similar in its denial of diversity, pluralism, and contest. As already observed, this discourse provides little space for conflicting interpretations of the *Charter*. The *Charter* is understood more as a cache of rules for courts to elucidate definitively than as the basis for a conversation in which its participants perpetually remake the constitutional instrument.<sup>22</sup> This discourse does not invoke the substance of the reasons provided by the lower courts. Indeed, this formal approach provides no tools for assessing diverging judicial interpretations. It would be fully compatible with a legal tradition, unlike the common law’s, in which judges did not bother justifying their decisions with reasons. What counts is the result. The prime minister’s discourse of supremacy is a formal one in which it is the institutional

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<sup>16</sup> Madhavi Sunder, “Cultural Dissent” (2001) 54 *Stan. L. Rev.* 495.

<sup>17</sup> Roderick A. Macdonald & David Sandomierski, “Against Nomopolies” 57 *N.I.L.Q.* [forthcoming in 2007].

<sup>18</sup> Kwame Anthony Appiah, *The Ethics of Identity* (Princeton, N.J.: Princeton University Press, 2005) at 151-52.

<sup>19</sup> Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, N.J.: Princeton University Press, 2002) at 16.

<sup>20</sup> Martha C. Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999) at 37. For recent explorations of the historical diversity internal to Christian and Jewish traditions, see Mark D. Jordan, ed., with Meghan T. Sweeney & David M. Mellott, *Authorizing Marriage? Canon, Tradition, and Critique in the Blessing of Same-Sex Unions* (Princeton, N.J.: Princeton University Press, 2006) [Jordan, *Authorizing Marriage?*].

<sup>21</sup> Jordan, *Blessing Same-Sex Unions*, *supra* note 14 at 5. Once collective illusions are discarded, it becomes apparent that “there is no coherent Christian tradition to claim” respecting marriage, “much less a Judeo-Christian one” (*ibid.* at 100).

<sup>22</sup> White, *Heracles’ Bow*, *supra* note 3 at 35.

pedigree of a court's interpretation of the *Charter* that trumps, eliminating any need or possibility for substantive discussion.<sup>23</sup>

Cast in the hieratic language of legalism, it also precludes political disagreement. External opponents of the proposed change—persons outside the minority group—are ostensibly silenced by the appeal to the *Charter*. So, similarly, are internal opponents of a proposed change—members within the minority group who think it not such a good idea. The claim to *Charter* supremacy leaves only a precarious rhetorical space for those who opposed same-sex marriage from within the gay community on queer theoretical grounds.<sup>24</sup>

A third similarity might, wryly, be called meta-discursive. For the most part, the two discourses—religion and fundamental rights—avoid discussing their relationship one to the other. Mr. Harper attempts to frame a conflict between rights to equality and to freedom of religion. But he does not endeavour to integrate within his theory the prior development of secular regulation of civil marriage. For its part, the prime minister's affirmation that Bill C-38 is “about civil marriage, not religious marriage” oversimplifies the matter, rather scanting a rich political and legal tradition.<sup>25</sup>

## The contested distinctness of civil marriage

### *Pushing off from religious rules*

“This is a very short Bill,” says a senator opposing the proposed change to the definition of marriage, “but one striking at the root of social and domestic life.” It seems that to meet the desires of a few, the “whole edifice of society and all that is blessed in domestic life must be imperilled,” and absent any desire to consider and discuss the measure's effects. The senator states: “[E]very body within the sound of my voice revolts from the very thought of such a marriage, and yet we are now asked to legalize it.” He submits a slippery slope argument, claiming that sanctioning such marriages will lead to denying sacred law “in every detail.” The result will be to

<sup>23</sup> This discourse operates awkwardly given the Supreme Court of Canada's abstinence, in *Reference re Same-Sex Marriage*, from addressing the constitutionality of the old opposite-sex rule. The last substantive decision is the Chrétien administration's choice not to appeal the judgment in *Halpern*. The prime minister clings disingenuously to the formal supremacy claim based on a decision's judicial pedigree. When he says “[w]e have heard from courts across the country, including the Supreme Court” (*House of Commons Debates* (16 February 2005) at 3575 (Hon. P. Martin)), he avoids noting the highest court's silence on the merits.

<sup>24</sup> Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: The Free Press, 1999) c. 3.

<sup>25</sup> The discourses share another similarity, not germane here, concerning the separation of powers. Each privileges an institution of governance: the religious discourse takes it that Parliament should regulate marriage in accordance with religious norms; the *Charter* discourse holds the courts responsible for announcing changes to the rules of marriage. Both ignore the possibility that regulating marriage might be an institutionally shared enterprise, one borne out by the fact that in the same-sex litigation, the impugned rule was in some provinces a nineteenth-century common law rule announced by judges and, in Quebec, a rule enacted federally in 2001. Compare *Halpern*; *Hendricks v. Quebec (A.G.)*, [2002] R.J.Q. 2506 (Sup. Ct.).

“familiarize ourselves with all the abominations which the law forbade.”<sup>26</sup> Off Parliament Hill, a bishop joins his voice in opposition. The belief that the said marriages are unscriptural entails that they ought not to be legalized. He observes the group of potential beneficiaries to be “a mere fraction” and that sound utilitarian principles prohibit legislating “for the very few, when such legislation must injuriously affect the welfare and happiness of a much larger number.” Worse, the liberty sought for the few may inflict “positive injustice” upon the majority.<sup>27</sup> Another clergyman estimates such marriages to be “revolting and unnatural in the extreme ... Nature itself teaches that all such marriages are to be avoided.”<sup>28</sup>

By contrast, in support of the proposed change, a member of Parliament estimates that since the only objection derives from a religious source, “it is better in a mixed community, such as ours, that people should be left to the free exercise of their opinions.”<sup>29</sup> Mention was also made of those couples already living as spouses whose relationships could not be legally regularized.

