

## A HOLY SECULAR INSTITUTION

*Perry Dane*\*

### ABSTRACT

*Religious arguments have figured on both sides of the debate over same-sex marriage. Some supporters have insisted, however, that, as long as the question at hand is limited to civil marriage, consideration of the religious dimension of marriage is just irrelevant. Thus, the Massachusetts high court, in its Goodridge opinion, wrote: “In Massachusetts, civil marriage is . . . precisely what its name implies: a wholly secular institution.”*

*American civil marriage is, to be sure, a secular institution. But the claim that it is a “wholly secular institution” suggests that religious arguments about civil marriage are just confused, guilty of a category mistake.*

*This Article examines the notion that civil marriage is a “wholly secular institution.” It concludes that the “secular” and “religious” meanings and institutions of marriage are so intermeshed in our history, legal and religious imagination, and doctrine that trying to wall off “civil marriage” from religious considerations is neither possible nor desirable. The idea of “marriage” is a piece of intellectual and cultural “capital” common to both church and state, and changes in the meaning of that idea would have both secular and religious implications. Moreover, the institutions of “civil” and “religious” marriage are not as easily divisible as many believe. Religious believers are legitimate stakeholders in any debate over the meaning of civil marriage, and the religious dimension of marriage can and should be relevant to the civil polity’s understanding of the institution and its own legal and political arguments regarding same-sex marriage.*

---

\* Professor of Law, Rutgers School of Law—Camden. I appreciate the helpful comments of participants in the forums in which I presented versions of this Article, particularly the Rutgers Law School Faculty Symposium, the University of Western Ontario Faculty of Law faculty workshop, the Fourth Biennial Symposium on Religion and Politics of the Paul B. Henry Institute at Calvin College, the Annual Consultation of the Association of Conference Attorneys of the United Church of Christ, and a panel discussion at the Pennsylvania Bar Institute. I am also grateful to Gregory Bassham for helping me to think through the “meaning” of “meaning.” *See infra* note 32.

*All this is not to suggest that religious objectors should have a veto on the recognition of same-sex marriage in civil law. Indeed, this Article does not reach any bottom-line conclusion on the marriage controversy. The intermeshing of the secular and religious dimensions of marriage does have practical consequences, which the Article discusses. But those consequences cut both ways, in the manner of interlocking opposites. The Article's overriding goal is to illuminate the playing field, not to score points for one side or the other.*

INTRODUCTION .....	1125
I. VOICES .....	1133
II. MEANINGS, IMPLICATIONS, AND INSTITUTIONS .....	1136
A. <i>Themes, Tropes, and Doctrines in the Meaning of Civil Marriage</i> .....	1136
1. <i>The Meaning of Religious Meaning</i> .....	1137
2. <i>The Meaning of Civil Marriage</i> .....	1145
B. <i>Civil Marriage and Marriage Simpliciter</i> .....	1156
C. <i>Civil Marriage and Religious Rites</i> .....	1159
1. <i>Holy (Civil) Matrimony</i> .....	1159
2. <i>The Unmarked State</i> .....	1168
III. CONSEQUENCES .....	1172
A. <i>Stakes</i> .....	1172
B. <i>Arguments</i> .....	1175
1. <i>Sufficient Reason</i> .....	1175
2. <i>Rightful Dignity</i> .....	1178
3. <i>The Coherence of Compromise</i> .....	1184
4. <i>The Urgency of Now</i> .....	1185
5. <i>An Invitation</i> .....	1185
6. <i>A Conclusion of Complexity</i> .....	1186
C. <i>The Elephant Clause in the Room</i> .....	1187
1. <i>Really Hard</i> .....	1187
2. <i>Strictly Inseparate</i> .....	1189
CONCLUSION .....	1191
POSTSCRIPT .....	1192

## INTRODUCTION

For many Americans, the religious dimension of marriage is central to their conception of the institution. It should therefore be no surprise that, in the continuing controversy over same-sex marriage, religious arguments, sensibilities, ideas, and positions have figured on both sides of the debate.<sup>1</sup> At least some activists, scholars, and judges have insisted, however, that, as long as the constitutional or policy question at hand is limited to *civil* marriage, any consideration of the religious dimension of marriage, or religious views about marriage, is just irrelevant.

Thus, for example, the conventional wisdom among many scholars is that “[s]tate civil marriage is exactly that, a . . . *civil* (not religious) institution.”<sup>2</sup> More pithily and powerfully, Evan Wolfson, a long-time activist and analyst, and the founder and director of the “Freedom to Marry” organization,<sup>3</sup> argues

---

<sup>1</sup> It bears emphasis that many explicitly religious voices have argued strenuously *in favor* of same-sex marriage. See, e.g., MARVIN M. ELLISON, SAME-SEX MARRIAGE? A CHRISTIAN ETHICAL ANALYSIS (2004); MARK D. JORDAN, BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE (2005); DAVID G. MYERS & LETHA DAWSON SCANZONI, WHAT GOD HAS JOINED TOGETHER? A CHRISTIAN CASE FOR GAY MARRIAGE (2005); GRAY TEMPLE, GAY UNIONS IN THE LIGHT OF SCRIPTURE, TRADITION, AND REASON (2004); Gary Chamberlain, *A Religious Argument for Same-Sex Marriage*, 2 SEATTLE J. SOC. JUST. 495 (2004); UNITED CHURCH OF CHRIST, RESOLUTION IN SUPPORT OF EQUAL MARRIAGE RIGHTS FOR ALL (2005), available at <http://www.ucc.org/assets/pdfs/in-support-of-equal-marriage-rights-for-all-with-background.pdf>.

<sup>2</sup> Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy*, 54 AM. U. L. REV. 1487, 1527 (2005).

<sup>3</sup> I should mention, in the interest of full disclosure, that Evan Wolfson was one of my college freshman suitemates. By a striking coincidence, though, our freshman counselor (resident advisor) was John Guernsey, now the Rev. John Guernsey, an Episcopal minister whose Virginia congregation has separated from the Episcopal Diocese of Virginia and the Episcopal Church in the United States in protest of the larger church’s willingness to install a non-celibate homosexual as the Bishop of New Hampshire, and who has, more recently, as part of the effort to form an institutional structure for more conservative American Anglicans, been made a bishop under the authority of the Anglican Province of Uganda. See Julia Duin, *Episcopal Church Sees First Defection; Others Expected to Follow All Saints’ After a Week of Parish Voting*, WASH. TIMES, Dec. 12, 2006, at B1; *Interview: Bishop John Guernsey*, RELIGION & ETHICS NEWSWEEKLY, Sept. 21, 2007, <http://www.pbs.org/wnet/religionandethics/week1103/interview.html>. For more general discussions of the ongoing crisis in the worldwide Anglican Communion, see EPHRAIM RADNER & PHILIP TURNER, THE FATE OF COMMUNION: THE AGONY OF ANGLICANISM AND THE FUTURE OF A GLOBAL CHURCH (2006); REFLECTIONS GROUP, LAMBETH INDABA: CAPTURING CONVERSATIONS AND REFLECTIONS FROM THE LAMBETH CONFERENCE 2008: EQUIPPING BISHOPS FOR MISSION AND STRENGTHENING ANGLICAN IDENTITY (2008), available at [http://www.lambethconference.org/vault/Reflections\\_Document\\_\(final\).pdf](http://www.lambethconference.org/vault/Reflections_Document_(final).pdf).

that the “freedom-to-marry movement . . . is about legal *rights*, not diverse religious *rites*.”<sup>4</sup>

Perhaps most consequentially, the Massachusetts Supreme Judicial Court, in its opinion in *Goodridge v. Department of Public Health*,<sup>5</sup> the landmark state constitutional law decision affirming the right of same-sex couples to enter into civil marriages, tried at several points to wall off the religious dimensions of marriage from its inquiry.<sup>6</sup> In the most important of these passages, at the start of the heart of its constitutional analysis, the court wrote: “We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and

---

<sup>4</sup> EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 108 (2004). He continues: “And because civil marriage licenses are obtained from the government, ending sex discrimination in legal or ‘civil’ marriage won’t compel any change in our nation’s churches, synagogues, mosques, and temples.” *Id.* In a related but somewhat different vein, Wolfson also argues that “[r]eligious institutions, under the direction of their individual leaders and religious teachings, preach what they believe is best for those people who share the same faith . . . . Government should not be a weapon used to impose religious rules or parochial interpretations on others.” *Id.* at 109.

<sup>5</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>6</sup> For example, near the beginning of the opinion, the court wrote:

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.

*Id.* at 948. Later, in a footnote, the court emphasized:

We are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons. Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage.

*Id.* at 965 n.29.

since pre-Colonial days has been, precisely what its name implies: *a wholly secular institution*.”<sup>7</sup>

American civil marriage is, to be sure, a secular institution embedded in a secular legal system. But the *Goodridge* court made a point of raising the ante, arguing that civil marriage is a *wholly* secular institution.<sup>8</sup> This claim that civil

<sup>7</sup> *Id.* at 954 (emphasis added). The court continues:

No religious ceremony has ever been required to validate a Massachusetts marriage. In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. While only the parties can mutually assent to marriage, the terms of the marriage—who may marry and what obligations, benefits, and liabilities attach to civil marriage—are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void ab initio), the Commonwealth defines the exit terms.

*Id.* (citations omitted).

<sup>8</sup> Significantly, the more recent California Supreme Court decision holding in favor of a state constitutional right to same-sex marriage did not go out on the same rhetorical limb, *see In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, California Marriage Protection Act (2008), CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”), though it did emphasize in a footnote the conceptually different argument that “[f]rom the state’s inception, California law has treated the legal institution of *civil* marriage as distinct from *religious* marriage,” *id.* at 407 n.11. *Cf. id.* at 434 (declining to decide whether “the Legislature would . . . violate a couple’s constitutional right to marry if—perhaps in order to emphasize and clarify that this civil institution is distinct from the religious institution of marriage—it were to assign a name other than marriage as the official designation of the family relationship for *all* couples”). The California court’s more cautious approach might well be closely tied to its decision, discussed *infra* note 16, to apply strict scrutiny rather than rationality review to the exclusion of same-sex couples from the state’s marriage law.

Several other state supreme courts, both before and after the *Goodridge* decision, more directly acknowledged the “symbolic or spiritual significance of the marital relation,” *Baker v. State*, 744 A.2d 864, 888–89 (Vt. 1999), to both sides of the debate and at least partly for that reason held that same-sex couples were constitutionally entitled to the legal incidents of civil marriage, but not necessarily to “marriage” itself. *See id.* at 885, 887 (“Although plaintiffs sought injunctive and declaratory relief designed to secure a marriage license, their claims and arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections, and security incident to marriage under Vermont law. While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally protected rights, that is not the claim we address today. . . . Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy.” (citations omitted)); *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006) (“Raised here is the perplexing question—‘what’s in a name?’—and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? We are mindful that in the cultural clash over same-sex marriage, the word marriage itself—independent of the rights and benefits of marriage—has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.”).

As this Article was going to press, the Iowa Supreme Court decided *Varnum v. Brien*, 763 N.W.2d 862 (2009), upholding a right to same-sex marriage under the state constitution’s equal protection clause. The opinion is striking, and particularly relevant to this Article, because of its relatively extended effort to confront

marriage is a “wholly secular institution” has an obvious rhetorical purpose. It implicitly acknowledges the religious salience of marriage. Otherwise, why make the point? But it suggests that religious arguments about *civil* marriage are just confused, guilty of a species of category mistake.<sup>9</sup> The implication is that if religious objectors to civil same-sex marriage really understood that the court was *only* considering the civil and secular side of marriage, and thus really understood what was and was not at stake in the decision, they might, like Emily Litella on *Saturday Night Live*, retreat from the debate with a meek “never mind.”<sup>10</sup>

It is not entirely clear in exactly what sense civil marriage is, according to the *Goodridge* court, a “wholly secular institution.” I can think of at least four or five possible readings.<sup>11</sup> More important, it usually pays to be suspicious of any effort to wave a controversy away just by explaining it. As often as not, the proffered explanation will turn out to be just another position in the same old debate.<sup>12</sup>

---

religious objections to same-sex marriage. I briefly analyze the court’s discussion in a Postscript at the end of this Article.

