

Private Law as Constitutional Context for Same-sex Marriage

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While scholars of gay and lesbian activism have long eyed developments in Canada, the leading Canadian judgment on same-sex marriage has recently been catapulted into the field of vision of comparative constitutionalists indifferent to gay rights and matrimonial matters more generally. In his irate dissent in the case striking down a state sodomy law as unconstitutional, Scalia J of the United States Supreme Court mentions *Halpern v Canada (Attorney General)*.¹ Admittedly, he casts it in an unfavourable light, presenting it as a caution against the recklessness of taking constitutional protection of homosexuals too far.² Still, one senses from at least the American literature that there can be no higher honour for a provincial judgment from Canada — if only in the jurisdictional sense — than such lofty acknowledgement that it exists. It seems fair, then, to scrutinise academic responses to the case for broader insights. And it will instantly be recognised that the Canadian judgment emerged against a backdrop of rapid change in the legislative and judicial treatment of same-sex couples in most Western jurisdictions.

Following such scrutiny, this paper detects a lesson for comparative constitutional law in the scholarly treatment of the recognition of same-sex marriage in Canada. Its case study reveals a worrisome inclination to regard constitutional law, especially the judicial interpretation of entrenched rights, as an enterprise autonomous from a jurisdiction's private law. Due respect accorded to calls for comparative constitutionalism to become interdisciplinary, comparatists would do well to attend, *intradisciplinarily*, to private law's effects upon constitutional interpretation. The private law genealogy of same-sex marriage in Canada exemplifies the type of narrative that accounts of legal developments framed exclusively within constitutional law may occlude. On one level, the paper's ambition is

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¹ (2003) 65 *Ontario Reports* (3rd) 161 (CA).

² *Lawrence v Texas* 593 *United States* 558, 573 (2003).

to rectify the substantive account of the path to same-sex marriage in Canada. On another, it seeks to highlight a sense of disciplinary self-sufficiency on the part of constitutional scholars and their view of constitutional law as immune to private law influences. The unsatisfactoriness of this understanding gestures towards a richer research agenda for comparatists.

RECOUNTING SAME-SEX MARRIAGE IN CANADA

An orthodox account of the path leading to same-sex marriage has emerged. This narrative regards *Halpern* as the culmination of previous judgments concerning constitutional equality claims by gay men and lesbians. Before presenting a richer narrative, one emphasising same-sex marriage as an outgrowth of family law, it is necessary to recite the constitutional facts and survey the prevailing version. Early this decade, same-sex couples in several provinces sued for the right to marry. They claimed that the opposite-sex definition of marriage discriminated against gay men and lesbians on the basis of sexual orientation, contrary to section 15 of the Canadian Charter of Rights and Freedoms.³ All judges hearing the claim agreed that the old opposite-sex rule infringed the equality right, although disagreements arose over the consequences of this fact and its rightful remedy. Several judges suspended the effects of their declaration that the challenged rule was unconstitutional, leaving the federal parliament time to respond. But in June 2003, Ontario's highest court in *Halpern* reformulated the common law rule so as to make marriage the 'voluntary union for life of two persons to the exclusion of all others', effective immediately. The federal government, although it had opposed the claims until then, elected (controversially) to appeal neither *Halpern* nor the subsequent judgments in other provinces. Instead, it referred draft legislation that would implement same-sex marriage across the federation to the Supreme Court of Canada for an opinion as to the bill's constitutionality. The Supreme Court declared the bill's core parts constitutional, warily declining to opine whether the Charter's equality guarantee specifically required same-sex marriage.⁴ In July 2005, the federal Civil Marriage Act redefined marriage for civil purposes as 'the lawful union of two persons to the exclusion of all others'.⁵

In the prevailing account, the first obstacle was the absence of sexual orientation from the list of grounds for discrimination in section 15. Thus, the first substantial step towards same-sex marriage was the Supreme Court's acceptance of sexual orientation as a ground analogous to those inscribed in the exemplary list. In *Egan v Canada*,⁶ all the judges recognised sexual orientation as analogous, although a narrow majority upheld the exclusion of same-sex cohabitants from the old age security scheme in question. Next, goes the story, in *M v H*,⁷ the Court allowed the claim that it was unconstitutional to exclude

³ Part I of the Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) 1982 c 11. Section 15(1) reads: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

⁴ *Reference re Same-Sex Marriage* [2004] (3) *Supreme Court Reports* 698, 2004 SCC 79.

⁵ SC 2005 c 33 s 2.

⁶ [1995] (2) *Supreme Court Reports* 513.

⁷ [1999] (2) *Supreme Court Reports* 3.

same-sex cohabitants, on the basis of sexual orientation, from the spousal support regime that provincial legislation already applied to unmarried opposite-sex cohabitants. Finally, *Halpern* and its companion cases from other provinces determined that the opposite-sex requirement for marriage discriminated unjustifiably against same-sex couples. What is significant is the extent to which Canadian scholarly treatments of these developments regard them as forming a story about the constitutional right to equality and as steps along a Charter journey that is best mapped from within constitutional law.⁸

Legal scholars have, of course, explored other dimensions of the recognition of same-sex couples. Commentators have assessed relational recognition as an attribute of citizenship,⁹ as an instance of the contractualisation of intimate relations,¹⁰ as a celebration of the place of gay men and lesbians in society,¹¹ and as an instance of family law's complex mediation of identity.¹² The private international law implications have received richly merited consideration.¹³ Constitutionalists have conscripted the same-sex marriage cases in their ongoing exploration of the relationship between courts and legislatures, particularly the idea that judicial review followed by legislative amendments enacts an inter-institutional 'dialogue'.¹⁴ Despite these elaborations, it remains fair to conclude that the Canadian legal literature generally tells the story of same-sex marriage as one of constitutional law. What emerges is a sequence of events dominated by judicial interpretation of the constitutional equality guarantee.¹⁵ The standard accounts depict the Charter as the storehouse of progressive norms.

Trends in Canadian family law scholarship further substantiate the Charter account's supremacy. In scholarly and more popular representations, the litigation culminating in *Halpern* eclipsed the formalities for relationship recognition recently introduced by the legislatures of Nova Scotia and Quebec.¹⁶ While some lament that the immediate remedy in *Halpern* denied parliament the chance of a meaningful response, the scholarly action has undeniably shifted away from legislatively created marriage substitutes — innovations

⁸ For representative accounts, see Hogg, PW (2006) 'Canada: The Constitution and Same-Sex Marriage' (4) *International Journal of Constitutional Law* 712; Wintemute, R (2004) 'Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and its Limits' (49) *McGill Law Journal* 1143 at 1153-72; Gee, G and Webber, GCN (2005) 'Same-Sex Marriage in Canada: Contributions from the Courts, the Executive and Parliament' (16) *Kings College Law Journal* 132; Bala, N (2003) 'Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships' (29) *Queen's Law Journal* 41 at 62-80; Mossman, MJ (2004) *Families and the Law in Canada: Cases and Commentary* Emond Montgomery at 86-101; Payne JD and Payne, MA (2006) *Canadian Family Law* (2nd ed) Irwin Law at 24-27.

⁹ For example, Cossman, B (2002) 'Sexing Citizenship, Privatizing Sex' (6) *Citizenship Studies* 483.

¹⁰ For example, Roy, A (2001) 'Partenariat civil et couples de même sexe: la réponse du Québec' (35) *Revue juridique Thémis* 663.

¹¹ MacDougall, B (2000-01) 'The Celebration of Same-Sex Marriage' (32) *Ottawa Law Review* 235.

¹² Leckey, R (2002) 'Harmonizing Family Law's Identities' (28) *Queen's Law Journal* 221.

¹³ Bailey, M (2004) 'Same-Sex Relationships across Borders' (49) *McGill Law Journal* 1005.

¹⁴ For example, Roach, K (2004) 'Dialogic Judicial Review and its Critics' (23) *Supreme Court Law Review* (2nd series) 49.

¹⁵ A rare exception regards same-sex marriage as an 'internally consistent development for the evolution of family law': Romano, M (2003) "'Do You Take This Man to Be Your Lawfully Wedded Husband?' — A Case of Form Following Substance' (15) *Windsor Review of Legal and Social Issues* 3 at 14.