The change mooted in these debates was not the inclusion of same-sex couples. It was the alteration of the laws prohibiting marriage between related persons, specifically, the lifting of the interdiction against a widower’s marrying the sister of his late wife.<sup>30</sup> The paradigmatic case seems to have been the dying wife and mother whose sister moves selflessly into the family home to act as nurse. Its power as a paradigmatic case derives from the support it provides to opposing views. Opponents to the proposed change contended that the possibility of an eventual marriage between the husband and his dutiful sister-in-law would wrongfully eroticize dealings, quite literally over the wife’s dying body, which propriety dictated should remain chastely fraternal. Proponents argued it would be least disruptive for the bereft children if Auntie could formalize the *de facto* maternal role assumed during their mother’s illness. The prohibition had previously been the target of abortive legislative efforts, in the metropolis and in the colonies.<sup>31</sup> It was finally lifted in the dominion in 1882.<sup>32</sup> The prolonged debates on the matter, in the press and in Parliament, canvassed a number of points.

<sup>26</sup> *Senate Debates* (27 April 1880) at 387, 388; (28 March 1882) at 180 (Hon. Mr. Kaulbach).

<sup>27</sup> Hibbert Binney, Bishop of Nova Scotia, *Reasons for Rejecting the Proposed Alterations in the Marriage Law of the Dominion* (Halifax: Baillie & Anderson, 1880) at 6, 3, 8.

<sup>28</sup> Rev. D.B. Blair, *A Dissertation on the Degrees of Kindred Which Bar Marriage According to Leviticus XVIII and XX* (Halifax: Nova Scotia Printing, 1873) at 42.

<sup>29</sup> *House of Commons Debates* (27 February 1880) at 298 (Mr. Abbott).

<sup>30</sup> In the common law provinces, the prohibition had been received with English law. In Quebec, it appeared in art. 125 C.C.L.C.

<sup>31</sup> For a catalogue of prior attempts, see *House of Commons Debates* (27 February 1880) at 291-92 (Mr. Girouard).

<sup>32</sup> *An Act concerning Marriage with a Deceased Wife’s Sister*, S.C., 45 Vict., c. 42. Eight years later, Parliament permitted marriage to a dead wife’s niece: *An Act to amend An Act concerning Marriage with a Deceased Wife’s Sister*, S.C., 53 Vict., c. 36.

There were constitutional questions. Some doubted the jurisdiction of Parliament to legislate in relation solely to marriage.<sup>33</sup> Another view was that, jurisdictional questions aside, an old English statute impeded Parliament from altering the prohibited degrees.<sup>34</sup> Catholics within Quebec were alert to any trespass upon their right, secured by the *Quebec Act, 1774*,<sup>35</sup> to practise their religion. Some argued that the right to the Catholic religion disabled Parliament from applying such legislation to Quebec. In the alternative, more narrowly, others denied that any such valid federal legislation could apply to Roman Catholics within that province.<sup>36</sup>

At the time of Lower Canada's private law codification in 1866, a minority view had emerged that merely codifying the Roman Catholic Church's rule might interfere unconstitutionally with religious freedom. Rigidly crystallizing the religious prohibitions, ran the argument, interfered with the Catholic religion by purportedly eliminating the pope's discretion to grant dispensation from them in individual cases.<sup>37</sup> Substantively, this theory of the unconstitutionality of these codal articles is chiefly an historical curiosity. Yet the form of the argument should give pause to those keen for the state to incorporate religious norms into its legislation. Arguments against the liberal state's legislating religious norms into civil law typically concern the rights and liberties of nonbelievers. By contrast, the objection here hints at the perils *for believers* of binding a state's regime to religious traditions. Rendering a religious norm into the state's *lex scripta* may unintentionally do violence to that norm by petrifying it. The state's reification and enforcement of religious norms may prove much less flexible and organic than the practice of the religious community. State recognition may transform "fluid, transformative, and intersubjective" practices into "dead memorials."<sup>38</sup> Bracketing liberal neutrality, it may be strategically unwise for believers to seek compliance with religious norms in the state's

<sup>33</sup> Such suspicions rested upon an idiosyncratic reading of Parliament's constitutional authority to legislate respecting "Marriage and Divorce" (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91(26), reprinted in R.S.C. 1985, App. II, No. 5) as limited to "marriage in relation to divorce." P.B. Mignault, *Le droit civil canadien basé sur les "Répétition écrites sur le Code civil" de Frédéric Moulton avec Revue de la jurisprudence de nos tribunaux*, t. 1 (Montreal: C. Théoret, 1895) at 340 [Mignault, *Le droit civil*].

<sup>34</sup> Specifically, 32 Henry VIII, c. 38, declared the levitical degrees to be the impediments to marriage enforceable within the king's realm and "any of his Grace's other land and dominions." J.H. Blumenstein, "Matrimonial Jurisdiction in Canada" (1928) 6 Can. Bar Rev. 570 at 575.

<sup>35</sup> 14 Geo. III, c. 83 (U.K.), reprinted in R.S.C. 1985, App. II, No. 2.

<sup>36</sup> Such arguments likely exaggerated the potential harm: the federal statute did not purport to repeal art. 129 C.C.L.C., which provided that one could not compel a priest to solemnize a marriage against which there existed some impediment under his religious doctrines and beliefs and the discipline of his church.

<sup>37</sup> Désiré Girouard, *Considérations sur les Lois civiles du mariage* (Montreal: Nouveau Monde, 1868) at 25 [Girouard, *Considérations*]. A later scholar opines, rather cynically, that the ecclesiastical rule's "historical venerableness" becomes less compelling as it was for centuries "a prolific source of Church revenue," dispensation being always available for a price. E.F. Raney, *Marriage and Divorce Laws of Canada* (Social Service Council of Canada, 1914) at 4.