<sup>9</sup> The term “category mistake” comes from GILBERT RYLE, *THE CONCEPT OF MIND* (1949). I am not, strictly speaking, using it in Ryle’s sense, which refers to a type of *logical* mistake. Nevertheless, there is at least a suggestive resemblance between Ryle’s effort to dismiss much of the classical discussion of the mind as a category mistake and the efforts of some same-sex marriage advocates to dismiss certain religious concerns as simply confused.

<sup>10</sup> This classic exchange was one example:

Emily Litella [played by Gilda Radner]: I’m here tonight to speak out against *busting* schoolchildren. Busting schoolchildren is a terrible, terrible thing. I hear this is going on all over the country. Mean policemen arrest little children and put them in jail in the wrong neighborhood, so they can’t even play with their little friends. Imagine, busting schoolchildren! The food in jail isn’t good, and even though they get bread, I don’t believe they can get toast. Or nice cake. Now, who will tuck them in? Where will they hang their leggings? Where will they set up their little lemonade stands? Well, they don’t have toys in jail, except maybe . . .

Chevy Chase: [ interrupting ] Miss Litella?

Emily Litella: Yes?

Chevy Chase: I’m sorry. The editorial was on *bussing* schoolchildren. Bussing. Not busting.

Emily Litella: Oh. I’m sorry. Never mind.

Saturday Night Live Transcripts, Season 1: Episode 7–Weekend Update with Chevy Chase (1975), <http://snltranscripts.jt.org/75/75gupdate.phtml>.

<sup>11</sup> See *infra* text accompanying notes 17–19 and note 19.

<sup>12</sup> An evocative object lesson here is that Ryle’s own argument that much of the classic “mind-body problem” was merely what he was the first to call a “category mistake,” see RYLE, *supra* note 9, at 11–24, ended up, not disposing of the problem, but merely staking out one of the positions in the continuing, still intense, debate. See DAVID J. CHALMERS, *THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY* 23

This Article seeks to sort out, and to examine and critique, the notion that civil marriage is a “wholly secular institution.” My conclusion is that the “secular” and “religious” meanings and institutions of marriage are so intermeshed in our history, legal and religious imagination, and doctrine that trying to wall off “civil marriage” from religious considerations is neither possible nor desirable. The idea of “marriage,” with all its complications and contradictions, is a piece of intellectual and cultural “capital” common to both church and state. Its social and legal meaning has both secular and religious sources, and changes in that meaning would have both secular and religious implications.<sup>13</sup> Moreover, the institutions of “civil marriage” and “religious marriage” are not as easily divisible as many commentators and courts seem to believe. The civil law both recognizes and, in certain respects, seeks to control the religious dimensions of marriage. Conversely, the most prevalent and influential religious understandings of marriage in the United States hold that, while marriage is an institution ordained by God, only the state has the juridical authority to “marry” a couple, and that therefore the religious blessings of marriage depend on a sound and appropriate civil law of marriage. In that sense, “civil marriage” is much like the “civil” seven-day week—a cultural institution unexplainable apart from aspects of religious history, and whose elimination or distortion would render the continuing life of many of our religious traditions incredibly more difficult and awkward. In short, religious believers are legitimate stakeholders in any debate over the meaning of civil marriage.

---

(1996) (arguing, contrary to Ryle’s suggestion that there is nothing to the meaning of our mental concepts beyond associated causal criteria, that mental states possess a “phenomenal quality” that requires its own philosophical account).

Another useful, if again only evocative, cautionary tale is the effort of some philosophical theories, such as logical positivism, to make certain disputes about religion or morality or aesthetics simply “go away.” THOMAS NAGEL, *THE VIEW FROM NOWHERE* 11 (1986). As Nagel puts it: “To the extent that such nonsense theories have an effect, they merely threaten to impoverish the intellectual landscape for a while by inhibiting the serious expression of certain questions. In the name of liberation, these movements have offered us intellectual repression.” *Id.* Nagel goes on to argue that deflationary theories are tempting precisely because certain problems are genuinely difficult, even “intractab[le]” or “hopeless,” to the point that we might welcome approaches that “offer to raise us above the old battles” by suggesting that the old debates are “misconceived and the problems unreal.” *Id.*

<sup>13</sup> To be sure, the idea of “marriage” has always varied across cultures, and is always changing in any given culture. In particular, the Western conception of marriage has developed over the centuries in radical and significant ways, particularly with respect to its assumptions about gender relations, and its rules regarding hierarchy, property, individual autonomy, the role of extended family, and the possibility of dissolution. My point here is not to deny the possibility or desirability of change, but rather to overcome the claim that civil marriage is a “wholly secular institution” that can be redesigned without religious stakes, religious implications, religious costs, or for that matter religious benefits.

All this is not to suggest that religious objectors should have a veto, in either the policy or constitutional debate, on the recognition of same-sex marriage in civil law. Such a conclusion would be absurd. For one thing, as noted at the start, there are religious voices on both sides of the marriage debate. In addition, to say that religious believers are legitimate participants in the debate does not imply that no other considerations are relevant or important. In particular, it does not dispose of separate arguments, grounded in both justice and practicality, in favor of same-sex marriage.

More generally, this Article does not reach any bottom-line conclusion on the political and constitutional controversy regarding same-sex marriage. Nor does it even argue that appreciating the religious dimension will make resolving the same-sex marriage debate easier. If anything, it will make it harder.<sup>14</sup> The intermeshing of the secular and religious dimensions of marriage does have practical doctrinal consequences, which I will discuss. It casts into doubt, for example, the *Goodridge* court's conclusion<sup>15</sup> that a legislative decision to limit the benefits of marriage to opposite-sex couples is simply not "rational" and therefore fails even the most deferential test of constitutionality.<sup>16</sup> At the same time, though, it strengthens the argument for

---

<sup>14</sup> Indeed, if I have any methodological axe to grind, it is to resist the tendency of too much legal scholarship to turn into an extension of brief-writing. My reasons resemble those in Professor Paul Campos's powerful critique:

[S]o much legal argument is by its very nature strategic and instrumental, rather than a candid statement of true belief. Indeed, to ask a lawyer if he really *believes* all the assertions put forward in his brief is like asking a novelist if she really believes all the things her characters say . . . .

. . . .

Scholarship is, or should be, another matter. A scholar seeks truth. Scholarly inquiry has distinctive value to the extent, and only to the extent, that it makes the pursuit of truth its fundamental goal.

Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817, 849–50 (1993).

This is not to say that legal scholarship should eschew the normative discourse of legal argument. For a critique closer to that position, see, for example, PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 1–30, 86–88 (1999). Rather, I am simply suggesting that even the normative arguments of genuinely truth-pursuing legal scholarship will unavoidably be less clear-cut and easily confined, and often much less convenient or congenial, than the arguments of legal advocacy.

<sup>15</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

<sup>16</sup> *Id.* Notably, the only other court that has so far found in favor of a constitutional right to same-sex marriage did so on the basis of the more demanding "strict scrutiny" or "compelling state interest" standard. See *In re Marriage Cases*, 183 P.3d 384, 401–02, 443–45, 451 (Cal. 2008). This is not only important analytically; it also allows for a more respectful, less dismissive, attitude to the opposing view. Cf. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 96–99 (1985) (criticizing the *Roe v. Wade* opinion for resting on the claim that an unviable fetus was not a constitutional "person" rather than more forthrightly holding that whatever fetal rights exist are outweighed by the right of women to sexual equality). Of course *Roe*, notwithstanding Calabresi's critique, at

requiring civil same-sex marriage, or something like it, under a less deferential standard of review tied to considerations of human dignity and equal liberty. Nevertheless, in the end, my principal aim in this Article is not to press any of these conclusions, but rather to demonstrate the complexity of the problem, to elaborate some important analytic tools, and to help illuminate the issues, the arguments, and the imaginative possibilities for all concerned.<sup>17</sup>

\* \* \*

As noted, the claim that civil marriage is a “wholly secular institution” has several possible interpretations. I am not particularly interested in what the Supreme Judicial Court of Massachusetts actually “intended” by its use of the phrase. But it will be useful, heuristically, to organize the discussion here by way of these different possible nuances. Part I of this Article visits, briefly, the general and much-debated claim that religious values should be irrelevant to *any* public debate, whether about marriage or anything else. Part II looks at three arguments that, though distinct, are tied together by way of the overarching question whether religious believers are, in some special sense, appropriate and legitimate stakeholders in the *specific* debate over the meaning of civil marriage. First, it examines whether the legal meaning<sup>18</sup> of civil marriage can be understood entirely apart from religious ideas, religious values, religious history, and continuing religious debates. Then, it asks whether the notion of “marriage” in the civil context can be walled off from a more general fund of meaning in which religious believers, and others, might be deeply invested. Finally, it critiques the idea that “civil marriage” and “religious marriage” are obviously separate *institutions*.<sup>19</sup> Part III then

---

least accorded religious objections to abortion the dignity of being included, however peripherally, in the normative conversation. *See infra* note 29.

<sup>17</sup> I am, for what it’s worth, sympathetic to the political, constitutional, *and* religious arguments that either marriage or something close to it should be available to same-sex couples.

<sup>18</sup> I discuss *infra* note 32 what I “mean” when I speak of “legal meaning.”

<sup>19</sup> There is one more possible interpretation of the *Goodridge* court’s insistence that civil marriage is a “wholly secular institution.” In this fifth reading, the “secular” character of civil marriage would be understood to rest on, or even merge into, the fact that civil marriage is a creature of enacted, or positive, law.

At least some of the *Goodridge* court’s language easily supports this reading. Most directly, the court’s claim that civil marriage is a “wholly secular institution” is entirely embedded in an argument about the purely positive character of civil marriage:

We begin by considering the nature of civil marriage itself. *Simply put, the government creates civil marriage.* In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. No religious ceremony has ever been required to validate a Massachusetts marriage.

---

In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.

798 N.E.2d 941, 954 (Mass. 2003) (emphasis added) (citations omitted).

More broadly, the opinion can be read to suggest that civil marriage is not only “wholly secular,” it is also, for the same reason, not grounded in any notion of “natural” marriage or a “natural right” to marry. Indeed, the court explicitly opines later on in a footnote that the “‘right to marry’ is different from rights deemed ‘fundamental’ for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights.” *Id.* at 957 n.14 (citation omitted).

The *Goodridge* court’s apparent equation of the “secular” and “positive” character of civil marriage is evocative and significant, whether or not it fully explains what the court meant by its statement that civil marriage is a “wholly secular institution.” But even the notion that civil marriage is a “wholly positive institution” is by no means self-evident. It certainly oversimplifies the unresolved doctrinal mystery about what it exactly means for the right to marry to be “fundamental.” See *infra* notes 78–88 and accompanying text. More important, it ignores important complexities in the very idea of positive law. See generally JAMES BERNARD MURPHY, *THE PHILOSOPHY OF POSITIVE LAW: FOUNDATIONS OF JURISPRUDENCE* (2005). It also ignores the crucial work that theories of “natural” marriage have done—albeit rarely in isolation—in advancing human rights in the American context. For example, slave-holding jurisdictions in the antebellum South generally refused to give civil legal effect to marriages among slaves. See Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 301 (2006). Nevertheless, several jurisdictions—both before the Civil War for individually freed slaves and after the War for all former slaves—retroactively validated such marriages once a slave became free. *Id.*

The judiciaries and legislatures in these jurisdictions adopted natural rights principles when determining that slaves had the right to enter into intra-racial marital relationships, but lacked the ability to exercise that right by legalizing those relationships. This right remained dormant or inactive until the disability was removed through emancipation or curative legislation.

*Id.* at 317.

Most important, the assumption that the positive law of marriage necessarily stands on one side of a bright conceptual line, with “religious” and “natural” marriage both on the other side, is at odds with vital strands in the legal tradition that either put positive and natural marriage on one side of the line, with religious marriage alone on the other, or put natural marriage on one side, with both positive and religious marriage on the other. The formative case for both these alternative strands is *Dalrymple v. Dalrymple*, (1811) 161 Eng. Rep. 665 (K.B.):

Marriage, in its origin, is a contract of natural law, it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind; it is the parent, not the child, of civil society . . . . In civil society it becomes a civil contract regulated and prescribed by law and endowed with civil consequences. In most civilized countries acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded: it then becomes a religious as well as a natural and civil contract; for it is a great mistake to suppose that because it is the one therefore it may not likewise be the other.