¹⁶ For example, Roy, A (2002) 'Le partenariat civil, d'un continent à l'autre' (2002) *Revue internationale de droit comparé* 759. Before the same-sex marriage litigation, Canadian family law scholars had methodically analysed the legislative options for recognising same-sex relationships. For example, Davies, C (2000) 'The Extension of Marital Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods' (17) *Canadian Family Law Quarterly* 247.

within the private law of the family — to marriage via the Charter. It is, moreover, testimony to the emphasis placed upon the Charter that, in some accounts framed explicitly within family law, the same-sex recognition cases figure in a larger narrative. Some scholars identify a fundamental transformation of family law as a consequence of Charter litigation. Due to the Charter cases, on this view, family law is no longer private law, but public law.¹⁷ A ‘constitutionalizing’ of family law is said to have occurred.¹⁸

Like the domestic literature, comparative studies typically frame same-sex marriage in Canada as a story of equality rights under the Charter.¹⁹ *Halpern* is underscored for its finding that excluding same-sex couples from marriage violated their human dignity.²⁰ Where same-sex marriage in Canada is seen as the end of a process, that process is typically regarded as one of constitutional litigation. The ‘triumph of the Canadian experience’ is thus attributed to the ‘incremental approach of addressing benefits and protections under equal protection principles’.²¹ Contrasted with the American experience, Canadian developments regarding same-sex marriage have been seen as stemming ‘primarily from the combination of a richer liberalism in Canadian political culture’ combined with ‘a judiciary emboldened by a relatively recent constitutional change that elevated its rights consciousness, as well as that of the citizenry’. These developments ‘illustrate the ability of courts to achieve social change’.²² The prior spousal support challenge in *M v H* receives a similar constitutional characterisation.²³

The constitutional slant on the Canadian experience appears not only in the substantive account, but also in the limited attention to comparative methodology. Although some have complained — probably justifiably — that case selection in comparative constitutional studies is ‘seldom systematic’,²⁴ some of the comparative studies of same-sex marriage address, if only in passing, the suitability of comparing Canadian and American experiences. Canada and the United States are seen as appropriately comparable because

¹⁷ The most influential exposition is Harvison Young, A (2001) ‘The Changing Family, Rights Discourse and the Supreme Court of Canada’ (80) *Canadian Bar Review* 749.

¹⁸ Bala, N (2001) ‘The Charter of Rights & Family Law in Canada: A New Era’ (18) *Canadian Family Law Quarterly* 373 at 426. Compare Toope, SJ (1991) ‘Riding the Fences: Courts, Charter Rights and Family Law’ (9) *Canadian Journal of Family Law* 55 at 95 (Charter ‘destined to have a relatively minor impact’ upon family law).

¹⁹ Eskridge Jr, WN (2002) *Equality Practice: Civil Unions and the Future of Gay Rights* Routledge at 108-12; McReynolds, AW (2006) ‘What International Experience Can Tell U.S. Courts about Same-Sex Marriage’ (53) *UCLA Law Review* 1073 at 1096-1100; Wojcik, ME (2004) ‘Wedding Bells Heard around the World: Years from Now, Will We Wonder Why We Worried about Same-Sex Marriage?’ (24) *Northern Illinois University Law Review* 589 at 636-45; Wright, WK (2006) ‘The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales’ (20) *International Journal of Law, Policy and the Family* 249 at 252-56; Smith, M (2007) ‘Framing Same-Sex Marriage in Canada and the United States: Goodridge, Halpern and the National Boundaries of Political Discourse’ (16) *Social and Legal Studies* 5 at 11-18; and Bamforth, N (2007) ‘Same-Sex Partnerships: Some Comparative Constitutional Lessons’ (2007) *European Human Rights Law Review* 47.

²⁰ Samar, VJ (2005) ‘Justifying the Use of International Human Rights Principles in American Constitutional Law’ (37) *Columbia Human Rights Law Review* 1 at 85.

²¹ Gutierrez, D (2004) ‘Gay Marriage in Canada: Strategies of the Gay Liberation Movement and the Implications it Will Have on the United States’ (10) *New England Journal of International & Comparative Law* 175 at 186-204 and 219 [footnote omitted].

²² Pierceson, J (2005) *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada* Temple University Press at 165.

²³ Norrie, KM (2000) ‘Constitutional Challenges to Sexual Orientation Discrimination’ (49) *International & Comparative Law Quarterly* 755 at 756-57; Dupuis, M (2002) *Same-Sex Marriage, Legal Mobilization, & the Politics of Rights* Peter Lang at 137-38.

²⁴ Hirschl, R (2006) ‘On the Blurred Methodological Matrix of Comparative Constitutional Law’ in Choudhry, S (ed) (2006) *The Migration of Constitutional Ideas* Cambridge University Press 39 at 43.

they 'share overlapping histories and a constitutional system that supports human dignity and basic rights'.²⁵ On other views, features of the Canadian constitutional jurisprudence limit the export value of *Halpern*. For instance, unlike their American counterparts, Canadian courts readily accepted sexual orientation as an immutable characteristic for the purposes of constitutional equality claims.²⁶ In one estimation, Canadian courts generally take a 'more expansive view' of their section 15 than Americans do of their Fourteenth Amendment's Equal Protection Clause.²⁷ This paper's objective is not to adjudicate these conflicting assessments. The telling observation here is that the enterprise of scrutinising comparability remains firmly located within constitutional law, or rather, within the jurisprudence of entrenched rights. The comparatists pay negligible attention to the effects on the private law of the family of different federal distributions of legislative authority, such as the American dispersal of power over marriage to the states and the Canadian consolidation of jurisdiction over marriage and divorce in the federal parliament.

The constitutional emphasis is obviously noteworthy only if somehow problematic. One cause for suspicion about the constitutional slant is that, while the Charter is silent on such matters, the judges in *Halpern* appear to have subscribed to a functional understanding of family regulation. A functional approach best explains the court's response to the claim that marriage is heterosexual because it 'just is'. The judges dismissed this argument out of hand as circular,²⁸ although it maintains appeal for those favouring more formal or 'traditional' attitudes.²⁹ Turning from judicial attitudes towards the family to the Charter, three further cautions emerge — two in the text itself, a third in doctrine — against reading the Canadian constitution as entailing same-sex marriage.³⁰

First, the Charter's famous limitation clause, section 1, contemplates reasonable limits on all protected rights 'as can be demonstrably justified in a free and democratic society'. This clause explicitly subjects constitutional discourse to external considerations.³¹

The second textual feature has already been noted: the Canadian Charter provides no explicit protection against discrimination on the basis of sexual orientation. Canadian

²⁵ Samar 'Justifying the Use' supra at 85.

²⁶ Dooley, PJ (2000) 'I Am Who I Am, or Am I? A Comparison of the Equal Protection of Sexual Minorities in Canadian and U.S. Courts: Immutability Has Only Found a Home North of the Border' (17) *Arizona Journal of International & Comparative Law* 371.

²⁷ Blumberg, GG (2004) 'Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective' (51) *UCLA Law Review* 1555 at 1582 footnote 155.

²⁸ *Halpern* supra at para 71.

²⁹ For example, it is the position of France's leading private law scholars that marriage by definition involves a man and a woman. For Carbonnier, 'It is implied that the two spouses must be of *different sexes, man and woman*' ('*Il est sous-entendu que les deux époux doivent être de sexes différents, homme et femme*') [emphasis in original]: Carbonnier, J (2002) *Droit civil [:] La famille, l'enfant, le couple* (21st ed) (t 2) Presses Universitaires de France at 417. In the United Kingdom, see the view of Sir Mark Potter that marriage is by 'longstanding definition and acceptance' a formal relationship between a man and a woman primarily designed for producing and rearing children, available at: <http://news.bbc.co.uk/2/hi/uk_news/england/north_yorkshire/5230708.stm>, reporting *Wilkinson v Kitzinger and another* [2006] *All England Reports (D)* 479 (Jul) (High Ct Family Division). For a contrast of formalism and instrumentalism (akin to functionalism for present purposes) in Canadian equality jurisprudence, see Réaume, D (2006) 'The Relevance of Relevance to Equality Rights' (31) *Queen's Law Journal* 696 at 714-24.