<sup>38</sup> Val Napoleon, "Delgamuukw: A Legal Straitjacket for Oral Histories?" (2005) 20:2 C.J.L.S. 123 at 125.

enactments. Cluttering Caesar's statute book with God's laws may prove messy for all concerned. Most interesting for present purposes, however, are the arguments over the suitability of amending state law in departure from religious strictures.

The majority of Anglican officials, the Presbyterian bodies, and the Roman Catholics opposed alteration to "what is and has been the law of the Church and the law of the land."<sup>39</sup> But clerical interventions in the debate were not unanimous. There were religious dissenting voices.<sup>40</sup> Some Hebrew scholars proposed alternative readings of Leviticus, the prohibition's biblical source. Ultimately, it was not revisionist exegesis—internal to the religious view—that proved decisive but—externally—a decision that religious norms need not be determinative. Despite religious opposition to the proposed change, and the orthodox conviction that scripture forbade it, Parliament legislated anyway. It thereby distanced the constitutive rules of civil marriage from the traditional definition of the mainstream religions. Here is an indication that, at least occasionally, vanquishing the opponent in a difficult debate on social issues is precisely the "Canadian way." Concern for those couples already living as spouses shows regard for social practice as a source for marriage regulation; marriage norms can emerge bottom up, instead of only top down.

The debate over prohibited degrees is a major moment for the nascent civil character of state marriage. Pre-Confederation, there had been little distinction between civil marriage as contract and religious marriage as sacrament. In a treatise published prior to Confederation and to Quebec's 1866 codification, civil and religious law intermingle seamlessly.<sup>41</sup> Admittedly, the constitutional conferral of legislative authority over marriage and divorce upon the dominion Parliament had augured potential differences between civil and sacred marriage. But it was not until the amendment of the prohibited degrees that Parliament began to realize this potential. The distribution of legislative jurisdiction was the product of a liberally neutral, nation-building will for national uniformity in matters of status. Yet it stemmed simultaneously from the desire for divorce to be possible, one day, for members of Quebec's English-speaking Protestant minority. It had been obvious to the Fathers of Confederation that the legislature of Quebec, the fiefdom of French-speaking Roman Catholics,

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<sup>39</sup> *Marriage with a Deceased Wife's Sister: A Bible Argument, with Facts Long Obscured*, By a Clergyman (Hamilton: Office of the "Churchman," 1871) at 3. See also *Review of Several Late Publications on Marriage with a Deceased Wife's Sister Condemning This Proposed Innovation on Our Religious Institutions* (Halifax: Wesleyan Conference Steam Press, 1859); John Laing, *Marriage with the Sister of a Deceased Wife, Considered in Connection with the Standards and Practice of the Canada Presbyterian Church* (Toronto: Adam, Stevenson & Co., 1868).

<sup>40</sup> In favour of the change, see e.g. *Deceased Wife's Sister: Letters by The Rev. D.V. Lucas, M.A., in Reply to The Rev. H. Roe, D.D.* (Montreal: Gazette Printing Company, 1882) (letters previously published in *The Gazette*).

<sup>41</sup> James Armstrong, *A Treatise on the Law Relating to Marriages, in Lower Canada* (Montreal: John Lovell, 1857).

would be unlikely to permit divorce within that province.<sup>42</sup> Confederation's architecture thus cements into its structure the possibility for the state's institution of civil marriage to differ substantively from the matrimonial sacrament. The point is not the general liberal one that a constitution is appropriately blind to religious groups; provisions for denominational schooling obviate any such hypothesis. Instead, less neutrally, the grant to Parliament of legislative power over marriage and divorce inscribes in the foundational text the drafters' intention to prevent any particular religion from imposing its rules for marriage upon adherents to another religion.

The patina formed with time upon sections 91 and 92 of the *Constitution Act, 1867* should not obscure the intense contemporary disagreement from which they issued. What lawyers and lawmakers take for granted today was controversial at the time.<sup>43</sup> The contest and debate, followed by the making of an intensely political decision, form part of the tradition. Marriage and the family as social phenomena may predate their juridical recognition by the state. The discourse of religious supremacy makes this point to suggest the naturalness of the contours of the state's regulation of these phenomena. Yet it should be remembered that not only the state's substantive regulation of marriage, but also the constitutional framework within which that regulation occurs are the contingent outcomes of political controversy. What the broad brush of constitutional myth making paints as a compromise was, nevertheless, a victory of one view over opposing positions.

Within Quebec, a civil marriage distinct from the religious sacrament emerged at a glacial pace. Though plainly adopting the Napoleonic *Code civil* (1804) as their model, the codifiers in Canada East did not emulate post-revolutionary France in producing civil marriage as a "civil sacrament."<sup>44</sup> For the first century after Confederation, no concept of civil marriage profaned Quebec law. The priests and ministers of recognized religions, emboldened by robust assumptions as to the things suitably renderable unto God, monopolized the solemnization of marriage and all acts of civil status (birth, marriage, burial). "Pour se marier en Bas-Canada," a text contemporaneous with the 1866 code pronounces authoritatively, "il faut être chrétien." Improbable as it was "dans un pays religieux comme le Bas-Canada" that a person without a religion would even seek to marry, "la Législature d'une nation chrétienne ne peut raisonnablement s'occuper des infidèles et encore moins des athées et des impies."<sup>45</sup> Such a state of affairs is glaringly incompatible with contemporary aspirations of liberal state

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<sup>42</sup> F.J.E. Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14 McGill L.J. 209 at 211-15.

<sup>43</sup> See the hope that "divorce is more likely to be prevented by leaving the subject among the functions of the local legislatures, at all events as far as Lower Canada is concerned, than by leaving it to the Federal Parliament." *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada* (Quebec: Hunter, Rose & Co., 1865) at 691 (6 March 1865) (Hon. Mr. Dorion).