. . . .  
 . . . At the Reformation, this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony, but it likewise retained those rules of the canon law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage.

discusses some consequences of this analysis and tries to fit it into a richer account of the Establishment Clause and the separation of church and state in the American constitutional imagination.

## I. VOICES

One simple interpretation of what the Supreme Judicial Court of Massachusetts might have meant when it called marriage a “wholly secular institution” is that it was just tapping into a more general view that specifically religious arguments should, in a liberal and “secular” polity, be kept out of “public” debate on any controversial question. That general view can be put in either political-theoretical or constitutional terms. As a constitutional position, it might suggest, for example, that legislation enacted on the basis of religiously derived convictions, or in response to religious arguments, is *for that reason* invalid. Or it might require that neither legislatures nor courts ever engage, in their respective deliberations, with religiously tinged traditions of normative inquiry. The Massachusetts court might have had something like the latter sense in mind when it wrote that, although “[m]any people hold deep-seated religious, moral, and ethical convictions” on one or the other side of the same-sex marriage debate, “[n]either view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.”<sup>20</sup>

The problem raised here is relevant and important. I do not want to linger on it in this Article, however. Whether there should be limits to religious discourse in the public square, and what those limits might be, have by now become among the most exhaustively cogitated questions in contemporary

---

*Id.* at 669–70.

In any event, the distinction between natural and positive accounts of marriage deserves serious study in its own right, as does the place of “natural” marriage in a civil conception of the institution. I plan to pursue these questions in a separate essay. See Perry Dane, *Nature, Equality, and Same-Sex Marriage* (unpublished manuscript, on file with author). For now, however, I will put this variation on the theme to one side.

<sup>20</sup> *Goodridge*, 798 N.E.2d at 948. For the complete quotation, see *supra* note 6. Cf. *Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring in the judgment) (“I do not doubt the sincerity of deeply held moral or religious beliefs that make inconceivable to some the notion that any change in the common law definition of what constitutes a legal civil marriage is now, or ever would be, warranted. But, as matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.”).

political and constitutional theory,<sup>21</sup> and I do not think there is much useful I can add to that general debate. Nevertheless, three points seem in order.

First, the general argument against invoking specifically religious arguments in the public square, or basing policy choices on those religious arguments, is just that—a general argument. If compelling, the argument would apply to the same-sex marriage debate no more and no less than it applies to any other public debate—whether it is about abortion,<sup>22</sup> the death penalty,<sup>23</sup> tax policy,<sup>24</sup> or the rule against perpetuities.

---

<sup>21</sup> For a long but still selective list of sources on both sides of this question, see Perry Dane, *Separation Anxiety*, 22 J.L. & RELIGION 545, 550 n.11 (2007) [hereinafter Dane, *Separation Anxiety*] (review essay on NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005)).

This debate is obviously an old one, and many of the arguments on both sides have been repeated more often than many of the participants would be willing to acknowledge. For a more recent, balanced and thoughtful, contribution, particularly notable for its international scope and its mix of theoretical and practical insights, see ROGER TRIGG, *RELIGION IN PUBLIC LIFE: MUST FAITH BE PRIVATIZED?* (2007).

If there is a new twist that has emerged in the conversation more recently, it is the increasing prominence of at least some religious skeptics who argue that barring religious arguments from public debate, whatever its effect on the rights and interests of believers, also perniciously restricts the ability of non-believers to advance their own deepest, value-laden, and emotionally resonant arguments in public conversation. See, e.g., JACQUES BERLINERBLAU, *THE SECULAR BIBLE: WHY NONBELIEVERS MUST TAKE RELIGION SERIOUSLY* (2005); AUSTIN DACEY, *THE SECULAR CONSCIENCE: WHY BELIEF BELONGS IN PUBLIC LIFE* (2008). For a related argument, though one more sympathetic to religion and its values, see WILLIAM E. CONNOLLY, *WHY I AM NOT A SECULARIST* (1999).

<sup>22</sup> Cf. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (“Although neither a State nor the Federal Government can constitutionally pass laws which aid one religion, aid all religions, or prefer one religion over another, it does not follow that a statute violates the Establishment Clause because it happens to coincide or harmonize with the tenets of some or all religions. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. The Hyde Amendment, as the District Court noted, is as much a reflection of ‘traditionalist’ values towards abortion, as it is an embodiment of the views of any particular religion.” (citations and internal quotation marks omitted)).

<sup>23</sup> Cf. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (holding the imposition of the death penalty on the mentally retarded to be unconstitutional, and citing in support, along with other evidence of a social consensus against the practice, an amicus curiae brief by “representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, . . . explaining that even though their views about the death penalty differ, they all ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’” (citation omitted)).

<sup>24</sup> Cf. NAT’L CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* ¶ 202(d) (1986) (arguing that the “*tax system should be continually evaluated in terms of its impact on the poor*”); Curtis Ramsey-Lucas et al., Nat’l Council of Churches, “Religious Community for Responsible Tax Policy” Is Launched (Apr. 5, 2001), <http://www.nccusa.org/news/01news33.html> (“As representatives of the faith community we believe that government is intended to serve God’s purposes by promoting the common good. Paying taxes to enable government to provide for the needs of society is an appropriate expression of our stewardship. We believe the United States of America should have a responsible tax policy for all people, particularly the most vulnerable. We are gravely concerned with the current tax cut proposals initiated by President Bush and being

Second, if the *Goodridge* court, in describing marriage as a “wholly secular institution,” did mean to say that religiously influenced views about marriage had no place in the public debate or in its own consideration, that would have been an extreme position. The Establishment Clause mandates a separation—even a strict separation—between religion and state. As I have discussed elsewhere, though, this strict separation is consistent with, indeed supports and buttresses, an active role for religious voices, religious views, and religious influences in public debate.<sup>25</sup> The courts, in any event, have held that religious arguments are not *for that reason alone* excluded from public debate, and that religious motives do not, in themselves, invalidate legislation.<sup>26</sup> Establishment Clause doctrine does look to whether challenged legislation has a “secular legislative purpose.” “But, despite occasional infelicity and doctrinal static in the opinions, there is an important difference, which the Court has respected, between statutes with impermissible religious purposes, on the one hand, and legislators motivated by religious arguments, on the other.”<sup>27</sup> Governmental practices that are themselves religious, or legislation that is understandable *only* in religious terms, might well be struck down. But religious influences and religious arguments still have a place in the larger normative conversation. Moreover, courts in their own work have engaged with religiously influenced normative claims, and treated them as relevant to their own distinctively legal modes of argument,<sup>28</sup> even when they have ended up trumping those normative claims with other considerations.<sup>29</sup>

---

debated and passed by Congress. As millions of people—parents and children, the elderly, people with disabilities, and the working poor—are driven to seek charity to meet their most basic needs, we are appalled that the focus of attention in this Congressional session is not on meeting their needs; rather, it is on tax cuts that will mostly benefit the affluent.”); see also Michael A. Livingston, *The Preferential Option, Solidarity, and the Virtue of Paying Taxes: Reflections on the Catholic Vision of a Just Tax System* (Oct. 27, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=958806>.

<sup>25</sup> See Dane, *Separation Anxiety*, *supra* note 21, at 550–53.

<sup>26</sup> The last part of the sentence in text paraphrases *id.* at 550.

<sup>27</sup> *Id.* at 552.

<sup>28</sup> See Perry Dane, *Spirited Debate: A Comment on Edward B. Foley’s Jurisprudence and Theology*, 66 *FORDHAM L. REV.* 1213, 1221 (1998) (“[T]o whatever extent religion and religious (or anti-religious) views are inserted, explicitly or implicitly, into the legal conversation, the law will understand them, just as it understands Rawlsianism and Pareto economics and all the other ingredients of our larger normative field, through its own categories and practices.”). A particularly interesting example of such use of religious materials appeared in several of the Supreme Court’s important cases on the Fifth Amendment privilege against self-incrimination. See *infra* notes 36–37 and accompanying text (discussing the *Miranda* and *Garrity* cases).

<sup>29</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 116 (1973) (“We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy,

Third, though, whatever view one has about the *general* place of religious discourse in public debate, that question is separable from more specific arguments about marriage—arguments that will occupy me for the rest of this Article. Thus, even someone who believes that religious arguments *do* belong in the public square might still argue that civil marriage, as actually constituted by the law, is a “wholly secular institution” in at least the same sense that automobile registration is a “wholly secular institution.” And, conversely, even someone who believes that religious arguments *do not* ordinarily belong in the public square might believe that civil marriage is already so imbued (or infected) with religious meaning, religious resonances, or religious stakes that unraveling the connection would be difficult or counterproductive.

In the last analysis, the general and unqualified notion that religious views should be kept out of the public square is both the least plausible and the least interesting interpretation of the claim that civil marriage is a “wholly secular institution.” It seems time, then, to proceed to some more specific, more focused concerns.

## II. MEANINGS, IMPLICATIONS, AND INSTITUTIONS

In shifting the discussion from the general to the particular, I want to consider the relevance of religion, not only to *views about* civil marriage, but to the *character of* civil marriage. This Part looks at that question through three related lenses: the *meaning* of civil marriage, civil marriage and its relation to the *broader idea* of marriage *simpliciter*, and the relation between the civil and religious *institutions* of marriage.

### A. *Themes, Tropes, and Doctrines in the Meaning of Civil Marriage*

In describing civil marriage as a “wholly secular institution,” the Supreme Judicial Court of Massachusetts might have meant that, in the contemplation of law, civil marriage is not an institution with religious meaning. If that was the court’s point, however, its view is too simple, and probably just wrong.

---

one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.”); *id.* at 160, 162 (noting “briefly the wide divergence of thinking on this most sensitive and difficult question” but holding that the state could not, “by adopting one theory of life, . . . override the rights of the pregnant woman that are at stake.”). *But cf.* DACEY, *supra* note 21, at 36–39 (criticizing the use of “Bracketing Strategy” in *Roe*).

Even a casual observer would, of course, notice that the laws of all the states recognize religious clergy or religious communities, in addition to various civil officials, as officiants in civil marriages.<sup>30</sup> No other civil institution is structured quite this way. The Massachusetts court did emphasize that “[n]o religious ceremony has ever been *required* to validate a Massachusetts marriage.”<sup>31</sup> But the opposite of “wholly secular” is not “wholly religious,” and the court’s observation seems to be a classic instance of the fallacy of false alternatives. Nevertheless, the court is not entirely wrong: the role of religious ceremonies in civil marriage, though an important part of the larger story, is *by itself* not dispositive. Without more, it could be discounted as only an administrative convenience or even a commandeering of religious ritual to provide the necessary formality to the sealing of the marital contract.

### *1. The Meaning of Religious Meaning*

What, then, might it mean for the law to recognize that civil marriage has religious meaning? For that matter, what might it mean for *any* civil institution or legal doctrine to have religious meaning? It is important to avoid two extremes here. On the one hand, a legal rule or institution does not have “religious meaning,” at least in any useful sense, merely because it is the subject of religious views or even has historical religious roots. On the other hand, a rule or institution should be understood to have “religious meaning” even if it doesn’t have exclusively or even predominantly “religious meaning.”

When I say that a rule or institution in a civil legal system has “religious meaning,” I have in mind a reading or picture of the rule or institution that is in one sense very general or holistic, but is also built on legal, even technical and doctrinal, particulars. This inquiry is necessarily interpretive. It might even admit of degrees. To inject some more rigor, though, I propose, more specifically, that a legal rule or institution has “religious meaning” if it would be difficult to give a reasonably complete account of the current details of that rule or institution, from the law’s own point of view, without taking religious influences, religious views, or a religious dimension into account.<sup>32</sup> Some examples might help.

---

<sup>30</sup> For a convenient compilation of state laws on the solemnization of marriages, see MARTINDALE-HUBBELL LAW DIGEST pt. 1 (LexisNexis CD-ROM, 2008).

<sup>31</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (emphasis added).

<sup>32</sup> To understand my project here, it might help to recall that the notion of “meaning,” as attached to law, can always actually “mean” two very different things. Most obviously, it can refer to the operative

Consider, to begin with, the system of automobile registration, or the rule of avulsion in the law of property, or for that matter most legal rules and institutions. Someone might have a religious view of automobile registration or river avulsion, or an account that relates these legal practices to religious roots. But, a reasonably complete account of either subject, as the law understands it, would not, by a long shot, need to include a reference to religion.