³⁰ It is proof of the contingency of the success of the Charter marriage claims that just a decade prior to *Halpern*, an appellate court had rejected the same claim. *Layland v Ontario (Minister of Consumer & Commercial Relations)* (1993) 14 *Ontario Reports* (3rd) 658 (Div Ct).

³¹ I am grateful to Eric Ward for reminding me of this effect of the constitutional text.

judges in the 1990s recognised sexual orientation as ‘analogous’ to the listed grounds, although they need not have done so. American experience has borne out this caveat.

The third caution, from doctrine and practice, is that, even when the claimant’s salient characteristic figures amongst the prohibited grounds, every equality claim depends upon the selection of the comparator group. Despite judicial efforts to make identifying the comparator group a mechanical matter of logic,³² it remains a matter of judgment, reviewable on appeal. In the same-sex relationship cases, characterising the claimant group favourably was clearly critical. Canadian judges accepted that it was correct to compare unmarried same-sex couples with married (opposite-sex) couples. Such acceptance depended upon a prior view of same-sex unmarried couples as familial or conjugal, one that might sensibly be supposed to derive from the private law of the family as opposed, say, to deviant. Thus the finding in *Halpern* that excluding same-sex couples violated their human dignity — seized upon by comparative constitutionalists — arose only after it had been determined that same-sex couples were comparable to married heterosexuals. The robustness of the determination of comparability is patent where the court holds that denying same-sex couples the right to marry would perpetuate the view ‘that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships’.³³ To the Ontario judges, it is axiomatic that same-sex couples are capable and worthy. But the contingency of such suppositions is plain. Less than ten years before *Halpern*, four justices of the Supreme Court of Canada had held that same-sex couples were not comparable with married and common law opposite-sex couples. In their view, a public pension scheme reasonably excluded same-sex couples in the company of ‘all sorts of other couples living together’, whatever their reasons for cohabitation and sexual orientation.³⁴ And those suppositions do not obtain as matters of common sense in other jurisdictions, such as the United States.³⁵

These cautions illuminate the weakness of the orthodox account, confined to constitutional law, by showing the Canadian Charter to be a porous text, susceptible to outside influences. Its application calls for assumptions not derivable from it. The judges’ conclusions on these points in *Halpern* and the prior judgments were not dictated by the graven words of section 15 of the Charter, nor reachable entirely from within the temple of constitutional law. Before sketching some of these influences in more detail, it is worth examining dissatisfaction with the resources of constitutional law for analysing the marriage question.

³² ‘The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*’ (*Hodge v Canada (Minister of Human Resources Development)* [2004] (3) *Supreme Court Reports* 357 at para 23, 2004 SCC 65).

³³ *Halpern* supra at para 94.

³⁴ *Egan* supra at 535. See also *EGALE Canada v Canada (Attorney General)* [2001] (11) *Western Weekly Reports* 685 at 726, 2001 BCSC 1365 (same-sex and opposite-sex relationships ‘at their core, demonstrably different’) (rev) (2003) 228 *Dominion Law Reports* (4th) 416, 2003 BCCA 406.

³⁵ For the view that a ‘fundamental difference’ obviates the comparability of ‘heterosexual and homosexual unions’, see Collett, TS (2003) ‘The Illusory Public Benefits of Same-Sex Encounters: A Response to Professor Carlos A. Ball’ in Wardle, LD et al (eds) (2003) *Marriage and Same-Sex Unions: A Debate* Praeger 148 at 148.

CROSSING DISCIPLINARY BORDERS

A sense that the classical doctrinal boundaries of constitutional law do not suffice for examining same-sex marriage is detectable. An examination of the extent to which the Canadian same-sex marriage jurisprudence has migrated to the United States concludes that the terms of inquiry need to be altered. Brenda Cossman observes that in the traditional sense of directly influencing foreign constitutional law, the Canadian judgments have had little impact. Indeed, as noted, Scalia J cited *Halpern* as a warning against enlarging constitutional protection for homosexuals. Cossman argues that inquiry as to the migratory effects of the Canadian judgments must expand beyond conventional law to include a cultural studies dimension. Conventional comparative constitutionalism focusing on 'constitutional doctrine, as articulated by the courts, or within constitutional debates within the political sphere', fails to capture the 'transnational flows of people and cultural representations'.³⁶ These flows include gay and lesbian Americans who marry within Canada and return to the United States, claiming social and legal recognition of their marriages. Although outside the lawyer's customary resources, cultural texts, including representations of Canadian same-sex marriage in American television productions, may signify within American debates. The presence of Cossman's paper within a collection on the migration of constitutional ideas reinforces its thrust of conceptual movement: from one national space to another and from one sphere of social life to another.³⁷ Yet her argument for a cultural studies dimension of comparative constitutional law can also be understood as exhorting a movement by comparative constitutionalists themselves. It invites them to exit the law library and law faculty. In this respect, it joins with other recommendations for interdisciplinary comparative constitutionalism.

A number of scholars have proposed that comparative constitutional lawyers must themselves migrate to, or at least visit, other disciplines. Disciplines other than law may 'illuminate' comparative constitutional questions.³⁸ Suggestions for such complementary disciplines include political theory, for those seeking to identify how particular constitutions instantiate universal principles, and political science, for others more concerned with the core functions of constitutions and the impact of social movements. Such travelling is already detectable in the literature on same-sex marriage. Some scholarship treating struggles for gay rights generally, and for same-sex marriage specifically, combines attention to constitutional interpretation with sensitivity, rooted in a political science literature, to the impact of social movements,³⁹ or of organised religion.⁴⁰ It is also submitted that the comparative constitutionalist may be influenced by the province of anthropology,⁴¹ and

³⁶ Cossman, B (2006) 'Migrating Marriages and Comparative Constitutionalism' in Choudhry, S (ed) *The Migration of Constitutional Ideas* Cambridge University Press 209 at 220.

³⁷ The book's metaphor of migration contrasts with, among other things, 'static' comparison of different legal orders, examined as isolated legal entities defined by national borders. Choudhry, S (2006) 'Migration as a New Metaphor in Comparative Constitutional Law' in id 1 at 15.

³⁸ Tushnet, M (2006) 'Some Reflections on Method in Comparative Constitutional Law' in id 67 at 69.

³⁹ Goldberg-Hiller, J (2002) *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* University of Michigan Press; Eskridge Jr, WN (2002) 'Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century' (100) *Michigan Law Review* 2062.

⁴⁰ For example, Cox, C (2005) 'To Have and to Hold — Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States' (14) *Law & Sexuality* 1.

⁴¹ Tushnet 'Some Reflections' supra at 68.

that it may be fruitful to practice a constitutional ethnography.⁴² These invocations of the merits of other disciplines reveal, by negative implication, comparative constitutionalists' understanding of their own, unhyphenated discipline. Locating these other disciplines as external destinations preserves the purity of constitutional legal scholarship.⁴³ Political theory and anthropology, for example, are not understood as already or necessarily inside constitutional law's borders or implicated in it.

For its part, this paper's preoccupation is narrower. On conventional lawyerly terrain, domestic and comparative accounts of the development of same-sex marriage overlook a crucial dimension of the Canadian experience. Putting aside social, economic, and cultural elements, the charge is that they fail to grapple with important dimensions of the explicitly legal context. A conventionally legal story is going untold, that of the influence of developments in *private* law upon the eventual interpretation that judges accord the Canadian Charter. Whatever one thinks of legal transplants, it is uncontroversial to agree with Alan Watson's identification of the 'perils of comparative law'; two are relevant here, its potential superficiality and 'getting the foreign law wrong'.⁴⁴ Overlooking the private law dimension of the Canadian experience in comparative studies of same-sex marriage is an instance of comparative law's potential superficiality. It is also, arguably, an example of the graver sin, getting the law wrong. Although the Canadian and comparative literature typically treats the Charter as acting upon family law, it is crucial to complement such readings with attention to private law's acting upon the Charter. The poverty of a conception of constitutional law walled off from private law can be illustrated by the story of family law influences upon the judicial interpretation of section 15 in the marriage case. This private law genealogy of same-sex marriage is occluded by the standard focus on same-sex marriage as an outgrowth of purely constitutional law.