<sup>44</sup> Jean Carbonnier, *Flexible droit: pour une sociologie du droit sans rigueur*, 10th ed. (Paris: L.G.D.J., 2001) at 310.

<sup>45</sup> Girouard, *Considérations*, *supra* note 37 at 33.

neutrality.<sup>46</sup> Yet religion permeated legal discourse to an extent that a prominent commentator argued in the early 1950s that the civil law could instantiate its neutral principles simply by recognizing as valid a marriage performed by the minister of one faith for the adherents of another.<sup>47</sup> By the 1960s, criticisms of this situation proliferated, stimulated by increasing secularization. The population's growing mobility and urbanization separated people from their natal villages and it seemed less appropriate to maintain records parochially.<sup>48</sup> The legislature finally instated civil marriage in 1969.<sup>49</sup>

Today, in every Canadian jurisdiction, there is a plain separation between the civil record of birth and death and religious sacraments of baptism and burial. Civil and religious entry into a community and exit from it are parallel but distinct. It is only in respect of marriage that the civil contract and the religious sacrament can be performed simultaneously. This possible simultaneity engenders the slippage between the civil and the sacramental that infects the discourse of religious supremacy and everyday speech. In one apt observation, an "unruly mixture of religious, familial, communal, economic, and reproductive considerations ... surrounds most marriage rites."<sup>50</sup> The prolonged use of "marriage" to signal unions both civil and religious and both historical and contemporary arguably obscures more than it reveals. Unreflective use of the same term ahistorically occludes the dimension of contemporary erotic lives as "modern cultural and psychic productions."<sup>51</sup> The regulation of divorce further intensifies the distinctness of civil marriage.

Quebec's 1866 civil code enshrined an understanding of marriage's duration fully consistent with canon law. Marriage, in the codifiers' lapidary and unambiguous words, "can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."<sup>52</sup> As in the case of the prohibited degrees, divorce raised questions of constitutionality: would not federal legislation purporting to apply to Roman Catholics in Quebec

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<sup>46</sup> So, too, was the state of affairs prevailing in Nova Scotia in the late eighteenth and early nineteenth century. On the "very serious disputes" over the claim of Episcopal clergy, supported by the executive, to the "exclusive right of marrying," see Beamish Murdoch, *Epitome of the Laws of Nova-Scotia* (1832; Holmes Beach, Fla.: Wm. W. Gaunt & Sons, 1971), vol. 2 at 20. The author writes "that if all the sects were equalized in this respect, it would give much satisfaction to those who think the present practice a serious grievance, and it would produce no injury to any description of persons" (*ibid.*). On the special legislative dispensation granted in the mid-1790s for the solemnization of marriages by lay persons "where the inhabitants were remote from any clergyman," see *ibid.* at 19. In that province, religious adherents other than Anglicans urging the state to follow "traditional matrimonial practices" must mean a somewhat liberalized version. I am grateful to Bruce MacDougall and Philip Girard for this point.

<sup>47</sup> L. Baudouin, "Validity of Marriage Between Two Roman Catholics Solemnized by Protestant Minister—Nature of Marriage in Quebec" (1951) 29 Can. Bar Rev. 437.

<sup>48</sup> Louis Baudouin, "La famille face à un code moderne" (1967) 27 R. du B. 221 at 225.

<sup>49</sup> S.Q. 1969, c. 74.

<sup>50</sup> Mark D. Jordan, "Introduction" in Jordan, *Authorizing Marriage?*, *supra* note 20, 1 at 4.

<sup>51</sup> David M. Halperin, *How to Do the History of Homosexuality* (Chicago: University of Chicago Press, 2002) at 4.

<sup>52</sup> Art. 185 C.C.L.C.

impermissibly interfere with the exercise of their religion assured by the *Quebec Act*?<sup>53</sup> Into the 1960s, divorce laws across the dominion consisted of a “complicated pattern” of predominantly nineteenth-century English law.<sup>54</sup> In Newfoundland and Quebec, the patchwork prescribed recourse to the Senate for the dissolution of a marriage. By mid-decade, pressure for fresh divorce legislation was building on several fronts. Parliament, by introducing divorce legislation,<sup>55</sup> repeated the earlier signals that it had no ambition to keep civil marriage pegged to religious marriage. As remains the case today, the legislation did not ask churches or other religious institutions to recognize civil divorces.

The minister of justice’s remarks to the Commons on presenting the bill are revealing. Pierre Elliott Trudeau appeals neither to religious nor to constitutional supremacy. He expressly distances himself from religious law, espousing a view of civil marriage as appropriately informed by social needs. It would be erroneous to attempt to legislate concepts proper to a “theological or sacred order” into a “pluralistic” and “profane” society. His reference to a pluralistic society resonates with the references to a “mixed community” as a basis for bracketing religious considerations in the debate over prohibited degrees ninety years earlier. The gist was that the legislation was an effort to tackle a social problem and modernize the regime. As in the case of the prohibited degrees, there is attention to salient features of social practice—to lived experiences—as an influential source for state law. Marriage norms do not only issue downwards from above. Notably, discussion of rights is minimal. Rights—even here, they are not constitutional rights—enter the discussion only as justification for the policy choice to assign jurisdiction over divorce to superior courts rather than to county and district courts.<sup>56</sup>

The role of the churches in the divorce debates differed from their intervention in the debates over the prohibited degrees. Now the mainstream churches were one of the pressures impelling the government to act. Crucially, churches that did not regard their own religious marriages as dissoluble nonetheless acknowledged the social harms inflicted by the cramped existing hotchpotch of regimes. These harms included the sad subsistence of so-called dead marriages and spousal collusion in fabricating and proving fault. Consulted by the special joint committee of the Senate and House of Commons, church representatives declared that in a pluralistic society, it would be inappropriate for religious norms governing the indissolubility of marriage to apply to nonbelievers.<sup>57</sup> It was appropriate for

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<sup>53</sup> See Mignault, *Le droit civil*, *supra* note 33 at 551-60.