Some legal rules and institutions have more religious resonance but still do not have “religious meaning” in the sense relevant here. Consider again, for example, the progressive income tax. Religious traditions have views on the desirability, justification, and even details of progressive taxation.<sup>33</sup> Some of those views are even grounded in specific theological claims or sacred texts. All this is important. But a reasonably complete account of progressive taxation in the modern legal imagination could leave it out. And, it is hard to find specific details of the system of progressive taxation whose explanation would definitely require a reference to religion.

The story gets more complicated if we turn to some basic features of American constitutionalism. Some commentators have argued that the very notion of constitutionally enforceable human rights depends on conceptions of human dignity and equality that are inevitably religious at their core.<sup>34</sup> I do not

---

interpretation or construction of a particular legal rule or doctrine. But it can also refer to a broader and more thematic reading of a legal regime or institution, as in the common but disputed claim that tort law has a largely economic “meaning.” My discussion of the “religious meaning”—or the religious dimension of the “meaning”—of civil marriage tries to situate itself somewhere between these two meanings of “meaning.” If I have an excuse for such slipperiness, it is that the specifically doctrinal and more broadly cultural meanings of any legal idea are often deeply interconnected.

It also bears repeating in this connection that whatever “meaning” any legal regime has—whether doctrinal or cultural—will be filtered through the law’s “own distinctively legal modes of argument.” *See supra* note 28 and accompanying text. Thus, my argument here about the “religious meaning” of the legal institution of marriage has nothing to do, as such, with any more abstract jurisprudential debate about positivism or the religious or natural character of law itself.

<sup>33</sup> *See supra* note 24.

<sup>34</sup> Particularly relevant here is the recent work of Michael Perry, *see* MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 16 (2007) (“[W]hat ground one who is not a religious believer can give for the claim that every human being has inherent dignity is obscure. Especially obscure is what ground a resolute atheist can give.”); Michael J. Perry, *Morality and Normativity*, 13 LEGAL THEORY 211, 215–18 (2007) (arguing that only “an affirmative religious response” can adequately meet challenges to the international human rights principle that “each and every (born) human being has equal inherent dignity” (emphasis omitted)), and Jürgen Habermas, *see* JÜRGEN HABERMAS, TIME OF TRANSITIONS 151 (2006) (arguing that commitment to human rights is “the direct heir to the Judaic ethic of justice and the Christian ethic of love”). For an important, more general, philosophical argument along similar lines, *see* NICHOLAS

want to intervene in that argument here. Even if it is true, however, it must still be admitted that there is some distance, and a good deal of attenuation, between that putative religious core and the actual shape of constitutional principle and doctrine.<sup>35</sup>

The same can be said even of some of the strands of constitutional law whose religious connections seem particularly direct. Consider the constitutional rule against self-incrimination. American courts have been fond of pointing out the roots of the privilege against self-incrimination in Jewish legal principles found in the Talmud.<sup>36</sup> This history is, again, important and fascinating. But little in the contemporary shape of the doctrine turns on it. Indeed, the Supreme Court noticed that, while the Talmudic rule against a criminal defendant testifying against himself was categorical, the modern conception of the privilege turns on the presence of coercion, so that genuinely voluntary self-incrimination is just fine.<sup>37</sup>

Finally, consider a more offbeat but suggestive example—the christening of Navy ships.<sup>38</sup> The practice of “christening” ships as they begin their service

WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 325 (2008) (“It is impossible to develop a secular account of human dignity adequate for grounding human rights.”).

<sup>35</sup> It remains an entirely separate question whether the cultural commitment to fundamental human rights would survive if its religious undergirding were to be eroded or disappear. Wolterstorff, for one, is eloquently skeptical that it would. WOLTERSTORFF, *supra* note 34, at 393 (“Our Judaic and Christian heritage . . . declares that all of us have great and equal worth: the worth of being made in the image of God and of being loved redemptively by God. . . . It is this framework of conviction that gave rise to our moral subculture of rights. If this framework erodes, I think we must expect that our moral subculture of rights will also eventually erode and that we will slide back into our tribalisms.”). For a famously more rosy view, see Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 133–34 (Stephen Shute & Susan Hurley eds., 1993). A third philosophical camp, radically different from both Wolterstorff’s and Rorty’s, argues that religiously grounded thought has actually “prevented the free development of moral reasoning;” friends of this third view claim to voice “high hopes” for a new and compelling “[n]on-religious ethics” once the religious monopoly on foundational moral thought is demolished. DEREK PARFIT, REASONS AND PERSONS 453–54 (1984).

<sup>36</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 458 n.27 (1966) (“Thirteenth century commentators found an analogue to the privilege [against self-incrimination] grounded in the Bible.”); *Asherman v. Meachum*, 957 F.2d 978, 990 (2d Cir. 1992) (Cardamone, J., dissenting) (noting that the principle against self-incrimination is reflected in Christian and Jewish laws and traditions); *Moses v. Allard*, 779 F. Supp. 857, 870 (E.D. Mich. 1991) (“The Fifth Amendment privilege probably originated in ancient Talmudic law.”).

<sup>37</sup> See *Garrity v. New Jersey*, 385 U.S. 493, 497 n.5 (1967) (“The [constitutional] provision against self-incrimination is a privilege of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, does not permit self-incriminating testimony. It is inadmissible, even if voluntarily offered.” (quoting Norman Lamm, *The 5th Amendment and Its Equivalent in Jewish Law*, 17 DECALOGUE J. 1 (1967))).

<sup>38</sup> For an account of the history of the practice of christening ships, and the customs and rules now attached to it, see JOHN C. REILLY, JR., SHIPS OF THE UNITED STATES NAVY: CHRISTENING, LAUNCHING, AND

is, of course, akin to the common Christian rite of baptizing or “christening” babies. Moreover, the ceremonies surrounding the christening of ships have at times in the history of the practice included a good many specifically religious elements, including the participation of clergy, the use of hymns, and the like. And one can certainly imagine religious traditions having strong, even negative, views on the practice of christening ships.<sup>39</sup> Nevertheless, a reasonably complete account of the contemporary practice of ship christening in the United States would not require (beyond the compulsory historical reference) more than a passing reference to the religious parallel. More to the point, most of the specific elements of the contemporary ceremony, such as the choice of liquid, or the odd tradition that a *woman* smash the bottle of champagne on the hull, have much more to do with naval tradition than religious doctrine. To put it another way, the practice and norms of christening babies and the practice and norms of christening ships have become, over time, only distantly related, leading entirely separate lives and unlikely even to show up at the same family reunion.

Now let’s consider some examples on the other side of the ledger. Some might argue that, in a secular state with a constitutional ban on the establishment of religion, *no* rule or institution could have religious meaning. But this bald assertion is belied by the range of statutes and other legal rules that specifically reference religion, religious institutions, and religious ideas. Most resonant here might be the legal rules that in many states structure the secular legal form of churches and religious communities. I have written elsewhere, for example, about the “corporation sole,” a legal rubric designed, in essence, to translate into civil legal form the authority and ecclesiastical role of a bishop or similar figure in a hierarchal church such as the Catholic Church, the Episcopal Church, or the Church of Jesus Christ of Latter-Day Saints (Mormons).<sup>40</sup> In a corporation sole, the Bishop or similar figure *is* a religious corporation—not merely the director or trustee of a religious

---

COMMISSIONING (2d ed. 1975). As this pamphlet points out, the practice has its roots in both Christian and Pagan precedents. *Id.* at 5–6.

<sup>39</sup> See, e.g., ROBERT ROBINSON, THE HISTORY OF BAPTISM 362 (David Benedict ed., Boston, Lincoln & Edmands 1817) (“The ridiculous ceremony of christening ships, and blessing fleets, seems to have flowed from a principle of justice in time debased by superstition.”); cf. REPORT OF THE FOURTH BIENNIAL CONVENTION AND MINUTES OF THE EXECUTIVE COMMITTEE MEETINGS OF THE WORLD’S WOMAN’S CHRISTIAN TEMPERANCE UNION 92 (1897) (“Resolved . . . that we protest against the custom of christening a ship by breaking a bottle of wine over its prow.”).

<sup>40</sup> Perry Dane, *The Corporation Sole and the Encounter of Law and Church*, in SACRED COMPANIES: ORGANIZATIONAL ASPECTS OF RELIGION AND RELIGIOUS ASPECTS OF ORGANIZATIONS 50 (N.J. Demerath III et al. eds., 1998).

corporation, not even the sole director or trustee of a religious corporation, but *the* religious corporation. Although the corporation sole has a long history of purely secular usage in Anglo-American law, its nineteenth-century rediscovery in the United States was based solely on the need to give appropriate civil legal form to ecclesiastical institutions, and the contemporary details of this legal form in the United States cannot be understood apart from its religious dimension.

Institutions such as the corporation sole are particularly intense instances of the encounter between religion and civil law. A more textured example of that encounter is an institution like the seven-day week.<sup>41</sup> The seven-day week, with Sunday (and more recently Saturday as well) as its “weekend,” grows directly out of Jewish and Christian religious and cultural norms. Other faiths, and other cultures, have divided time differently. This is not to deny that the seven-day week has taken on secular significance, including a certain sunk cost cultural investment. But the question at hand is not whether a civil legal institution is *wholly* religious, only whether it has religious meaning. And no reasonable explanation of why the week is seven days long, or why the weekend falls on Saturday and Sunday, could leave religion out of account. To see the point, imagine trying to debate without any reference to religion an effort, on the model of one of the least successful innovations of the French revolutionary government in 1792,<sup>42</sup> to change the week to ten days, or to change the weekend to Monday and Tuesday, or eliminate it entirely.<sup>43</sup>

It is, of course, a separate question exactly how far civil deference to the religious dimension of the seven-day week can and should go. The U.S.

---

<sup>41</sup> See generally EVIATAR ZERUBAVEL, *THE SEVEN DAY CIRCLE: THE HISTORY AND MEANING OF THE WEEK* 6–9 (1985). See also BONNIE BLACKBURN & LEOFRANC HOLFORD-STREVEVS, *THE OXFORD COMPANION TO THE YEAR* 566–82 (1999); E.G. RICHARDS, *MAPPING TIME: THE CALENDAR AND ITS HISTORY* 266–68, 273–74 (1998).

<sup>42</sup> See NORMAN HAMPSON, *A SOCIAL HISTORY OF THE FRENCH REVOLUTION* 200 & n.3 (1963); ZERUBAVEL, *supra* note 41, at 28–30. Both this effort, and a similarly unsuccessful campaign in the early days of the Soviet Union to switch to a five-day week, see BLACKBURN & HOLFORD-STREVEVS, *supra* note 41, at 688–89 (detailing the Soviet Union’s early effort to institute a new calendar); ZERUBAVEL, *supra* note 41, at 35–37 (describing the attempt to institute a five-day week), were explicitly grounded in anti-religious motivations. *Id.* at 29 (“The real target of the [French republican] reform campaign . . . was the Christian . . . seven-day week, and, from a symbolic standpoint, the abolition of the seven day ‘beat’ expressed the wish to de-Christianize France far more than the attempt to make life there more ‘rational.’”); *id.* at 36 (“As in France 140 years earlier, the main purpose of abolishing the seven-day week in the Soviet Union was to destroy religion there.”).

<sup>43</sup> A major innovation of the Soviet effort to introduce a five-day week was eliminating a uniform weekend or day of rest and instead assigning each one-fifth of the workforce to a different “day off.” BLACKBURN & HOLFORD-STREVEVS, *supra* note 41, at 689.

Supreme Court famously upheld Sunday Blue Laws, despite the Establishment Clause.<sup>44</sup> The Canadian Supreme Court, even without an establishment clause, struck some of them down.<sup>45</sup> With or without Blue Laws, however, the basic religious meaning of the seven-day week remains in place.