THE PRIVATE LAW PEDIGREE OF SAME-SEX MARRIAGE

Prior changes to the law of marriage made possible the Charter interpretation elaborated in *Halpern* and permitted same-sex couples to access the institution with comparatively little fuss. For a prominent Canadian family scholar, this ease for same-sex couples in assuming the rights and obligations of the existing matrimonial regime derived from it being 'already structured to involve only two people'.⁴⁵ It is not merely that same-sex couples could access marriage as it existed without structural reforms; 'already structured' evokes a static picture, understating the dynamic character of relatively recent changes that eased the entry of same-sex couples into marriage. Three regulatory changes illustrate the point.

⁴² Scheppelle, KL (2004) 'Constitutional Ethnography: An Introduction' (38) *Law & Society Review* 389.

⁴³ Theirs is far from the identity as 'mongrels' proposed for comparatists by Rosen, L (2003) 'Beyond Compare' in Legrand, P and Munday, R (eds) (2003) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 493 at 510.

⁴⁴ Watson, A (1993) *Legal Transplants: An Approach to Comparative Law* (2nd ed) University of Georgia Press at 10-11.

⁴⁵ Bala, N et al (2005) 'An International Review of Polygamy: Legal and Policy Implications for Canada' (research paper for Status of Women in Canada) at 38 (basis for distinguishing same-sex marriage from polygamy).

The first is the move to regulate marriage as an association of two equal subjects, as opposed to a single entity. The common law and civil law traditionally regulated a marriage not as an association of individuals, but as an entity. Translating the biblical metaphor of man and woman becoming 'one flesh'⁴⁶ into rights and obligations with a lawyer's literal mindedness, the common law regarded husband and wife, in Blackstone's words, as 'one person in law'.⁴⁷ The entity approach favoured privacy for the family unit and shielded its workings from state scrutiny. As feminist political theorists objected cogently, it thereby precluded the framing of justice claims from within families. The distinction between entity regulation and individual regulation aptly distinguishes the earlier substantive regulation of rights and obligations within marriage from contemporary regimes in which spouses are formally equal.

The common law strictly limited a married woman's capacity to initiate legal action and to own and alienate property. In the late 19th century, the British parliament displaced these rules by statute, permitting married women in Britain to acquire and hold property free from any rights of control by their husbands.⁴⁸ The Canadian common law provinces soon followed. Under these enactments, the husband and wife's unity in matters of property ceded to a policy of strict separatism. In the eyes of third parties, the married woman now equalled her husband as a legal subject.⁴⁹ By contrast, in Quebec the married woman's incapacity incapacitated her for a further eight decades. Save for minor reforms, it subsisted into the 1960s. The married woman's civil incapacity was a corollary of the civil law's traditional role for the husband as *chef de famille*. Even when the married woman's emancipation finally arrived in 1964,⁵⁰ it came 'cloaked' in a 'conservative spirit'.⁵¹ Nonetheless, the changes marked a significant shift in the vision of the family or of marriage as objects of civil regulation.

The telling point for same-sex marriage is that unlike the older model, the contemporary model of civil marriage as comprising two equal individuals does not presume partners of different sexes performing starkly differentiated roles. As an historian of marriage notes, somewhat baffled by the American reaction against same-sex marriage, heterosexuals themselves had already 'broken down the primacy of two-parent families based on a strict division of labor between men and women'.⁵² If spouses today remain intertwined in a complex dialectic of independence and connectedness, one entailing risk and vulnerability, the dance does not require the partners to be of opposite sexes.⁵³

⁴⁶ Genesis 2.24.

⁴⁷ Blackstone, W (1765) *Commentaries on the Laws of England* Book I (1st ed) Clarendon Press chapter 15 at 430 [footnote omitted].

⁴⁸ Married Women's Property Act 1882 45-46 Vict c 75 (UK).

⁴⁹ The caveat about third parties is meant to capture women's incomplete equality and autonomy vis-à-vis their husbands; eg the juridical impossibility of marital rape persisted long into the period of women's emancipation as agents able to bargain in the marketplace.

⁵⁰ An Act respecting the legal capacity of married women SQ 1964, c 66.

⁵¹ Brisson, J-M and Kasirer, N (1996) 'The Married Woman in Ascendance, the Mother Country in Retreat: From Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866-1991' (23) *Manitoba Law Journal* 406 at 415.

⁵² Coontz, S (2005) *Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage* Viking at 274.

⁵³ This dialectic is beautifully explored by Kasirer, N (2006) 'The Dance Is One' in Normand, S (ed) (2006) *Mélanges offerts au professeur François Frenette: études portant sur le droit patrimonial* Presses de l'Université Laval 13 at 27-28. A somewhat different spin is placed on the equivalent matrimonial reforms in France; the pacs,

The second change is the legislative abolition of the illegitimacy of children born out of wedlock. In the 1960s, criticisms multiplied of the penalties and disadvantages imposed by law upon illegitimate children. The extent of the disadvantages attached to illegitimate children shrank somewhat; in common law provinces, legislation permitted legitimation if the parents married one another after the child's birth. But the criticisms of the consequences of illegitimacy and the incremental reduction of the class of bastards maintained the foundational dichotomy of legitimacy and illegitimacy. In the late 1970s and 1980s, however, most Canadian jurisdictions abolished the distinction between legitimate and illegitimate filiation. Children whose parents were identifiable attained 'the same rights and obligations', to use the words of Quebec's civil code, 'regardless of their circumstances of birth'.⁵⁴ Abolition broke radically with the earlier, incremental reforms. Filiation's new autonomy rejected the idea that it inherits its value from marriage, affirming its intrinsic value. Legislative abolition shifted filiation's role from the propagation of legitimacy to the service of children's identity and material support. In so doing, it displaced marriage's central reproductive function. The civil law had traditionally regarded the procreation of children as marriage's principal but not its sole end; the law had also historically supported marriage as a 'partnership of help and assistance'.⁵⁵ Establishing the filial bonds between children and parents on equal footing irrespective of marriage eliminated marriage's exclusive privilege as the 'unique source of legitimacy and of rights'.⁵⁶ It strengthened marriage's aspect of mutual help and assistance, which, unlike unaided reproduction, does not depend upon the spouses being of different sexes.

The abolition of illegitimacy may bear still further upon the same-sex marriage question. It does so if the reforms to filiation were motivated by a principle of broader application. If the abolition of illegitimacy is correctly regarded as exemplary of an equitable principle implicit in the private law of the family, that principle might militate for change to the law of civil marriage to the benefit of gay men and lesbians. By its nature, such a principle would resist a canonical verbal formulation. A plausible articulation might be the notion that the normative institutions of family law should not exclude, to their detriment, those without volition or responsibility in the matter. Ultimately the principle might not have assisted gay men and lesbians in the circumstances, but the better approach to major reforms requires attempting to understand them as generated by a legislative intentment broader than its particular incarnation in the statutory language. The private law of

'the shame of marriage' (*la honte du mariage*), is regarded as particularly odious arising, as it does, so shortly after 'the culmination point of balance and equity in the long history of our civil legislation' (*ce point culminant d'équilibre et d'équité dans la longue histoire de notre législation civile*): Cornu, G (2003) *Droit civil [:] La famille* (8th ed) Montchrestien at 114.

⁵⁴ Art 522 CCQ.