<sup>54</sup> *Report of the Special Joint Committee of the Senate and House of Commons on Divorce* (Ottawa: Queen’s Printer, 1967) at 47 (Joint Chairmen: The Hon. A.W. Roebuck & A.J.P. Cameron) [*Report on Divorce*].

<sup>55</sup> *Divorce Act*, S.C. 1967-68, c. 24.

<sup>56</sup> *House of Commons Debates* (5 December 1967) at 5083, 5086 (Hon. P.-E. Trudeau).

<sup>57</sup> *Report on Divorce*, *supra* note 54 at 92. The procedure of “consulting religions” privileges hierarchical, organized traditions that have identifiable spokespersons and authorities over

the state to depart from religious norms in legislating in respect of civil marriage. Indeed, several of the Protestant churches would have gone further towards basing divorce upon the no-fault idea of marriage breakdown than the government did. Parliament, cautious against precipitous reform, ultimately preserved a considerable place for fault.<sup>58</sup> Appreciating the significance of the churches' stance regarding divorce legislation requires acknowledgement of the magnitude of the disjunction between a marriage regime including divorce and marriage under canon law. Once the civil law makes divorce available, the character of civil marriage becomes "profoundly different" from Catholic doctrine regarding the indissoluble character of religious marriage. Civil marriage in a regime permitting divorce has become merely "perpetual."<sup>59</sup>

### *Church and state*

Contrast these two moments in the redefinition of civil marriage. In the case of the prohibited degrees, institutionalized religion mobilized to defend the biblically influenced status quo. Religious institutional actors claimed that civil marriage has, historically, tracked religious marriage and should continue to do so. The religious spokesmen predicted that the proposed departure from religious prescriptions would harm the institution of civil marriage. Reform would dangerously interpose a gap between the civil and religious definitions of marriage. In the case of divorce, however, the churches did not attempt to stop Parliament from legislating a secular regime that they found repugnant, to varying degrees, for their flocks. Indeed, some urged the government to go further than it did. The churches accepted the appropriateness of distinguishing civil marriage from religious marriage. While committed to a top-down regulatory model for their congregations, they contemplated a more bottom-up approach for state legislation.

Both moments perturb the contemporary narrative of religious supremacy. They show that the contemporary discourse overstates the abiding similarities between secular and religious marriage. It exaggerates the constancy with which religious institutions have themselves contended that civil marriage should continue to reflect religious norms. In principle, nothing binds the authorities of a religious institution to consistency with the arguments of their predecessors. There is no legal sense in which the leaders of mainstream religious institutions of the late 1960s who advocated divorce reforms waived an entitlement on the part of their successors to demand,

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other formations. The effect would seem to be that, when religions are consulted regarding marriage matters, not all religions can be treated equally.

<sup>58</sup> *House of Commons Debates* (5 December 1967) at 5085 (Hon. P.-E. Trudeau). It took Parliament until the mid-1980s to instate the no-fault approach advocated by the Protestant churches in the 1960s.

<sup>59</sup> Jacques Godron, *Le mariage: Principes catholiques, solutions légales* (Paris: Éditions du Cerf, 1946) at 105 [Godron, *Le mariage*]. The civil law defines "perpetual" as "established for an unlimited period" (*Private Law Dictionary and Bilingual Lexicons*, 2d ed. (Cowansville, Qc.: Yvon Blais, 1991) s.v. "perpetual"). "Perpetual" speaks to the unspecified duration; "indissoluble" speaks to the impossibility of voluntary termination.

decades later, that secular marriage track religious marriage in a different respect. But the disjuncture between the religious stance in the 1960s and that of the more conservative churches in the contemporary same-sex marriage debate at least calls for the discourse of religious supremacy to be nuanced. The “traditions” of marriage to which the discourse of religious supremacy refers include the churches’ calls for a secular divorce regime distinct from religious law.

Indeed, it is remarkable that Parliament’s legislative distancing of civil marriage from religious rules has not deterred religious institutions from objecting to later proposals on the chief basis of fresh inconsistency with their religious tenets. The legislative intrusion in 1882 of a set of “revolting and unnatural” unions into the class of civil marriages did not galvanize religious institutions to declare civil marriage permanently, irreversibly distanced from the religious sacrament. The introduction of divorce, which differentiated civil marriage “profoundly”<sup>60</sup> from the religious sacrament, “den[ying] the sacramental theory of marriage,”<sup>61</sup> did not prevent Roman Catholic authorities from regarding themselves as having a stake in Bill C-38’s amendments to civil marriage. Despite legislative delineation of an increasingly distinctive secular institution, representatives of organized religions still claim that civil marriage remains mimetically tied to sacramental marriage.

In a penetrating study on the rule of law’s cultural force, Paul Kahn observes that the outcome of a particular case never jeopardizes law’s rule. Each side in a legal controversy will claim that the law “requires” its desired outcome; “each will describe the alternative position as an absence of law and thus the rule of men.” But “such dramatic rhetoric rarely carries forward beyond the moment of decision. The legal scholar and the dissenting judge cry that the sky is falling, but it never does. All go on to the next case or the next legislative session and start the same arguments all over again.”<sup>62</sup> Kahn’s account aptly describes the conduct of religious institutions in regard to civil marriage. They protest and presage dire consequences. Yet once the decision is made and the bill passes, they wait to reprise the same arguments when the legislature next proposes reform. The rules of marriage, like the rule of law, seem more resilient than supposed by their defenders. Neither Kahn’s account of this pattern nor this paper’s borrowing of it is intended to imply insincerity. To the contrary, the ritual aspect of these argumentative forms likely deepens the sincerity on the part of those invoking them. But it implies a need for cautious and critical distance in assessing the content of claims formulated in this way by repeat institutional players.