Or consider the even more complicated and controversial question of Christmas. The Supreme Court has posited that Christmas in the United States is, in a sense, two distinct holidays—a religious holiday that celebrates the birth of Jesus, and a national secular holiday marked by such cultural symbols as Santa Claus and Christmas trees.<sup>46</sup> My own view is different: I suggest that, while the Court’s account does reflect the view of some Americans, the best overall cultural reading of Christmas is that it is a single, religious, holiday that happens to be celebrated, as many religious holidays are, partly through the medium of certain cultural accessories, such as Santa Claus and Christmas trees.<sup>47</sup> These cultural accessories, even if they do not convey any propositional content, or even symbolize anything in particular, “constitute, for most Americans, part of what some sociologists call ‘religious capital,’ the total set of commitments, rituals, and practices in which believing individuals invest their time and energy.”<sup>48</sup>

Even if the Court is right, however, the purely civil Christmas would still have religious meaning in the sense suggested here. As the Court has acknowledged, no adequate account of Christmas could reasonably leave out its religious connections.<sup>49</sup> Congress could not turn the civil Christmas into a “Monday holiday” with the same ease that it took to change the official day for

---

<sup>44</sup> *McGowan v. Maryland*, 366 U.S. 420, 452 (1961).

<sup>45</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.).

<sup>46</sup> *See, e.g., County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 579 (1989) (“As observed in this Nation, Christmas has a secular, as well as a religious, dimension.”); *Lynch v. Donnelly*, 465 U.S. 668, 680–85 (1984) (implicitly distinguishing between the “Christmas Holiday season”—a “National Holiday” celebrated with “traditional, purely secular displays” that engender “a friendly community spirit of goodwill”—and the more specifically religious “origins” or dimensions of that “National Holiday”); *id.* at 709 & n.15, 710–11 (Brennan, J., dissenting) (emphasizing the “constitutional importance” of “the fact that the Christmas holiday in our national culture contains both secular and sectarian elements” and distinguishing between the “*secular* celebration of Christmas” with “secular figures as Santa Claus, reindeer, and carolers” and the specifically religious display of a crèche whose “purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma”).

<sup>47</sup> Perry Dane, *Christmas 3* (Nov. 27, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=947613> [hereinafter Dane, *Christmas*].

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Lynch*, 465 U.S. at 685 (“Even the traditional, purely secular displays extant at Christmas . . . would inevitably recall the religious nature of the Holiday.”).

celebrating Washington's Birthday or Memorial Day.<sup>50</sup> Nor could it credibly try to inject a new and revised meaning into it, as it did when it morphed Armistice Day into Veterans Day.<sup>51</sup>

Again, understanding the religious dimension of the civic celebration of Christmas helps, but does not conclude, the constitutional analysis. I am drawn to the view that the best constitutional solution would be "to get government . . . out of the business of Christmas. This would mean, not only no crèches or crosses, but no Christmas trees, no Santa, no decorations. Nothing."<sup>52</sup> But even a response that rejected the "bracing austerity" of such strict separationism<sup>53</sup> would still need to acknowledge the religious meaning of, and the religious stakes in, the problem.

Finally, consider the Establishment Clause itself. It is by now a commonplace that the American commitment to religious disestablishment was inspired by a combination of pragmatism, proto-liberal political theory, and a distinctive theological tradition that warned of the dangers of state sponsorship for both the integrity of the church and the salvation of believers.<sup>54</sup>

---

<sup>50</sup> Uniform Monday Holiday Act, Pub. L. No. 90-363, 82 Stat. 250 (1968) (codified as amended at 5 U.S.C. § 6103(a)); see MATTHEW DENNIS, RED, WHITE, AND BLUE LETTER DAYS: AN AMERICAN CALENDAR 162, 194–95, 216, 220–21, 236–40 (2005) (discussing the Uniform Monday Holiday Act of 1968 and its cultural consequences).

<sup>51</sup> DENNIS, *supra* note 50, at 234–37 (discussing history of the national Armistice Day holiday, its ambiguous relationship to Memorial Day, and its eventual transformation into Veterans Day).

<sup>52</sup> Dane, Christmas, *supra* note 47, at 8.

<sup>53</sup> *Id.*

<sup>54</sup> See ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 3–31 (1990) (discussing "Enlightenment separation, political centrist, and pietistic separation" as three main ideological categories influencing the Founders' views on religion and government); DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 59–67 (2002) (examining the federalism concerns underlying Jefferson's "wall of separation" metaphor); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 2, 6–11 (1965) (discussing enlightenment and evangelical understandings of the separation of church and state); ELWYN A. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES: THE DEVELOPMENT OF CHURCH-STATE THOUGHT SINCE THE REVOLUTIONARY ERA 15–26 (1972) (examining the theory of religious liberty held by evangelicals, focusing particularly on the views of Isaac Backus); Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 294–98 (2002) (examining the views of pietists to argue that the separation of church and state was "first laid down, as a means to protect the church, not the state"); Dane, *Separation Anxiety*, *supra* note 21, at 565–68 (discussing the theological roots of the "strict separationist" view of the Establishment Clause); Carl H. Esbeck, *A Typology of Church-State Relations in Current American Thought*, in RELIGION, PUBLIC LIFE AND THE AMERICAN POLITY 3 (Luis E. Lugo ed., 1994) (discussing six distinct theological camps on the relationship between church and state: strict separationists, freewill separationists, institutional separationists, structural pluralists, nonpreferentialists, and restorationists); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 291–97 (2001) (discussing the Framers'

Less obvious, though, is the extent to which the theological element of American separationism has helped determine its particular direction and shape. For example, most secular Western countries take for granted that government can give non-preferential aid to religious schools and other institutions;<sup>55</sup> if American constitutional doctrine is more suspicious of such aid, it is largely because of the theology of the Establishment Clause.<sup>56</sup> Moreover, the continued vitality of the American no-aid principle depends in part on whether that separationist theology, or at least a theological perspective compatible with it,<sup>57</sup> retains its salience as against the attractions of a flatter, more barren, more straightforwardly “liberal” conception of mere neutrality. Thus, the Establishment Clause has “religious meaning” by any measure, and certainly in the sense being stressed here. It might, to be sure, seem paradoxical that a rule of law requiring the separation of religion and state would embody religious commitments, but there is no actual paradox here, only a certain measure of healthy irony.<sup>58</sup>

---

understandings of church–state relations and the Establishment Clause); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 872–79 (2009) (describing the historical underpinnings of the argument that the separation of church and state was needed to avoid corruption of religion); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1667–72 (2003); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 377 (1996) (describing the views of religious liberty held by four groups in the late eighteenth century: puritans, evangelicals, enlightenment thinkers, and civic republicans); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 491–97 (1991) (explaining the contributions of the evangelical and enlightenment traditions to eighteenth-century understandings of church–state relations).

<sup>55</sup> See W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 20–21 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (discussing the approaches that European countries have taken to church–state relations and the role of government in supporting religious organizations); Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1261–62, 1267–71 (contrasting the level of state aid given by the government to churches and religious schools in European countries and the United States).

<sup>56</sup> See Derek H. Davis, *Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035, 1038, 1061 (2002) (contrasting the American tradition of church–state separation with the “pale religiosity” spawned by “church-state partnerships” in modern Europe, and emphasizing the “critical subtlety” in the American tradition, which emphasized that “religion must remain beyond the ‘cognizance’ of civil government, not merely neutral in its eyes”).

<sup>57</sup> See Dane, *Separation Anxiety*, *supra* note 21, at 572–76 (discussing contemporary theological developments and their implications for the separationist ideal). For an intriguing recent effort to understand and justify aspects of First Amendment separationism in terms of the neo-Calvinist Dutch Reformed theology of Abraham Kuyper, see Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 110, 128–29 (2009).

<sup>58</sup> The theological roots of American separationism is actually only one example of the much more thoroughgoing, and deeply profound, role that religious thought has played in inspiring, defining, and legitimating many of the central features of much of our “secularity,” including the presuppositions of modern science, see R.G. COLLINGWOOD, *THE IDEA OF NATURE* 115–17, 170 (1945) (describing the views of Berkeley,

## 2. *The Meaning of Civil Marriage*

With these examples in mind, let's return to the question of marriage. The institution of civil marriage is not as straightforward as the institution of the corporation sole;<sup>59</sup> it is not just an effort to translate ecclesiology into secular terms. But marriage is also not like automobile registration or the rule of avulsion.<sup>60</sup> So the relevant question is whether civil marriage is more like ship christening or more like Christmas, more like progressive taxation or more like the seven-day week, more like the rule against self-incrimination or more like the Establishment Clause.

The answer turns out to be close. It is also complex, involving both competing currents in the civil law and important tensions in religious conceptions of marriage. Coming to any sensible conclusion will require some exposition, in several distinct steps.

*First:* When the Supreme Judicial Court of Massachusetts described civil marriage as a wholly secular institution, it was not saying anything radically new. Indeed, referring to marriage as a secular institution, or secular or civil contract, is a surprisingly old theme in American case law. In particular, nineteenth-century courts often employed this formula in the context of upholding the validity of non-ceremonial (common law) marriages,<sup>61</sup> even as

---

Kant, and Whitehead on the relation between God and science or nature); PETER HARRISON, *THE BIBLE, PROTESTANTISM, AND THE RISE OF NATURAL SCIENCE* (1998); Dorothy Stimson, *Puritanism and the New Philosophy in 17th Century England*, in 3 *BULLETIN OF THE INSTITUTE OF THE HISTORY OF MEDICINE* 321, 321–22 (Henry E. Sigerist ed., 1935) (“Puritanism was an important factor, hitherto little regarded, in making conditions in England favorable to the new philosophy heralded by Bacon and in promoting the type of thinking that helped to arouse interest in science . . . .”); see also JOHN HEDLEY BROOKE, *SCIENCE AND RELIGION: SOME HISTORICAL PERSPECTIVES* 326–27 (1991) (“Despite the pressures to insulate scientific and religious vocabularies, there have been profound changes in our understanding of science itself that have created space for renewed dialogue between scientist and theologian.”), and secular pluralist politics, see KRISTEN DEEDE JOHNSON, *THEOLOGY, POLITICAL THEORY, AND PLURALISM: BEYOND TOLERANCE AND DIFFERENCE* 140–73 (2007) (discussing how the writings of St. Augustine contribute to the understanding of “how we might live together in a pluralist and diverse society”); PEREZ ZAGORIN, *HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST* (2003); Elizabeth Mensch, *Christianity and the Roots of Liberalism*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 54, 55 (Michael W. McConnell et al. eds., 2001); see also PERRY, *supra* note 34, at 8–13. For a magisterial effort to unearth the complex character of modern secularity as a whole, see CHARLES TAYLOR, *A SECULAR AGE* (2007).

<sup>59</sup> See *supra* note 40 and accompanying text.

<sup>60</sup> See *supra* text accompanying notes 32–34.

<sup>61</sup> One quick reminder might be in order here: “Common law marriage” means something different in legal understanding than it often does in common usage. Journalists, for example, often treat “common law marriage” as the state of living together without being legally married. In legal usage, to the contrary, a common law marriage—also known as informal marriage, irregular marriage, non-ceremonial marriage, or marriage by habit and repute—is a full-fledged, legally valid, and binding marriage entered into through the

against state statutes (some older than the Marriage Act in England) that seemed to require that marriages be solemnized to be valid.<sup>62</sup> The argument in these cases was simply that, because civil marriage was a civil contract rather than a religious rite, it only required the consent of the parties and not any particular ritual, whether civil or religious, and statutes to the contrary should be read as directory rather than mandatory.

*Second:* Nevertheless, this particular judicial formula, more than most of what judges say in the course of justifying their conclusions, should not be taken at face value. Indeed, with respect to the particular argument that non-ceremonial marriage is justified by the nature of civil marriage as a “civil contract,” the account in many, though not all,<sup>63</sup> cases had the story exactly backwards.

Non-ceremonial marriage was a possibility in England through much of the late Middle Ages, not because marriage was conceptualized as merely a “civil contract,” but because canon law, of its own force and as incorporated into English law, though it condemned non-ceremonial marriages, nevertheless treated them as valid and binding. The Church was willing to treat non-ceremonial marriages as valid partly because of the influence of Roman law, but more directly because of the Church’s theological vision of marriage as a natural institution whose central feature was consent and its specifically

---

mutual consent of the parties (and usually cohabitation and some public “holding out”) without a marriage license or any civil or religious ceremony. Many states recognized common law marriages in the nineteenth century, but the number has steadily declined since then. At present, about ten states still allow full-fledged common law marriages, and a handful of others recognize such marriages entered into before a certain date or give them limited effect for certain purposes. TONI IHARA ET AL., *LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES* ch. 2, at 3 (13th ed. 2006).