⁵⁵ Mignault, PB (1895) *Le droit civil canadien basé sur les 'Répétition écrites sur le Code civil' de Frédéric Mourlon avec Revue de la jurisprudence de nos tribunaux* t1 C Théoret at 331 (*'une société de secours et d'assistance'*). It should be acknowledged that Mignault — whose nine-volume opus is still cited by Quebec courts, though frankly contemporary scholars are not uncritical of his parochial view of Quebec civil law — undercuts his own assertion of marriage's chief end as reproductive by opening his discussion of marriage with a statement conspicuously silent on child rearing: 'Marriage is a solemn contract by which two persons of different sexes promise mutually to each other fidelity in love, communion in happiness, help in misfortune' (*'Le mariage est un contrat solennel par lequel deux personnes de sexe différent se promettent mutuellement la fidélité dans l'amour, la communion dans le bonheur, l'assistance dans l'infortune'*) id.

⁵⁶ Cornu, G (1998) *L'art du droit en quête de sagesse* Presses Universitaires de France at 379 (*'source unique de légitimité et de droits'*).

the family is best viewed as alive with implicit norms neither exhausted nor frozen by individual enactments.

The third stage is the legislative embrace of a functional approach to regulating marriage and families more generally. This move is exemplified in recognition of couples on the 'muddled terrain' outside marriage.⁵⁷ Positive regulation of unmarried, opposite-sex cohabitants signals a legislative commitment to a shift 'from definition of family in monolithic, ideal terms to pluralistic, functional terms'.⁵⁸ Beginning in the 1970s, legislatures in all the common law provinces ascribed to unmarried opposite-sex couples reciprocal support obligations akin to those applicable to married couples. It is no longer enough, a legislature declares by enacting such measures, to assign rights and obligations in virtue of formal ordering, triggered by 'the inaugural solemnity'.⁵⁹ The legislature regards the problems of couples' lives as normatively relevant and as calling for legal adjustment. In the functional style of family law so modelled, the legislature seeks to bring state law more into line with social reality.⁶⁰ Such legislation exemplifies a bottom-up approach to family law regulation, rather than a top-down approach based on traditionally defined marriage as the sole legitimate locus for sexual relations and reproduction.⁶¹ Legislatures show themselves to understand kinship as 'not a form of being but a form of doing',⁶² one to which legal regimes should be at least cautiously responsive. The 'doctrinal context'⁶³ in which judges would subsequently interpret the Charter's equality right in the claims for same-sex marriage included these prior legislative signals from most provincial legislatures of the importance of sensitively regulating those already living as married. The exclusive emphasis upon the icon of Charter equality in the accounts of same-sex marriage in Canada obscures the dynamism of the legislatures' alteration of the legal context. Intentionally or not, these reforms fitted marriage for same-sex couples.

The other crucial development was the move towards seeing such couples as fit for marriage. A complex process transformed the judicial and social perception of same-sex couples from deviants to marriage-like units.⁶⁴ Many gradual changes are discernible; three are presented here as exemplary. Collectively, such incremental changes informed

⁵⁷ Dubler, AR (2003) 'In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State' (112) *Yale Law Journal* 1641 at 1656.

⁵⁸ Bala, N and Bromwich, RJ (2002) 'Context and Inclusivity in Canada's Evolving Definition of the Family' (16) *International Journal of Law, Policy and the Family* 145 at 148.

⁵⁹ Cornu *L'art du droit* supra at 154 ('la solennité inaugurale').

⁶⁰ If this functional style is comparatively recent in Canadian family law, it should not be overlooked that private law has historically developed resources able to 'palliate normative dissonance' by mediating 'between abstract legal right and lived experience': Brierley, JEC and Macdonald, RA (eds) (1993) *Quebec Civil Law: An Introduction to Quebec Private Law* Emond Montgomery at §143.

⁶¹ See Bala and Bromwich 'Context and Inclusivity' supra at 157-58. The bottom-up approach has other antecedents within Canadian legal regulation of marriage, including state recognition of aboriginal customary marriage: *Connolly v Woolrich* (1867) 17 *Rapports judiciaires révisés de la Province de Québec* 75 (Sup Ct). I am grateful to Kathleen Lahey for reminding me of this point.

⁶² Butler, J (2000) *Antigone's Claim: Kinship Between Life and Death* Columbia University Press at 58 [endnote omitted].

⁶³ For elaboration of doctrinal and institutional contexts as crucial objects of comparative constitutional study, see Tushnet, M (2004) 'Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action' (36) *Connecticut Law Review* 649.

⁶⁴ For the United Kingdom, Cretney, S (2006) *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* Oxford University Press. This paper does not uncritically endorse the recognition of same-sex couples as family and as conjugal. Concerns that such recognition may generate unintended consequences abound in feminist and queer literatures.

the assumptions of the judges who allowed the Charter claim in *Halpern*. It is proof of the interstitial character of these developments that, mapped, each would fall between the seven legal landmarks — sodomy repeal, equal age of consent for same-sex relations, first big sexual orientation anti-discrimination law, legal benefits for same-sex cohabiters, registered partnership legislation, adoption by same-sex partners, same-sex marriage — identified in a leading comparative work charting ‘legal incrementalism’ in the recognition of same-sex relationships.⁶⁵

The first moment is an uncelebrated inching by homosexual couples onto the terrain of conjugality. Unlike *Halpern*, which ended in the issuance of wedding licences, it is an unhappy occasion for all concerned. It emerges from the wreckage of a marriage. Canada’s original Divorce Act (1968) listed adultery as the first statutory ground for divorce. Commission of an ‘unnatural offence’ appeared as a distinct ground; this category of marital horrors contained guilt of sodomy, bestiality, rape, and commission of a ‘homosexual act’.⁶⁶ The implication, dictated by basic principles of statutory interpretation, and consistent with prior case law, was that only opposite-sex encounters could amount to adultery. Another, more awkward implication was that ‘sodomy’ was not, as one might have supposed, a species of ‘homosexual act’, but something different; indeed, judicial annoyance at the clumsy legislative drafting pervades the reported cases. In one of the later applications of the provisions, the judge suggests treating homosexual conduct as heterosexual adultery, in light of the contemporary ‘tolerance shown by society for such a sexual preference’.⁶⁷ Spurred on by changing mores, the judge effectively amends the legislation, deeming homosexual relations no longer ‘unnatural’, but merely adulterous. By this point, same-sex relations have exited the ‘field outside the disjunction of illegitimate and legitimate’ and entered the ‘struggle between the legitimate and the illegitimate’.⁶⁸

Second, starting in the mid-1980s, courts allowed remedial property claims occasioned by the end of same-sex cohabitation. A few judges recognised constructive trusts of the sort previously deployed for individuals disadvantaged by the break-up of an unmarried heterosexual couple. In one such case, the judge found that a lesbian couple and their two children had ‘worked and played as a “family-like” unit complete with its trials and tribulations, its joy and laughter, and its strengths’.⁶⁹ In another, two men were found to have shared, over 13 years, ‘a committed, caring and loving relationship, tantamount in all respects to a traditional heterosexual marriage’.⁷⁰ In resolving these private law claims, the courts did not mass same-sex couples indiscriminately with all other associations between unmarried persons. They regarded them as akin to married couples in their interdependence and deep commitment.

The third example straddles the division between purely private law developments and the later Charter litigation. In deciding an early Charter claim by a member of a same-

⁶⁵ Eskridge Jr *Equality Practice* supra at 116-17. Eskridge credits the legal incrementalism thesis to Waaldijk, K (2001) ‘Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands’ in Wintemute, R and Andenæs, M (eds) (2001) *Legal Recognition of Same-Sex Partnerships* Hart Publishing 437.

⁶⁶ SC 1967-68 c 24 s 3(b).

⁶⁷ *Guy v Guy* (1982) 35 *Ontario Reports* (2nd) 584 at 589 (SC).

⁶⁸ Butler, J (2004) *Undoing Gender* Routledge at 105.

⁶⁹ *Anderson v Luoma* (1986) 50 *Reports of Family Law* (2nd) 127 at 134 (BCSC).