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<sup>60</sup> Godron, *Le mariage, ibid.* at 105; see also Mgr Lucien Beaudoin, *La Dissolution du Lien matrimonial en Droit Canonique et en Droit Civil canadien* (Ottawa, 1948) at 262.

<sup>61</sup> Rev. M.J. Whelan, *Marriage: The Law of the Church and the Law of the Land* (Ottawa, 1911) at 2. He locates the fundamental rupture between civil and religious marriage effected by divorce at the time of the Reformation.

<sup>62</sup> Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999) at 117-18.

As legal positivists might rightly remark, Parliament's legislating in departure from religious norms says nothing about the merits of the resultant legislation. For present purposes, substantively assessing the changes discussed is unnecessary. The brute fact of such legislation testifies to the presence of a culture of argument, a tradition of civil marriage within which legislatures, over the voices of religious protest or with religious blessing, materially differentiate civil marriage from the religious sacrament. The cycle of protest, reform, and adjustment on the part of the protesters—they lick their wounds and gird their ecclesiastical loins for future battles—is itself a feature of Canadian politico-legal history and culture. One conclusion to draw is that core socio-legal institutions are more durable and flexible than their defenders are likely to estimate. Another is that a dose of epistemic humility is warranted in defining those institutions and identifying their unalterable essence.

The preceding paragraphs' implications for the discourse of religious supremacy are perhaps obvious. They testify that the contemporary discourse of religious supremacy takes a selective view of the traditional relationship between religious and civil marriage. They remind that in crafting the rules of civil marriage, Parliament has not regarded itself as bound to the revealed truths of religions. It has instead responded to the desires, problems, and social practices of actual families. Indeed, by deploying marriage—arguably lazily—as a proxy for economic interdependence when effecting the redistributions of the welfare state, the state has ascribed to civil marriage a host of material and social significations unknown to religious versions. Genesis and Blackstone speak of man and woman joining in one flesh, but they are silent respecting their entitlement to survivor benefits under the Canada Pension Plan. The suggestion of a direct, unmediated transfer of religious norms to the civil legislation of marriage confronts significant and inconvenient counter-examples. Anthropologically, this discussion underscores the weaknesses of the discourse of religious supremacy stemming from its ascription of an internal uniformity to the set of religions. Well-intentioned religious practitioners have disagreed on matters of marriage they regard as going to its core.<sup>63</sup> As my great-great-grandfather's case attests—his remarriage permitted by federal law and by the Presbyterian but not the Anglican Church—it is wrong to assume that the set of civilly permissible marriages has consistently matched the set of religiously permissible ones. There is no entitlement to have the conditions for a particular religious marriage mirrored by the conditions for civil marriage.<sup>64</sup> These paragraphs also

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<sup>63</sup> It may also be worth recollecting the ambivalence, if not downright hostility, towards marriage and family life signalled by the historical Jesus: "he not only avoided marriage and family himself, but also taught people to forsake those institutions and enter into an alternative, eschatological society. The household was part of the world order he was challenging." Dale B. Martin, "Familiar Idolatry and the Christian Case against Marriage" in Jordan, *Authorizing Marriage?* *supra* note 20, 17 at 20.

<sup>64</sup> In *Halpern*, the court rejected the Metropolitan Community Church of Toronto's contention that nonrecognition of its marriages infringed its freedom of religion (*supra*

gesture, however, towards the subtlety and incompleteness of the discourse of *Charter* supremacy.

The *Charter* discourse rests upon the straightforward assertion that Bill C-38 concerns civil marriage, not religious marriage. As a matter of political strategy, it likely struck the prime minister as less antagonistic to those moved by religious considerations to claim that Bill C-38 concerned civil marriage in hermetic isolation from religious marriage. He presented the two as totally unrelated, like ritual circumcision and the law of trusts. If this manner of presentation is not strictly false, this paper's episodic review emphasizes that it is significantly incomplete. Civil and religious marriage are distinct but not, after all, unrelated. They have a complex historical relation, an "ancient commingling."<sup>65</sup> Within the Canadian setting, civil marriage has achieved distinctness from religious marriage, but the achievement of that distinction entailed that legislating about civil marriage has always occurred in relation to religious marriage and against it. Civil marriage, as known today, took form in departure from religious marriage, the one defined against the other. Consequently, it is much less than the full story to say that dealings with one arise without in some way reenacting and reconfiguring their relationship of difference.<sup>66</sup> You may characterize your going to the cinema the night of 24 December as purely secular. But if you do so in defiance of your family, who expect you at mass, such a characterization seems impoverished and does little to advance the understanding of human interactions. Similarly, to characterize the French law banning head scarves and other religious symbols as purely secular understates its signals to religions. The view of the relationship between civil and religious marriage presented here is a richer and fuller one. Rather than no relation at all, it is a relation of tension and opposition.<sup>67</sup> While this paper does not attempt to present a complete theory of Canadian civil marriage, such a theory would need to articulate this sense of opposition.

A further factor complicates the alternate notions of a one-way transmission of religious norms to the civil sphere and of marriage, in the state's eyes, as a purely civil institution. Since 1990, the *Divorce Act*<sup>68</sup> has included measures intended to encourage a spouse to remove impediments to his spouse's religious remarriage. The provision imposes consequences in the civil courts for religious nonfeasance. Parliament was explicitly motivated by the denial of a *get* by Orthodox Jewish men to their former

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note 10 at paras. 51-57). While the conditions by which the state makes available civil marriage must not discriminate, there is no entitlement to demand a civil imprimatur for a particular religious marriage.

<sup>65</sup> Jordan, *Blessing Same-Sex Unions*, *supra* note 14 at 4.