As just noted, the terms “non-ceremonial” and “common law” marriage are essentially synonymous. I use both terms in this Article, though generally reserving “common law” marriage to refer to the specific institution in English and American legal history and “non-ceremonial” marriage to refer to the more general idea, which has also appeared in the history of a variety of other legal systems, including canon law.

<sup>62</sup> See, e.g., *Askew v. Dupree*, 30 Ga. 173, 176 (1860) (“Let us, in the first place, ascertain the legal principles which are involved in this question. And the first, and the foundation of all the rest, is that marriage is a civil contract.” (quoting Cabaniss, J.)); *Fenton v. Reed*, 4 Johns. 52, 54 (N.Y. 1809) (Kent, C.) (“No formal solemnization of marriage was requisite. A contract of marriage *per verba de presenti* amounts to an actual marriage . . . .”); see also *Meister v. Moore*, 96 U.S. 76, 78 (1877) (“Marriage is everywhere regarded as a civil contract.”).

<sup>63</sup> For a particularly learned discussion, see *In re Roberts’ Estate*, 133 P.2d 492 (Wyo. 1943). Justice Blume’s opinion for the court in this case argued that Chancellor Kent’s opinion in *Fenton v. Reed*, which drove the widespread recognition of common law marriage in many States, was “wrong.” *Id.* at 497.

religious desire to “regularise cohabitation, to save the children of such unions from the stigma of bastardy and their parents from the sin of fornication.”<sup>64</sup>

In 1563, the Council of Trent, concerned about the harm caused by “clandestine” marriages, enacted a decree, known by its first word “Tametsi,” which, though reiterating that marriages created by the consent of the parties were binding as long as the Church did not invalidate them, imposed a new requirement of “canonical form” conditioning validity on, among other things, the participation of a priest and witnesses in a wedding ceremony.<sup>65</sup> By the time of Trent, however, England had already split from Rome, and the Church of England continued to adhere to the old rule validating informal marriages. This posed particular problems for the civil state, which had its own concerns about secret marriages and the desirability of certainty of expectations in property, kinship relations, and the like. Thus, in the Marriage Act 1753, also known as Lord Hardwicke’s Act,<sup>66</sup> the British Parliament abolished common law marriage. The Marriage Act, however, did not extend to Scotland, where non-ceremonial marriage was not fully abandoned until 2006.<sup>67</sup> It also arguably did not apply to the American colonies. The best explanation for the development of common law marriage in the United States was a combination of several factors: the ideological construction of marriage as contract, to be sure, but also the legacy of a very old religious tradition upholding unsolemnized marriages, legal uncertainty regarding the original reach and post-revolutionary reception of English law, simple misunderstanding of the precedents, and—as important as any other factor—the difficulty of requiring resort to either a governmental or religious official in a dispersed frontier society. Similarly, the reasons for the increasing abandonment of common law marriage in the United States in the years since its nineteenth-century heyday

---

<sup>64</sup> J.A. Andrews, *The Common Law Marriage*, 22 MOD. L. REV. 396, 396 (1959) (British spelling in original).

<sup>65</sup> See Edward Schillebeeckx, *Christian Marriage and the Reality of Complete Marital Breakdown*, in CATHOLIC DIVORCE: THE DECEPTION OF ANNULMENTS 82, 86–87 (Pierre Hegy & Joseph Martos eds., 2006). Nevertheless, it bears emphasis that, even today, the theology of the Latin branch of the Catholic Church considers the marrying couple, and not the priest, to be the “ministers” of the sacrament of marriage. See REV. JOHN NASH GRIFFIN, SERMONS ON THE CREED OF POPE PIUS IV, at 142 (Dublin, George Herbert 1852) (“Since it properly belongs to the minister to pronounce the words of the form, and by these to perform the sacrament, and in this sacrament the words of the form are uttered by the married couple, it is necessary that *they themselves are the ministers of this sacrament!*” (quoting Bellarmine, *De Sacramento Matrimonio*)); Father William Saunders, Catholic Educ. Res. Ctr., *The Marriage Covenant*, <http://www.catholiceducation.org/articles/marriage/mf0014.html> (last visited Mar. 2, 2009).

<sup>66</sup> 26 Geo. 2, c. 33 (Eng.).

<sup>67</sup> *Id.* The Act also exempted Jews and Quakers from the requirement that marriages be celebrated in the Church of England. *Id.*

include the venerable and very instrumental civic imperative of certainty and fixing settled expectations, the practical difficulty of proving mutual consent to marry in an age of more casual cohabitation, and the relative logistical ease in modern America of requiring marrying couples to go through the procedures set out in law.

One lesson of this tale is that the question of non-ceremonial marriage cuts across any divide between “secular” and “religious” characterizations of civil marriage. There are powerful religious arguments for and against non-ceremonial marriage, and there are powerful secular arguments for and against non-ceremonial marriage.

As relevant here, however, the more important lesson is that the statement that civil marriage is merely a “civil contract” needs to be understood as a judicial trope. It is a code for a complex set of claims, which do not translate smoothly into a neat modern dichotomy between “rights” and “rites.” Some of those assumptions, as I have already emphasized and as I will explain in more detail, are themselves deeply religious. Moreover, this trope can be, and has been, employed strategically. It serves, and has served, certain rhetorical ends, and cannot be treated in isolation as an abstract, absolute, claim of truth.

*Third:* All this might not be particularly significant—after all, even tropes deserve respect—were it not for the fact that American case law also contains, alongside the trope that marriage is a civil contract, a counter-trope emphasizing its distinctively religious character.<sup>68</sup> This counter-trope sometimes appears as mere ornament. But it is also employed to solve very specific doctrinal questions. For example, should marriages be as easy to dissolve as other “civil contracts”? No, because the “well being of society, the interest of the children of the marriage, good morals *and the precepts of religion*, all forbid that the marriage contract should be dissolved unless the objects of the relation have been defeated, and the cohabitation of the parties has become productive of wrong, or the safety of one of the parties is endangered.”<sup>69</sup> Can a lengthy separation, by itself, dissolve a marriage? No, because such a rule would be “contrary to the whole doctrine of the Christian marriage.”<sup>70</sup> But does a statute of limitations apply to a claim of adultery in an

---

<sup>68</sup> For similar arguments, see generally Charles J. Reid Jr., *Marriage: Its Relation to Religion, Law, and the State*, 68 JURIST 252 (2008); John Witte, Jr., *An Apt and Cheerful Conversation on Marriage*, in THE FAMILY TRANSFORMED: RELIGION, VALUES AND THE FAMILY IN MODERN AMERICA (Steven M. Tipton & John Witte, Jr. eds., 2006).

<sup>69</sup> *De La Hay v. De La Hay*, 21 Ill. 251, 254 (1859) (emphasis added).

<sup>70</sup> *Pain v. Pain*, 37 Mo. App. 110, 114 (Mo. Ct. App. 1889).

action for divorce? No, partly because marriage is a religious institution, and not only a civil contract.<sup>71</sup> Is the loss of love of a husband toward his wife relevant, even if not dispositive, in an action for divorce grounded in a claim of cruelty? Yes, because the classical Christian view that a husband shall “delight in [his wife] as himself” is at least relevant to the factual and legal inquiry into whether he has violated his duties under law.<sup>72</sup> Why are incest and polygamy

---

<sup>71</sup> Mosely v. Mosely, 67 Ga. 92, 95–96 (1881):

Shall we place the marriage contract on the same plane as that of other contracts? It is true, in law-writings it is generally denominated a contract, but it is more than a contract, and differs from all others. In the Roman Catholic Church, it is a sacrament and indissoluble during the lives of the parties. Protestant Churches regard it of Divine origin, and invest it with the sanction of religion. Lord Robinson, a distinguished Scotch judge, in a passage approvingly quoted by Judge Story, says “marriage is a contract *sui generis* and differing in some respects from all other contracts so that the rules of law which are applicable in *expounding and enforcing other contracts may not apply* to this. It is the most important of all human transactions and the basis of the whole fabric of civilized society.” It is coeval with and essential to the existence of society. It cannot, like all other contracts, be dissolved by the mutual consent of the contracting parties. It may be entered into by persons who are not capable of forming any other lawful contract. It can be annulled by law, which no other contract can be, and its rights and relations are derived rather from the law relating to it than from the contract itself. In dissolving this contract by judicial procedure, we cannot conclude the legislature intended to class it with those other causes of action to which acts of limitation apply.

<sup>72</sup> Goodrich v. Goodrich, 44 Ala. 670, 673–74 (1870) (citations omitted):

As we ascend higher in the scale of animal organization . . . we find that marriage has, more or less, connected itself with the sacred rites of the people of all nations. Some have even thought that its influence does not terminate with life, and that it is indispensable for happiness in the life to come.

This important contract is acknowledged in all christian countries, to impose upon the parties to it something beyond the mere obedience of the wife towards the husband, and mere protection and maintenance on the part of the husband towards the wife. It is undoubtedly a contract at common law. It has been said, by the highest authority, that christianity is a part of the common law. Yet, although this may not be the law of this State to the same extent that it has been declared in England, it certainly enters, in no small degree, into the ascertainment of social duties, when the statute law is silent on the subject. It must also be granted, that whatever is irreligious, in most instances, is wrong, and in many it is illegal.

The law requires that the wife shall obey all the just and reasonable marital commands of the husband, and it requires that the husband shall protect and maintain the wife, according to his station in life; that is, according to his means. It also refuses to sanction any “conduct,” on the part of the husband, beyond what may be necessary to accomplish these important ends. But christianity goes much further. It requires that the husband shall love the wife; that he “shall delight in her as in himself.” And the great apostle gives the most conclusive reason for this injunction. He says: “He that loves his wife, loves himself. For no man ever hated his own flesh; but nourishes and cherishes it.” The law does not attempt to enforce this important rule, but it so far recognizes the necessity of its spirit, as to feel that the wife is safe so long as she is under its protection; but when this shield of her security is withdrawn, then her peril begins. . . . And so long as he loves her, or—in the language of religion—so long as he “delights in her as himself,” all experience shows that he will protect her. But when the husband’s love no longer exists, then

prohibited? At least in part because of specifically Christian conceptions and traditions regarding the nature of marriage and the conditions for its validity. In short, much of what makes the institution of marriage legally distinctive has been, not unreasonably, explained on the basis of the continuing influence of religious ideas and religious traditions in the law.

Some of the doctrines and cases just cited do, admittedly, have a certain musty quality to them. But their underlying theme remains alive and salient: The law's understanding of civil marriage—including the practical functions that civil marriage plays in the polity and in social policy—assumes, draws on, and trades on a dignitary substratum of meaning that is largely, though not exclusively, religious, and is in any event bound up historically with religious ideas and developments.

Part of that dignitary meaning is grounded in marriage's insistently non-instrumental value and character.<sup>73</sup> There is, to be sure, some tension between marriage's intrinsic value and the more functional goods that it produces. One might even be cynical about the thought that the state trades on marriage's intrinsic good to help further the state's own instrumental ends. But I prefer to think of it as a more complex and inevitable interplay of levels of significance, at least analogous to any well-ordered national polity's necessary effort to

---

the wife's protection becomes uncertain. When this uncertainty grows so great that the wife is evidently imperiled and made unhappy to such a degree as to effect her health, and interfere with the discharge of her duties as a mother, then the courts will interpose for her protection.

A marriage may therefore be legal, though there is no love, in the apostle's sense, on either side. Nevertheless, it may be doubtful whether it may be said to be a christian marriage, in the absence of this important element. Hence, all christian marriages may reasonably be presumed to have had this important ingredient, as one of the inducements which led to its consummation. To hold otherwise, would be to insinuate that the christian, in this great relation, would belie his faith and creed.