⁷⁰ *Forrest v Price* (1992) 48 *Estates & Trusts Reports* 72 at 74 (BCSC). A further aspect of regarding homosexuals as ‘familial’ was the award of child custody to lesbians separated from heterosexual fathers: see Bala and Bromwich ‘Context and Inclusivity’ supra at 161.

sex couple, a judge referred explicitly to the impact of prior legislative amendments to 'spouse'. *Knodel v British Columbia (Medical Services Commission)*⁷¹ concerned the definition of 'spouse' in medical regulations. The claim was that the exclusive focus on opposite-sex couples discriminated against same-sex couples on the ground of sexual orientation, contrary to section 15 of the Charter. The court allowed the claim and, as a remedy, construed 'spouse' as including a member of a same-sex couple. The regulation had already extended 'spouse' beyond married individuals to cover 'a man or woman who, not being married to each other, live together as husband and wife' [sic]. Rowles J read the phrase 'live together as husband and wife' as intended to exclude relationships not marked by emotional and sexual commitment, but notices that the phrase does not require a couple to be husband and wife; here the drafter's inclusion of an action rather than a status becomes crucial. The judge then saw Knodel and his partner as having performed as husband and wife: 'They were deeply committed to each other emotionally and sexually, exchanged vows and rings in a private ceremony, established a home together, pooled their finances, and shared bank accounts and credit cards'.⁷² In this and other cases, Charter litigation introduced same-sex spouses into a category of spouse already loosened by legislation. The legislature had already established a functional criterion for 'spouse', shattering the term's ostensible ahistorical naturalness.

It is fair to anticipate an objection on the part of scholars who have combined constitutional research with the study of social movements. The argument would hold that, since social movements presumably influence the development of family law, it should be possible to leapfrog over the sensitivity to changes in family law advocated by this paper in favour of a comparative constitutionalism alert to social movements and informed by political science. This objection reduces private law to a frictionless conduit conveying social values to constitutional law. But if one takes seriously law's normative character as a means of social ordering, private law is not so reducible. While social movements and changing societal attitudes affect family law and constitutional law,⁷³ the better view is that family law mediates between social movements and the Charter, exerting its own influence on the values it absorbs and passes on. The process of private law adjudication, in which a fact-bound scenario is subjected to the analogical reasoning of common law judges — 'pushing outwards', in Geoffrey Samuel's felicitous turn of phrase, 'from the facts'⁷⁴ — added its own influences to constitutional law. Those views were not necessarily already explicit in social attitudes. The evidence pleaded in a property dispute might have led to a more concrete appreciation of the economic consequences of same-sex relationships than prevailed in popular culture. And the legislative text altering meanings of family provides a platform for significant reworking of family law's traditions.

Attempting to determine causation with forensic accuracy is likely to prove futile, and in any event, this paper does not claim that these private law developments caused the enactment of same-sex marriage within Canada. It does not pretend that each judge in

⁷¹ (1991) 58 *British Columbia Law Reports* (2nd) 356 (SC).

⁷² *Id* at paras 81-83. The identified hallmarks of family life appear material, financial and distinctly middle class; compare Carrington, C (1999) *No Place Like Home: Relationships and Family Life among Lesbians and Gay Men* University of Chicago Press at 173 ('consumption work' playing an 'essential part in the cultural production of family').

⁷³ For example, Eskridge Jr, WN (1994) 'Public Law from the Bottom Up' (97) *West Virginia Law Review* 141.

⁷⁴ Samuel, G (2003) *Epistemology and Method in Law* Ashgate at 104 [footnote omitted].

Halpern had read the divorce case upgrading homosexual conduct to adultery. Clearly, there is space to disagree over the relative weight of private law and other influences. But whatever their ultimate effect, the components of the private law story cannot justifiably be ignored by constitutionalists and others who narrate the same-sex marriage events in Canada. The understandings of same-sex couples as families emanating from the private law examples are not readily attributable to Canadian constitutionalism's rich liberalism.

If the paper rejects the self-sufficiency of the Charter in opening marriage to same-sex couples, neither does it imply that, left to its own devices, Canadian private law would have generated satisfactory legal responses to the social reality of same-sex couples. While the private law of the family offers rich normative resources for addressing the same-sex question, its doctrines have also been marshalled in the service of less progressive projects. Indeed, some scholars locating themselves fully within private law resist the legal accommodation of same-sex families. In France, one encounters the view that marriage as a foundational institution of the private law of the family cannot by definition extend to same-sex couples: 'it would deform marriage to open it to persons of the same sex'.⁷⁵ In Quebec, it is legislative tampering with the laws of filiation that has provoked private law scholars' sharpest attacks.⁷⁶ The contention thus cannot be that private law might profitably have been left alone to do the job. Indeed, framing such a claim would commit an isolationist error on the part of private law similar to that which this paper gently suggests constitutionalists have committed. Like constitutional law, private law does not develop in a vacuum. The two are related one to another, each partially heteronymous.⁷⁷ What is necessary for richer comparative research is grappling with the contours of the relationship between constitutional rights and private law.

⁷⁵ Malaurie, P and Fulchiron, H (2004) *Droit civil [:] La famille* Defrénois at §108 ('c'est dénaturer le mariage que de l'ouvrir aux personnes de même sexe'). Redefining marriage to permit spouses of the same sex would destroy a key substantive effect of the institution: 'it would be no longer the founding act of a family, but the simple juridical framework for the relations of a couple' ('il ne serait plus l'acte fondateur d'une famille, mais le simple cadre juridique de relations de couple'). The family/couple distinction may elude one not versed in the civil law, but it explains why some were able to live (if grudgingly) with the pacs: the pacs regulates patrimonial consequences of 'relations of a couple' ('relations de couple') but does not purport to found new families. Others reject even the pacs on the basis of marriage's opposite-sex requirement: see the vivid contrast between 'Marriage, rock and symbol' and 'the pacs, powder and sand' in Cornu *Droit civil [:] La famille* supra at 114 ('Le mariage, roc et symbole, le pacs, poudre et sable').

⁷⁶ For example, Joyal, R (2005) 'Comment et pour qui modifier les lois, ou l'art d'oublier le quoi et le pourquoi. L'exemple récent des modifications au droit québécois de la parenté et de la filiation' in Ouellette, F-R; Joyal, R and Hurtubise, R (eds) (2005) *Familles en mouvance: quels enjeux éthiques?* Presses de l'Université Laval at 157; Philips-Nootens, S and Lavallée, C (2003) 'De l'état inaliénable à l'instrumentalisation, la filiation en question' in Lafond, P-C and Lefebvre, B (eds) (2003) *L'union civile, nouveaux modèles de conjugalité et de parentalité au 21^e siècle* Yvon Blais 337; Moore, B (2002) 'Les enfants du nouveau siècle' in Service de la formation permanente, Barreau du Québec (eds) *Développements récents en droit familial* Yvon Blais 75. Compare Bureau, M-F (2006) 'La famille et la discrimination au Canada, conjugalité et parentalité en redéfinition' in Mercat-Bruno, M (ed) (2006) *Personnes et Discrimination, perspectives historiques et comparées* Dalloz 260.

⁷⁷ In France, a disciplinary divide persists in confining public law and private law scholars to separate epistemic communities. For the view that the private law of the family no longer exists in isolation from public law, see Millard, E (1995) *Famille et droit public [:] Recherches sur la construction d'un objet juridique* LGDJ. By contrast, scholarship from the United Kingdom is more likely to cross the divide, eg Wintemute, R (2005) 'Sexual Orientation and Gender Identity' in Harvey, C (ed) (2005) *Human Rights in the Community* Hart Publishing 175.