<sup>66</sup> The United Kingdom's recognition of same-sex relationships short of marriage tacitly confirms marriage's religious dimension by what it explicitly denies civil partnerships: "No religious service is to be used while the civil partnership registrar is officiating at the signing of a civil partnership document" (*Civil Partnership Act 2004* (U.K.), 2004, c. 33, s. 2(5)).

<sup>67</sup> Roderick A. Macdonald & Alexandra Popovici, "Catéchisme de l'islamophobie" [unpublished, on file with author].

<sup>68</sup> R.S.C. 1985 (2d Supp.), c. 3, s. 21.1.

wives, but the rules are of general application. The provision's origins in the political activism of Orthodox Jewish women—unsuccessful within their religious communities, successful in the legislative sphere<sup>69</sup>—present a counter-example to the religious supremacy claim's ascription of internal unity to religious communities. But the provision's significance is greater yet. It testifies to a conviction that there are values of civil marriage—equality of the spouses, autonomy, and freedom?—that are appropriately telegraphed towards religious marriages.<sup>70</sup> Far from holding religious norms and practices to be normatively prior, as proposed by the religious supremacy claim, Parliament seems to have subjected religious marriage, at least partially, to the values of civil marriage. This example indicates, not the religious discourse's simple account of Parliament's obligation to “uphold and defend” marriage and the family as it finds them, but something much more complex.

## Conclusion

This paper has identified two recently opposed hypotheses or discourses of supremacy proposed to resolve a clash of marriage norms. Bracketing their substantive differences, it has drawn out their similarities. In positivist fashion, each presumes that the relevant norms are imposed from above, either by religious authorities or by the courts. But historical practice indicates that marriage laws were changed in part in response to the lived experiences of couples disadvantaged by the status quo. Might such a process of amendment be fruitfully regarded as “external harmonization,” the “pursuit of greater coherence between state law ... and other, non-state normativities”?<sup>71</sup> Of course, adjusting the state law in light of social practice requires that those practices be mediated by values. A lawmaker never adopts all existing social practice as desirable and appropriately recognizable. If it is understandable why, for strategic reasons, politicians find it so tempting to construct an appeal to supreme law, it cannot be overlooked that such appeals ignore the tradition of regulation of marriage within Canada as plural, contested, and changing. Just forty years ago during the divorce debates, the government presented justifications grounded in social needs and good public policy. In contrast, contemporary debates are polarized around two thinner discourses of supreme law. Fears that Canada's political culture is “less vibrant” than a generation ago would seem to find

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<sup>69</sup> Shauna Van Praagh, Book Review of *Religion and Culture in Canadian Family Law* by John Tibor Syrtash (1993) 38 McGill L.J. 233 at 248-49.

<sup>70</sup> One scholar writes that such a provision “peut être interprétée comme contraignant une partie à faire un acte religieux, s'immiscant par là même dans un domaine qui relève par nature de choix personnels, d'une part, et s'ingérant dans un champ hors de sa compétence, l'ordre normatif religieux, d'autre part”; Anne Saris, *La compénétration des ordres normatifs : Étude des rapports entre les ordres normatifs religieux et étatiques en France et au Québec*, 3 vols. (D.C.L. thesis, McGill University, 2005) vol. 1 at 128-29 [unpublished].

<sup>71</sup> Robert Leckey, “Harmonizing Family Law's Identities” (2002) 28 Queen's L.J. 221 at 258.

fodder in the debates over Bill C-38.<sup>72</sup> The bent of today's political leaders to hide themselves behind the *Charter* may be understandable, but it is not plain that it is desirable or pardonable. Public discourse is impoverished consequently.

Religious interveners in recent debates have referred to the traditions of marriage. Attention to those traditions should be supplemented by acknowledgement of the robust political tradition of the regulation of civil marriage in this country, one of legislatures acting over the opposition of religious authorities. The discourse of religious supremacy obscures the multiple ways in which, long before the introduction of Bill C-38, the federal and provincial governments had already constituted civil marriage as different from religious marriage. The distinctions were not accidental, but deliberate. Elected leaders, handling the hot potato of same-sex marriage, abstained from further antagonizing their religiously motivated constituents by pointing out the laboured distinctiveness of civil marriage from religious marriage. Yet examples where it would be helpful to embrace the oppositional relationship between civil and religious marriage indicate the risks of reticence on this matter.

For example, the intermittently oppositional relation of civil marriage and religious marriage clarifies the peculiarity of objections by provincial marriage commissioners to performing same-sex civil marriages. The typical claim for religious accommodation at work concerns the interference of routine employment practices with long-established religious observance. But a provincial marriage commissioner's request for an exemption from the workplace duty of performing a same-sex civil marriage is different. The objection is not that the workplace obligation to perform a legally valid civil marriage prevents the commissioner from executing a prior religious duty, such as worshipping at a particular hour. The objection presumes that a believer has a religious duty not to act instrumentally in the state's conferral of a civil benefit upon a couple who would not qualify for *religious* marriage within the commissioner's faith community. The claim's oddness emerges more fully when it is recalled that the civil ceremony at issue was developed expressly for those to whom a religious institution might deny a religious ceremony.<sup>73</sup> Parliament's understanding is that the rules of civil marriage derogate intentionally from religious marriage on the basis that society is plural, mixed, and to use Trudeau's word, profane. Objecting to performing a civil marriage on the basis that the partners would not qualify for the sacrament of marriage is akin to refusing, on religious grounds, to process a consensual civil divorce on the basis that the sacrament of marriage is indissoluble. Could a Roman Catholic civil marriage commissioner refuse to remarry civilly divorced Catholics on the basis of a *religious* impediment to

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<sup>72</sup> Harry Arthurs & Brent Arnold, "Does the *Charter* Matter?" (2005) 11 Rev. Const. Stud. 37 at 111.

<sup>73</sup> For fuller development of this argument, as well as references to the cases in issue, see Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006) 69 Sask. L. Rev. 351 at 360.