<sup>73</sup> For some efforts at articulating a non-instrumental account of marriage and the goods of marriage, including views on both sides of the same-sex marriage debate, see Robert P. George, *What's Sex Got to Do with It? Marriage, Morality, and Rationality*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 142, 151–55 (Robert P. George & Jean Bethke Elshtain eds., 2006); Scott FitzGibbon, *Marriage and the Good of Obligation*, 47 *AM. J. JURIS.* 41 (2002); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *GEO. L.J.* 301 (1995); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 *AM. J. JURIS.* 51 (1997); cf. Misha Isaak, Comment, "What's in a Name?": *Civil Unions and the Constitutional Significance of "Marriage"*, 10 *U. PA. J. CONST. L.* 607, 613–21 (2008) (arguing that the difference between civil unions and marriage turns largely on the non-instrumental "intangible benefits" of marriage). For the purpose of my argument here, I am less concerned with the *content* of the non-instrumental character of marriage than with the sheer *fact* of its non-instrumental character.

integrate its own dual character as both a functional association and a constitutive basis for loyalty and identity.<sup>74</sup>

Perhaps even more key, though, to marriage's religiously inspired dignitary meaning is what might be called the truth-value of the marital union. The philosopher John Austin famously described the marriage ceremony as a "speech-act" or "performative utterance"<sup>75</sup> that establishes what John Searle has called an "institutional" rather than a "brute" fact.<sup>76</sup> The post-liberal theologian George Lindbeck argues, however, as part of his larger account of a "cultural-linguistic" approach to religion, that while positing that "marriage vows are performative, i.e., create the reality of marriage" would ordinarily entail that they are not "propositional, i.e., correspond to a prior reality of marriage," nevertheless, "if the banality may be permitted, in a marriage genuinely made in heaven, the earthly promises would produce a 'propositional' correspondence of one reality to another."<sup>77</sup>

Among the many consequences of this interplay of the secular and the religious, the functional and the intrinsic, and the performative and the propositional, is that the religious dimension of marriage helps explain one of the great modern legal doctrines of marriage—its constitutional status as a fundamental right, which was explicitly recognized in the early heyday of substantive due process,<sup>78</sup> and then gained new prominence in a series of cases beginning with *Loving v. Virginia*.<sup>79</sup> As many courts and commentators have recognized, there is some tension between the idea that marriage is a fundamental right and the view of marriage as nothing more than a creation of positive law,<sup>80</sup> and for that matter, as some have put it,<sup>81</sup> merely a "licensing

<sup>74</sup> See, e.g., Stéphane Courtois, *A Liberal Defence of the Intrinsic Value of Cultures*, 7 CONTEMP. POL. THEORY 31 (2008); John Kleinig, *Patriotic Loyalty*, in PATRIOTISM: PHILOSOPHICAL AND POLITICAL PERSPECTIVES 37 (Igor Primoratz & Aleksandar Pavković eds., 2008); CHARLES TAYLOR, RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM 120, 125 (1993).

<sup>75</sup> J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 5–6 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

<sup>76</sup> JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 51 (1969).

<sup>77</sup> GEORGE A. LINDBECK, THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE 65 (1984).

<sup>78</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("While this Court has not attempted to define with exactness the liberty thus guaranteed . . . some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

<sup>79</sup> 388 U.S. 1 (1967).

<sup>80</sup> See, e.g., Perry Dane, *Zablocki v. Redhail*, 434 U.S. 374 (1978), in 3 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 1811 (Paul Finkelman ed., 2006) [hereinafter Dane, *Zablocki*]; Laurence C. Nolan, *The*

law.” In particular, some have wondered whether the right to marry, as a fundamental right, could be “a basic entitlement, like the right to speech, or only a right of equal access, like the right to vote.”<sup>82</sup> The *Goodridge* court referred to this puzzle in one of its footnotes, commenting that civil marriage “enjoys a dual and in some sense paradoxical status as both a State-conferred benefit (with its attendant obligations) and a multi-faceted personal interest of ‘fundamental importance.’”<sup>83</sup> It claimed that “the State could, in theory, abolish all civil marriage” though not “without chaotic consequences.”<sup>84</sup>

Nevertheless, the U.S. Supreme Court has treated marriage as more than merely a state-conferred benefit. Indeed, in *Zablocki v. Redhail*,<sup>85</sup> one of the most interesting of its modern “right to marry” cases, the Court seemed at least to lean to the view that marriage was a basic, not only a comparative, entitlement, which some have taken to suggest that, however much the institution of civil marriage might be modified and regulated, it could *not* just be abolished.

One key to resolving this apparent paradox, of course, is to appreciate the degree to which the idea that marriage is a fundamental right might already take into account that civil marriage has a religious dimension. For example, in *Griswold v. Connecticut*, the pivotal case that grounded the constitutional right to use contraceptives on married couples’ right of privacy, the Court ended its opinion with this flourish:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a

---

*Meaning of Loving: Marriage, Due Process and Equal Protection (1967–1990) as Equality and Marriage, from Loving to Zablocki*, 41 HOW. L.J. 245 (1998); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005).

<sup>81</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 952 (Mass. 2003).

<sup>82</sup> Dane, *Zablocki*, *supra* note 80, at 1811. Compare, e.g., Sunstein, *supra* note 80, at 2096 (“The analogy between the right to marry and the right to vote is quite close. In both cases, the state may not be required to create the practice in the first instance. But so long as the practice exists, the state must make it available to everyone.”), with William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1496 (1994) (“Due to this inherent ‘legalness’ of marriage, the constitutional right to marry cannot be secured simply by removing legal barriers to something that exists outside of the law. Rather, the law itself must create the ‘thing’ to which one has a right. As a result, the right to marry necessarily imposes an *affirmative obligation* on the state to establish this legal framework.”). For an effort to redefine the content of the substantive right to marry as a right only to “personal-marriage,” rather than the positive legal institution of marriage, see Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21 (2006).

<sup>83</sup> *Goodridge*, 798 N.E.2d at 957 n.14.

<sup>84</sup> *Id.*

<sup>85</sup> 434 U.S. 374 (1978).

coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>86</sup>

More explicitly, in *Turner v. Safley*, in which the Court held that the “right to marry” enforced in *Loving* and *Zablocki* also applied to prison inmates, it explained that one of the reasons that “important attributes of marriage remain,” even taking into account “the limitations imposed by prison life,” was that “many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”<sup>87</sup>

The full implications of this holding in *Turner* are most obvious for prisoners sentenced to life who seek to marry non-inmates. For such prisoners, even more starkly than for the ordinary inmates in *Turner*, most of the usual, instrumental, and even conjugal, civil incidents and benefits of marriage are irrelevant or extremely attenuated, and the state might plausibly argue that a putative right to marry is trivial, or at least not “fundamental.” Nevertheless, at least one district court, relying on *Turner*, held to the contrary, and went on to

---

<sup>86</sup> 381 U.S. 479, 486 (1965).

<sup>87</sup> 482 U.S. 78, 95–96 (1987). I do not want to suggest that the religious dimension of marriage was the only factor that the Court cited. The full paragraph reads:

The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

*Id.* I should also note that, although the Court reiterated that marriage was a fundamental right, even in prison, it also held that restrictions on even fundamental rights would, in the prison context, be subject to a less stringent, more deferential, test of “reasonableness” rather than the strict scrutiny applied outside the prison walls. Even under that more deferential standard, however, the Court struck down the challenged regulation. *Id.* at 97.

strike down a statute that prohibited prisoners incarcerated for life from entering into a marriage while in prison.<sup>88</sup>

*Fourth:* One final part of the story might help tie it all together. Even to the extent that our legal tradition does indeed emphasize the “civil” and “secular” character of marriage, that is, ironically but importantly, itself largely a product of a specifically religious account of marriage.

The history of marriage in Western Christendom reflects a complex dance between the Church and other authorities. I will have more to say about this later. Suffice it to say for now that, although by the dawn of the Reformation the Church had for many centuries claimed jurisdiction over marriage, the Protestant Reformers insisted that the civil government, and not the Church, should have juridical authority over the institution. Their view had a negative aspect: The Catholic Church believed that marriage was both a natural institution instituted by God at the beginning of history and one of the seven sacraments—the external rituals established by Christ and given to the Church for conferring sanctifying grace.<sup>89</sup> Most Protestants, however, came to believe that marriage, though sacred, was not a sacrament.<sup>90</sup> But the Protestant argument also had an affirmative aspect: It emphasized the public, social, and contractual character of marriage, which depended in their view on the juridical authority of the state.<sup>91</sup>

In the original heat of the split between Catholics and Protestants, the debate over marriage was part of a larger, often fervent, polemic. Calvin famously compared marriage to “farming, building, cobbling, and barbering” as a “good and holy ordinance of God” that was, nevertheless, not a sacrament.<sup>92</sup> In a similar spirit, the early Massachusetts Puritans actually

---

<sup>88</sup> *Langone v. Coughlin*, 712 F. Supp. 1061 (N.D.N.Y. 1989).

<sup>89</sup> The other six sacraments in the Catholic view are baptism, confirmation, Eucharist, reconciliation, anointing of the sick, and holy orders. Orthodox Christians believe in the same seven sacraments, though some of their terminology differs. *THE CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH* 276 (2002).

<sup>90</sup> Indeed, part of the Protestant religious revolution involved rethinking the entire system of sacraments, not only reducing the number of sacraments to two—baptism and communion—but radically re-imagining the nature and purpose of even those that remained. SUSAN DORAN & CHRISTOPHER DURSTON, *PRINCES, PASTORS, AND PEOPLE: THE CHURCH AND RELIGION IN ENGLAND, 1500–1700*, at 12–13 (2d ed. 2003).

<sup>91</sup> See generally JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997).

<sup>92</sup> “Marriage is a good and holy ordinance of God; and farming, building, cobbling, and barbering are lawful ordinances of God, and yet are not sacraments. For it is required that a sacrament be not only a work of God but an outward ceremony appointed by God to confirm a promise.” JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 1481 (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960).

prohibited ministers from conducting marriage ceremonies, and assigned the celebration of marriage entirely to civil officials.<sup>93</sup> Thus, when some later American courts insisted at times that marriage was merely a “civil contract,” they were not snubbing the religious orthodoxy of their time, but conforming to it. In that sense, at least, the trope and counter-trope present in the American cases were not at odds, but were rather both consistent with the same religious vision.

It could be argued, of course, that it should not much matter *why* American legal tradition often emphasized that marriage is a civil contract, as long as it did. But this cannot be true. Just as it matters that the Establishment Clause reflects, at least in part, a specific American theological tradition, or that the civil week is intimately connected to the religious week, it also matters that the American law of marriage reflects, at least in part, a specifically Protestant view of marriage.

To begin with, this history suggests that, just as terms such as “nonsectarian” or “nondenominational” have in American history often simply meant “Protestant,” the trope that “marriage is a civil contract,” as used in American case law, was often code, not merely for “secular rather than religious” (though it was that too), but also for “Protestant rather than Catholic.” This is most explicit in some of the earlier cases, which directly attack the Catholic sacramental view of marriage.<sup>94</sup> It is more implicit in some later cases, in which courts rejected as simply irrelevant to the adjudication of

---

<sup>93</sup> See FELDMAN, *supra* note 21, at 102–03; Carter, *supra* note 54, at 295. For a more general discussion of competing and complementary religious conceptions of marriage, see WITTE, *supra* note 91.

<sup>94</sup> Thus, for example, in *Londonderry v. Chester*, 2 N.H. 268 (1820), the court upheld a common law marriage (actually a marriage celebrated by a minister who was not official ordained) with the following argument:

[Marriage] is a mere *civil* contract. Its form and execution are subjects of civil laws and usages; and religion has no legitimate concern with it, except to prescribe and enforce its duties. Those, probably, every religion, whether pagan, mahometan, jewish, or christian, do prescribe, and ought to enforce.

It is one of the corruptions of popery, that marriage itself is a “sacrament”; and, therefore, that the contract cannot be consummated or completed without the presence and aid of a priest. . . . But, at the reformation, different opinions began to prevail; and, during the protectorate, priests were altogether forbidden to solemnize marriage. Our own immediate ancestors never permitted them to do it till A. D. 1692. . . . Throughout New-England there is still conferred upon justices of the peace co-ordinate power to solemnize marriage. The form of the contract of marriage, as a mere civil transaction, is well enough established.