MUTUAL INTERACTION

Once it is admitted that confining analysis to conventional constitutional law materials is inadequate, reflection on a sounder approach might start with the sporadic recognition of some relation between entrenched fundamental rights and private law. One need not begin quite at zero. Even scholars who neglect the influences of private law upon the Charter's interpretation do not always regard the Charter as fully sealed off from private law. Occasionally, they detect a unidirectional vector moving from the Charter to the private law, 'a one-way projection of authority' issuing downwards.⁷⁸ Thus, some family law scholars see the Charter's values as having constitutionalised family law, while other private law scholars explore how the Charter's fundamental values 'influence the shape of private and common law'.⁷⁹ This one-way understanding can be traced to the highest judicial authority, the Supreme Court of Canada having affirmed that the judiciary 'ought to apply and develop the principles of the common law' consistently with constitutional values.⁸⁰

Some scholars, still sensing a unilateral movement down from the Charter and other fundamental rights instruments towards private law, regard that influence more negatively. The Supreme Court of Canada's determination that marital status is an analogous ground sufficient to support a discrimination claim under the Charter when unmarried couples are disadvantaged vis-à-vis married couples has generated anxieties in Quebec. The fear is that an overly broad construction of the Charter's equality right, vindicated by a robust constitutional remedy, might threaten Quebec's distinctive approach to regulating unmarried couples.⁸¹ In Europe, the perceived menace to private law appears not in a domestic charter but in the European Convention on Human Rights. One eminent commentator speaks darkly, in the context of perceived threats to marriage, of 'the European unification downwards'.⁸² In these examples, admittedly, political factors muddy the jurisprudential issues. The sense that fundamental rights intrude into private law arises where there are already feelings of ambivalence or suspicion — if not downright hostility — towards the higher authority responsible for establishing those rights. Indeed, in jurisdictions where fundamental rights appear to be propelling reforms, the attitudes of

⁷⁸ The phrase is taken from a classic critique of analytical positivism: Fuller, LL (1969) *The Morality of Law* rev ed Yale University Press at 192.

⁷⁹ Moran, M (2006) 'Inimical to Constitutional Values: Complex Migrations of Constitutional Rights' in Choudhry, S (ed) *The Migration of Constitutional Ideas* Cambridge University Press 233 at 239; also Saunders, C (2005) 'Constitutional Rights and the Common Law' in Sajó, A and Uitz, R (eds) (2005) *The Constitution in Private Relations: Expanding Constitutionalism* Eleven International Publishing 183.

⁸⁰ *RWDSU v Dolphin Delivery Ltd* [1986] (2) *Supreme Court Reports* 573 at 603. This idea appears as a coda in a holding that the Charter does not apply directly to private disputes nor to judicial orders made in virtue of unenacted, common law rules. For criticism of this leading judgment on the scope of the Charter's application and its problems for family law, see Toope 'Riding the Fences' supra at 68-71.

⁸¹ For example, Roy, A (2003) 'La Cour suprême reconnaît la liberté de choix des conjoints de fait' (12) *Entracte* 14. Supporters of the current laissez-faire approach characterise it in terms of autonomy and choice; those more critical, particularly concerned about the fate of children born to unmarried parents, typically adopt severer terms of legislative neglect.

⁸² Cornu *Droit civil* [:] *La famille* supra at 114 ('*l'unification européenne par le bas*'). See, more specifically, the anxiety over the possibility that the court in Strasbourg might detect a violation of the Convention right to respect for private and family life in the invocation by France of its public order exception under private international law to deny acknowledgement to same-sex marriages validly contracted in other EU member states: Malaurie and Fulchiron *Droit civil* [:] *La famille* supra at §173.

private law commentators towards them may provide a sensitive barometer of nationalist sentiment.

The shortcoming of these views, positive or negative, is the failure to grapple with movement the other way. They are blind to potential upward movement of values from private law towards the entrenched rights instrument. Yet the complex movement of values in the law of marriage overflows the doctrinal separation of constitutional from private law, rendering inapt the understandings just canvassed. It is worth clarifying that it would be misleading to speak of viewing Charter interpretation through a family law lens. Such a metaphor would wrongly imply the static transparency of the private law field at the expense of attention to the ongoing relationship — mutually self-constituting, simultaneously acting and acted upon.⁸³ Even where comparative studies of legislative and constitutional recognition of same-sex relationships briefly discuss family law,⁸⁴ they typically do not connect the ‘general changes in family law’⁸⁵ to the porousness of constitutional discourse and its implicit (and at times explicit) permeation by private law values.⁸⁶ Doing justice to the relationship between the private law of the family and the Charter is no simple task.

The silence in the scholarly literature regarding private law’s role should be qualified. Research for this paper unearthed one major comparative account of the Canadian same-sex marriage Charter cases alert to the imbrication of family law and constitutional law. Grace Blumberg identifies causes for the relative laggardness of the United States in recognising and regulating same-sex relationships in its family law. In her view, the failure of most American courts to regard the constitutional claim for marriage as ‘a compelling human rights claim’ is appropriately understood as stemming from American law’s ‘highly formal and static understanding of the conjugal relationship’.⁸⁷ The contrast is drawn with Canadian family law’s functional approach. Interpretation of the Canadian Charter appears in the argument, not to imply its ready export to the United States, but ‘to illustrate the powerful impact of a social, or functional, definition of the family’.⁸⁸ This account — by a family law scholar, not a constitutionalist — reveals a richer appreciation of the relationship between private law and constitutional law. Indeed, there is a promising understanding of the complexity of the movement of values from one legal field and institutional site to another in the view of the Canadian experience as demonstrating the

⁸³ For another metaphor evoking a doubtless unintentional but distracting sense of inertness, see Weinrib, LE and Weinrib, EJ (2001) ‘Constitutional Values and Private Law in Canada’ in Friedmann, D and Barak-Erez, D (eds) (2001) *Human Rights in Private Law* Hart Publishing 43 at 51 (Charter ‘a repository of the principles animating the polity as a whole’). The idea of values as animate and animating conflicts with the Charter’s being a repository, since no dictionary meaning of ‘repository’ — even rejecting out of hand the least plausible one, that of ‘[a] place in which a dead body is deposited; a vault, a sepulchre’, in favour of ‘[a] receptacle [...] in which things are or may be deposited or stored’ — coheres with the idea of anything alive ((1993) *The New Shorter Oxford English Dictionary* vol 2 *sv* ‘repository’). It would resonate rather differently to speak of the Charter as an incarnation or an embodiment of principles or values.

⁸⁴ Eskridge Jr *Equality Practice* *supra* at 115-26.

⁸⁵ Merin, Y (2002) *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* University of Chicago Press at 338.

⁸⁶ Bala ‘Controversy over Couples’ *supra* discusses prior family law developments regarding recognition of unmarried opposite-sex cohabitants in the same article as same-sex marriage, but without a sense that private law is acting upon the Charter. Private and public law are perceived as occupying different doctrinal spaces.

⁸⁷ Blumberg ‘Legal Recognition’ *supra* at 1577 [footnote omitted].

⁸⁸ *Id* at 1583.

‘synergy of legislation and constitutional litigation’ where lawmakers adopt a functional view of the family.⁸⁹ Yet the near silence in the comparative studies of Canadian same-sex marriage and, more generally, the neglect of private law in theorising on the compass of comparative constitutionalism — which often travels from constitutional law directly to disciplines regarded as other — testify to the need for further refinement of the inquiries.⁹⁰ Comparative law needs a better grasp of the dynamic relationship between social values, private law and constitutional rights.

CONCLUSION

If one cannot sincerely join with the most anxious voices denouncing changes in the law of civil marriage as a threat to fundamental order, one may still take this paper’s example as an occasion for departing from a practice of comparative studies in which constitutional law appears impervious to other legal influences. This case study indicates the problems of studying constitutional developments in isolation from their enculturation in private law. The prevailing story of same-sex marriage appearing in domestic and comparative literature is incomplete, superficial enough to be mistaken. As shown by the cautions noted and the history, *Halpern* should not be attributed solely to the text of the Charter, the richness of liberalism within Canadian constitutional law, or the boldness of the judges. But more is at stake than correcting an oversight in scholarly accounts of Canadian marriage developments.

This paper’s deeper interest derives from the likelihood that framing the marriage story exclusively within constitutional law is not an isolated mistake, but rather a symptom of an impoverished understanding of the relative places of private law and constitutional rights in legal order more generally. If so, it is worth investigating the possibility that domestic scholars and comparatists are ascribing unmerited credit to constitutional bills of rights in other fields, within Canada and elsewhere.⁹¹ Here there are implications for comparatist efforts to explain causation of constitutional developments. Comparative constitutionalism must take private law seriously as part of the constitutional context, and a dynamic one at that. Private law informs the attitudes of the judges who construe constitutional rights. At times, such context may matter much more than the wording of a constitutional guarantee. Implications are also apparent for those who, more programmatically, endeavour to engineer a transplant of a constitutional idea from one place to another. One would expect

⁸⁹ Ibid.