*religious* remarriage? What is the pre-existing *religious* duty or practice with which performing a *civil* marriage interferes?

This paper is sympathetic to *bona fide* claims of religious discrimination and is open to accommodation where possible. But a *bona fide* claim is not one of brute distaste for a task. The claim depends upon the demonstration, not just that the bureaucrat's religious institution does not bless same-sex couples within its holy spaces, but that a religious rule somehow impedes religious adherents from conferring, in the course of their *civil* employment, state benefits upon qualified individuals. Do St. Paul's injunctions to "be subject to the governing authorities" and, "[f]or the Lord's sake," to "accept the authority of every human institution"<sup>74</sup> hint that Christians, at least, may have difficulty making out the necessary claim of sincere belief that *religious* obligations apply to the definition and distribution of *civil* benefits?<sup>75</sup> Tracing the relation between civil marriage and religious marriage helps elucidate the issue.

Consider also polygamy. When politicians find themselves confronted by religiously motivated claims in favour of polygamy, they may find it convenient to recall the pedigree of civil marriage as a secular institution framed in rejection of religious rules. Parliament's jurisdiction over marriage permits it to legislate rules different from the constitutive rules of various religious forms of marriage. Moreover, the free exercise of a religion guaranteed by the *Charter* does not entail that civil marriage reflect religious requirements. Legislatures might also wish to recall that the *Divorce Act* provisions enacted in reaction to the difficulty of the *get* show not only that civil marriage is distinct, but that Parliament may judge it appropriate to promote the equality and autonomy norms of civil marriage in the religious sphere.

Ultimately, there is no supreme law of civil marriage to invoke to close debate. Marriage law is contestable, contingent, and controversial. My great-great-grandfather's second marriage would once have been outlawed as incestuous, but mores and the law changed—over the protests of organized religion—and such marriages achieved acceptance. The paintings commemorating that marriage give me hope that, perhaps in my lifetime, my marriage to another man will become comparably uncontroversial. Recognizing the political and cultural tradition of regulating civil marriage, with its conclusion that there are no supreme norms, that we are on our own,

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<sup>74</sup> Respectively, Romans 13:1; 1 Peter 2:13 (NRSV).

<sup>75</sup> To invoke freedom of religion, claimants need not demonstrate an objective religious obligation, but while a court is unqualified to rule on the validity of a religious practice, it will inquire into the claimant's sincerity, to ensure that the religious belief asserted "is in good faith, neither fictitious nor capricious, and that it is not an artifice." *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paras. 49-52, 2004 SCC 47. A religious adherent's abstaining from a civil duty is, of course, different from a religious institution's treatment of same-sex couples, although even there the delegation to religious officiants of state authority to perform civil marriages in the course of religious marriages may raise questions.

may be destabilizing. But it is possible that what is lost in certainty will be compensated in candour.

### Résumé

Les débats récents concernant le mariage des couples de même sexe appellent à une réflexion plus large sur la rivalité entre les normes qui prétendent gouverner le mariage. Lors de ces débats, deux prétentions prirent l'avant-scène: l'une voulant que la loi suprême du mariage se trouve dans les traditions religieuses, et l'autre selon laquelle le mariage civil serait purement séculaire et trouverait sa loi suprême dans la *Charte canadienne des droits et libertés*. Cet article identifie certaines similarités au sein de ces deux prétentions. En particulier, chacune suppose erronément l'uniformité interne des communautés culturelles. Un examen de l'histoire des amendements aux lois portant sur le mariage révèle qu'aucune de ces prétentions ne reflète fidèlement la tradition canadienne du droit du mariage. Les amendements aux lois concernant les degrés prohibés de liens de parenté et l'introduction de la loi fédérale sur le divorce illustrent le développement par le Parlement d'un mariage civil ou profane, par opposition consciente aux formes religieuses. Depuis les années 1880, les lois portant sur le mariage ont été modifiées périodiquement au motif que dans une société séculaire et plurielle, l'imposition de normes religieuses aux non-croyants est illégitime. Le Parlement ne s'est pas inspiré uniquement des normes explicites, dites autoritaires, mais a également considéré la pratique sociale comme une source de normes relatives au mariage. En somme, les réformes du passé révèlent une riche tradition de débat et de contestation, au cours de laquelle les Églises elles-mêmes n'ont pas constamment maintenu que les règles du mariage civil devraient être à l'image des règles religieuses. Contrairement aux prétentions des adeptes de la Charte, le mariage civil et le mariage religieux ne sont pas dénués de liens. Ils se situent au contraire dans une relation de tension et de différences qui requiert des ajustements constants.

### Abstract

Recent debates over same-sex marriage prompt reflection more generally on the competing norms regulating marriages. Two supremacy claims emerged in the debates, one that religious traditions provide the supreme law of marriage, another that civil marriage is entirely secular and its supreme law is the *Canadian Charter of Rights and Freedoms*. This paper identifies similarities in these claims. Both wrongly ascribe an internal uniformity to cultural communities. Referring to historical amendments to marriage law, the paper argues that both claims are unfaithful to the Canadian tradition of marriage law. Amendments to the prohibited degrees of relationship and the introduction of federal divorce legislation show the federal Parliament to have developed a civil or profane marriage in conscious opposition to religious forms. Since the 1880s, marriage law has been periodically altered on the basis that it is wrong in a plural, secular society to impose religious views on nonbelievers. Parliament has not simply followed top-down norms, but also regarded social practice as a source of marriage norms. Past instances of law reform indicate a rich political tradition of argument and contestation, one in which the churches have not maintained consistently that the civil law of marriage should

mirror religious rules. Civil marriage and religious marriage are not, as claimed by the standard bearers of the *Charter*, unrelated. They stand instead in a constantly adjusting relationship of tension and difference.

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