⁹⁰ For example, it is only once constitutional equality rights and family are viewed together that one can further pursue the intriguing observation that ‘in Canada and the USA, same-sex civil marriage seems to be more controversial than joint or second-parent adoption of children by unmarried same-sex or different-sex couples’. Wintemute, R (2005) ‘From “Sex Rights” to “Love Rights” in Bamforth, N (ed) (2005) *Sex Rights* Oxford University Press 186 at 204 [endnote omitted].

⁹¹ Sticking close to the Canadian Charter, one might begin by scrutinising the scholarly understanding of *Dunmore v Ontario (Attorney General)* [2001] (3) *Supreme Court Reports* 1016, 2001 SCC 94, in which the Supreme Court identified the Charter right to freedom of association (s 2(d)) as precluding a provincial government from excluding agricultural workers from a collective bargaining scheme. This paper would suggest the possibility that the construction given to the Charter right of freedom of association in *Dunmore* reflected the normativity of the labour regime framed in ordinary legislation. See most recently *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia* 2007 SCC 27.

a major change in the interpretation of a constitutional right to fare better on the ground if it had precedents of one kind or another in the texture of private law. Private law must be regarded as part of the context relevant to a constitutional transplant's prospects.⁹²

Before closing, it is worth explicating connections with two ideas falling within political theory. First, the argument for the importance of connecting constitutional rights to their domestic legal context is analogous to the larger argument, often made within feminist scholarship, on the need for human rights discourses to attend to context.⁹³ In short, internal comparative contexts (here family law and constitutional law) are needed for understanding external comparative contexts. Comparatists' habit of restricting their gaze to constitutional law, and to regard it as self-sufficient, evokes the monist tendency criticised by legal pluralists of recognising only a single normative order within a national territory. Internal diversity must be recognised prior to, or at least simultaneous with, external comparative study. The larger point also speaks to internal diversity within religions and cultures.

Second, while the idea that private law is part of the context influencing the judicial construction of entrenched rights matters to jurists dedicated to tracing causation and designing effective reforms, it should also speak to political theorists concerned with the legitimacy of judicial review. It is well known that the American Bill of Rights has generated a colossal body of political theory on such legitimacy issues. More recent instruments — the Charter in Canada and the Human Rights Act 1998 in the United Kingdom come to mind — have also inspired substantial debates. This paper would suggest that critics alarmed by what they perceive as the increased power of judges interpreting rights instruments should attend more closely to the extent to which private law sources, including enacted legislation boasting unimpeachable democratic bona fides, channel or even constrain the judges' rule.

If the interrelation between private law and entrenched fundamental rights is the substantive research agenda that this paper has raised for comparatists, a more self-reflective line of inquiry is also implicit. Why have so many domestic and comparative scholars neglected the influences of private law upon the Charter? The stripping away of the family law elements of the Canadian story of same-sex marriage is not the effect of constraints in collecting materials, since private law sources are relatively accessible for constitutionalists. Nor can it be the unavoidable effect of the simplification entailed by comparison: while the comparative enterprise inevitably requires omitting variables that are arguably relevant, comparative constitutionalists persist in aspiring to thick description.⁹⁴

⁹² For example, Nelken, D and Feest, J (eds) (2001) *Adapting Legal Cultures* Hart Publishing.

⁹³ For example, Lacey, N (2002) 'Violence, Ethics and Law: Feminist Reflections on a Familiar Dilemma' in James, S and Palmer, S (eds) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* Hart Publishing 117; also Nielsen, LB (2004) 'The Work of Rights and the Work Rights Do: A Critical Empirical Approach' in Sarat, A (ed) *The Blackwell Companion to Law and Society* Blackwell Publishing 63. On the need to connect feminist legal scholarship, socio-legal studies and comparative constitutional research, see Murphy, T and Whitty, N (2006) 'A Question of Definition: Feminist Legal Scholarship, Socio-Legal Studies and Debate about Law and Politics' (57) *Northern Ireland Legal Quarterly* 539.

⁹⁴ One ambitious scholar argues that 'The only way to adequately represent any particular instance, then, is to represent it as a complex and potentially contradictory intertwining of institutions, individuals, sensibilities, histories, and meanings': Scheppele, KL 'Constitutional Ethnography' *supra* at 399. Others, notable among them Pierre Legrand, set the bar for the practice of comparative law generally magnificently, quixotically high, aspiring to a study from the inside on multiple dimensions.

Is it possible that an answer lies in the blinding light of entrenched bills of rights? Their iconic force may make it difficult to attend to other legal materials. In the Canadian setting, one would want to test such a hypothesis by tracing the ascent of Charter scholarship throughout the 1980s and 1990s.⁹⁵ While the potential country sample is too small and with too many variables to permit rigorous testing, another obvious case study would be the United Kingdom. It has been suggested that when adjudicating claims of sexual orientation discrimination in the era of the Human Rights Act 1998, British courts ‘will inevitably be drawn’ to the jurisprudence of legal systems accustomed to constitutional judicial review.⁹⁶ The character of the human rights culture developing in the United Kingdom remains contested and unclear. Only time and careful comparison will reveal whether a similar focus on the constitutional instrument — albeit one not authorising judges to invalidate legislation — succeeds similarly in shifting scholarly attention away from private law as a site of relational recognition and influential values.

Or perhaps causation is to be found in the prestige ascribed to constitutional law generally. Does professional hubris incline constitutional lawyers to dismiss as unimportant the labours of their colleagues lower down Kelsen’s pyramid? For some, the relative inattention paid to the private law of the family may recall the view, criticised by feminist scholarship, that family regulation falls within a private domain appropriately shielded from law’s gaze.⁹⁷ That notion would necessarily be complicated by the fact that not only constitutionalists but also Canadian family law scholars joined in the orthodox account of same-sex marriage as predominantly a constitutional matter. The possibility that family law scholarship reflects the prestige attributed to constitutional law calls for further study. It might also be supposed that family law scholars embrace the discourse of constitutional rights over the internal normative resources of family law in acknowledgement of injustices (often patriarchal ones) effected under cover of the private law of the family. However understandable, such a move is imprudent, since judicial interpretations of constitutional rights will not always be politically satisfactory. Nor, perhaps due to institutional and doctrinal constraints, will they always instantiate good policy or fulfil society’s highest aspirations.⁹⁸ In the pursuit of family and gender justice, as with other kinds, it is surely best not to exclude a field of resources out of hand.

It is not this paper’s objective to favour one explanation or another. It aims to raise these issues for the research agenda of comparative constitutionalism, or more broadly, of comparative law. After all, the questions concern less the substance of constitutional law and private law than they do the culture of the scholars who demark, reiterate and contest the boundaries of those fields through legal scholarship. The questions, it might be said, are not about comparing legal cultures, but about the culture of comparative law. And these matters of culture are inseparable from matters of politics. Ultimately, *Halpern*

⁹⁵ For example, Devlin, R (1997) ‘The Impact of the Charter on Anglophone Legal Theory’ (4) *Review of Constitutional Studies* 19.

⁹⁶ Norrie ‘Constitutional Challenges’ *supra* at 755.

⁹⁷ From a large and important literature, eg Okin, SM (1989) *Justice, Gender and the Family* Basic Books; O’Donovan, K (1985) *Sexual Division in Law* Weidenfeld and Nicolson; O’Donovan, K (1993) *Family Law Matters* Pluto Press; Boyd, SB (1997) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* University of Toronto Press.

⁹⁸ For example, *Nova Scotia (Attorney General) v Walsh* [2002] (4) *Supreme Court Reports* 325, 2002 SCC 83; Leckey, R (2007) ‘Family Law as Fundamental Private Law’ (86) *Canadian Bar Review* 39.

and the scholarship examining it may matter most to comparatists, not for the unions of two persons of the same sex, but for the complex and evolving dialectic of independence, connectedness and mutual influence enmeshing constitutional and private law.