*Id.* at 278 (citations omitted).

marital questions, even among Catholics, specifically Catholic sensibilities about the institution and its prerequisites.<sup>95</sup>

More important, however, the historical development of the view that marriage is a civil contract emphasizes how profoundly marriage as an institution challenges the secular/religious dichotomy in the first place. When the Puritans forbade ministers from performing marriage ceremonies, they did not do so for modern separationist reasons. Quite to the contrary, they believed that marriage was a divinely ordained institution, that it had religious meaning, that the character and definition of marriage was a profoundly religious issue, and that *for religious reasons* it needed to be put into the hands of civil magistrates. Today, the exact mix of secular and religious dimensions in civil marriage is different. But that there is a mix should not be casually dismissed. And for that reason, it can be said that American civil marriage is a secular legal institution that has a central, and distinctive, layer of religious meaning.

### *B. Civil Marriage and Marriage Simpliciter*

I have just asked whether civil marriage has, in the law's own imagining, religious meaning. There is, though, a related but subtly different question also at play here. When the *Goodridge* court stated that civil marriage is a "wholly secular institution," it might also have been claiming that arguments about the meaning and limits of *civil* marriage have no direct implications for larger debates about the understanding of marriage *simpliciter*. This sort of claim, in fact, would be the quintessential Emily Litella counter-move, an exasperated suggestion that if the opponents only realized that their broader religious, cultural, and moral views and sensibilities were not at issue, they would apologetically say "never mind." But is it really so simple?

Again, analogies might help. Return to the example of ship christening. The Christian rite of baptism has had swirling around it for centuries a number of deep and divisive questions: Is baptism a direct source of grace or a symbolic entry into the Christian community? Is baptism only proper for believers who have reached the age of reason, or is it also a rite for infants? Does the ritual require full immersion, or only pouring of water, or even only sprinkling? What is the fate of those who are not baptized? But none of these classic, theologically and liturgically resonant debates is likely to be affected

---

<sup>95</sup> See, e.g., *Cassin v. Cassin*, 161 N.E. 603 (Mass. 1928); *Mirizio v. Mirizio*, 150 N.E. 605 (N.Y. 1926).

one whit by anything that could or would happen to the ritual of christening ships, whether in the overall meaning ascribed to the ritual or in any of its details.

Now, though, consider Christmas. Controversies about the character and celebration of Christmas have also raged, not for decades, but for centuries. The Puritans, indeed, banned the celebration of Christmas<sup>96</sup> much as they banned the religious celebration of marriages.<sup>97</sup> The balance of “secular” and “religious” elements in Christmas has also swung back and forth over time. In any event, though, it is, as noted earlier, useful to think of Christmas, in its various meanings, as an element of religious and cultural “capital,” which is to say that it is a set of practices and beliefs in which individuals and societies have invested their time and energy, and which in turn plays a complex set of roles in their lives. The meaning or value of religious and cultural capital can fluctuate, and can also be influenced by the attitudes and actions of influential participants in the cultural arena.

This is why I have suggested that the role that government plays with regard to Christmas poses an almost intractable problem. On the one hand, if government emphasizes the most propositionally explicit elements of Christmas, it risks both siding with Christianity and co-opting it, and thus violates two of the principles that undergird the American commitment to separation of religion and the state. On the other hand, if the government, in its own practices, ignores crèches and carols and the like, it “takes Christ out of Christmas,” and thus puts itself squarely on one side of—and, equally important, directly influences—the larger cultural struggle, which has been going on for centuries, about the meaning and place of Christmas.<sup>98</sup> In fact, it is to try to escape this dilemma, rather than in the spirit of a mechanical and rigid separationism, that I have suggested that the ideal solution would be to get government entirely “out of the business of Christmas.”<sup>99</sup>

Marriage is like Christmas in at least this sense: Its meaning is also a species of religious and cultural capital. Individuals, communities, and societies invest in that capital, and the decisions that others make affect the

---

<sup>96</sup> See STEPHEN NISSENBAUM, *THE BATTLE FOR CHRISTMAS* 3–5 (1996).

<sup>97</sup> See *supra* notes 21, 92–95 and accompanying text.

<sup>98</sup> For accounts of that struggle, see, for example, NISSENBAUM, *supra* note 96; PENNE L. RESTAD, *CHRISTMAS IN AMERICA: A HISTORY* (1995).

<sup>99</sup> Dane, *Christmas*, *supra* note 47, at 8. I do go on to point out, though, that this solution would “only be plausible if it could be communicated for what it is, not as an attack on Christmas, but as an effort to guard religious capital from appropriation or dilution.” *Id.*

meaning and value of their investment. As I put it in an earlier paper, marriage, whether governed by church or state, always has two faces:

In one respect, it is an institution governed by very precise, often technical, requirements and consequences. At the same time, though, it is an institution that participates in a larger legal and cultural project—an ongoing conversation about ends and means. These two faces coexist. Neither face should be reduced to the other, or deemed irrelevant.<sup>100</sup>

Thus, even if American civil marriage *were* an institution entirely without its own religious meaning, it would still participate in—and influence—a larger conversation, across national boundaries and across the boundaries between church and state, regarding the meaning and boundaries of marriage as such. Therefore, when opponents argue that recognizing same-sex marriage would threaten traditional marriage, they are not, as the caricature would have it, suggesting that any particular heterosexual married couples would find their marriages in trouble if their gay neighbors were able to wed. Rather, they are arguing that the web of meanings associated with the idea of marriage, understood as a cultural resource crossing boundaries of space, time, and jurisdiction, would be affected if the legal boundaries defining the institution were altered in any given jurisdiction. Such an effect might be a good thing. I am inclined to think that it would be. But it would be unrealistic and rigidly narrow-minded to deny that it would occur.

To be sure, it is arguable that, even if the meaning of marriage takes on this broader sense, the civil state is not responsible for any impact its own decisions might have on the larger conversation about marriage. But this is where the present argument complements that in the last section: Whether or not civil marriage has a “religious meaning” in the precise sense set out in that section, the place of American civil marriage in the larger conversation about marriage is neither accidental nor unintended. To the contrary, civil states, including the states of the United States, have—as noted earlier—historically traded on the larger meaning of marriage to attach to the institution the solemnity, seriousness, and moral charge that has customarily been associated with it. And that engagement brings with it certain unavoidable consequences.

---

<sup>100</sup> Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, in 4 *LAW AND RELIGION: CURRENT LEGAL ISSUES* 385, 405 (Richard O’Dair & Andrew Lewis eds., 2001) [hereinafter Dane, *Intersecting Worlds*].

### C. *Civil Marriage and Religious Rites*

The claim that civil marriage is a “wholly secular institution” has another possible reading, which is again related to, but separate from, the other two explored in this Part. The notion at work here is that, however much the *meaning* of civil marriage might have a religious dimension, civil marriage and religious marriage are still distinct *institutions*. Of course, many Americans get married with a marriage license in a religious ceremony. Nevertheless, the idea here is that, even in such a ceremony, two separate things are going on simultaneously—a “civil marriage” under the authority of the state and a “religious marriage” under the authority of the church. Moreover, it would be perfectly easy to imagine, in this view, not only a civil marriage without a religious marriage, as when a couple marries before a judge, but also a religious marriage without a civil marriage, as when a couple marries in a religious ritual but without a marriage license.

This picture is conceptually plausible. The problem is that it reflects neither the predominant theological tradition in this country, nor significant currents in civil law.

#### 1. *Holy (Civil) Matrimony*

The idea that “civil marriage” and “religious marriage” are distinct institutions, even when entered into simultaneously, actually does correspond well with the view of some faith communities. In the traditional Jewish conception, for example, Jewish marriage—*kiddushin* and *nissuin*—is a juridical institution governed by Jewish law, and bound up, at least in most views, with Jewish rituals, Jewish concepts, and Jewish intentions.<sup>101</sup> When rabbis who take this traditional view officiate at Jewish weddings, they generally comport to the requirements of civil law.<sup>102</sup> But their main function, and their main expertise, is to make sure that a distinctively Jewish juridical bond has been successfully created. Moreover, in the traditional Jewish view, a civil marriage—at least under most circumstances—is unlikely to establish a marriage under Jewish law,<sup>103</sup> and a civil divorce does not effectively dissolve

---

<sup>101</sup> See MAURICE LAMM, *THE JEWISH WAY IN LOVE AND MARRIAGE* 36–37 (1991).

<sup>102</sup> See JOSEPH GAER & ALFRED WOLF, *OUR JEWISH HERITAGE* 125 (1957); David Novak, *Jewish Marriage and Civil Law: A Two-Way Street?*, 68 *GEO. WASH. L. REV.* 1059, 1071 (2000).

<sup>103</sup> See LAMM, *supra* note 101, at 170.

the Jewish marital bond, which requires a separate juridical act governed in great detail by Jewish law.<sup>104</sup>

As a Jew, this view of the relation between civil and religious marriage comes naturally to me. But Jews constitute a small minority in the United States. And, as I have already suggested, the predominant Protestant view of marriage is very different.<sup>105</sup> In this conventional Protestant view, marriage is a sacred institution instituted by God, and one that has special spiritual and theological significance in Christian life.<sup>106</sup> It is also, though, a complex institution, not only sacred but also natural, emotional, and juridical.<sup>107</sup> But, however sacred and complex marriage is, it is *one* institution, simultaneously civil and religious. According to the mainstream, mainline, Protestant interpretation, *juridical* authority over marriage is vested in the civil government.<sup>108</sup> Moreover, there is no such thing, juridically speaking, as a

---

<sup>104</sup> See ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 470, 523 (1988); LAMM, *supra* note 101, at 170.

<sup>105</sup> To simplify the exposition, I am leaving the contemporary Catholic view, not to mention the views of Muslims, Hindus, and other faith traditions, out of the story. Nor do I purport here to canvass the entire range of Protestant views of marriage outside the historic “mainline” denominations. Nothing in my argument here, however, depends on demonstrating any sort of Protestant religious consensus, only on describing a historically and theologically important perspective that challenges any superficial effort to separate secular and religious marriage into unambiguously distinct institutions.

<sup>106</sup> See DON S. BROWNING, *EQUALITY AND THE FAMILY: A FUNDAMENTAL, PRACTICAL THEOLOGY OF CHILDREN, MOTHERS, AND FATHERS IN MODERN SOCIETIES* 218 (2007) (describing marriage as a “public institution, sanctioned by law, in service to the common good, and blessed by religion,” with “private, personal, and intersubjective dimensions,” but also “procreative and educational functions”).

<sup>107</sup> See *id.* at 207–08.

<sup>108</sup> Christian theologians have tended to view marriage from two important perspectives. First, marriage is understood to be grounded in the doctrine of creation and thus the gift of God to all humanity. . . . Just as Christians rejoice when the civil government justly rules, they also rejoice when marriage is honored and wisely administered in the public realm. From this perspective, Christians marry by “the authority of the state,” participating in the same social reality as all others who marry.

Christians, however, also view marriage as an issue of discipleship. They understand marriage to be grounded in the doctrine of redemption as well as creation. They seek to bring their marriages into accord with the will of God and to allow their relationship with Christ to form the pattern for the covenant of marriage.

OFFICE OF WORSHIP FOR THE PRESBYTERIAN CHURCH (U.S.A.) AND THE CUMBERLAND PRESBYTERIAN CHURCH, *CHRISTIAN MARRIAGE* 82 (1986). “The Protestant perspective varies widely, but it generally connects marriage with God’s creative activity. . . . Because it is common to all humanity, marriage is first of all a civil rather than an ecclesial concern.” HERBERT ANDERSON & ROBERT COTTON FITE, *BECOMING MARRIED* 140 (1993). More specifically,

[m]arriage is a civil contract between a man and a woman. For Christians marriage is a covenant through which a man and a woman are called to live out together before God their lives of

“religious marriage” or religious institution of marriage distinct from civil marriage. In a religious wedding service, the church is, strictly speaking, only embedding a civil juridical act in a liturgical setting that marks, emphasizes, reinforces, and blesses its spiritual, and specifically Christian, meaning.<sup>109</sup> But the church has no independent juridical power, even in a purely religious sense, to “marry” the couple apart from whatever authority it exercises on behalf of the state. Moreover, whatever the church does do with regard to marriage, and however significant those acts might be, they are not juridically necessary to establish a marriage.<sup>110</sup> To be sure, a Protestant church can hold

---

discipleship. In a service of Christian marriage a lifelong commitment is made by a man and a woman to each other, publicly witnessed and acknowledged by a community of faith.

2 THE CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.), BOOK OF ORDER § W-4.9001 (2007); *see also*, e.g., Don S. Browning, *Family Law and Christian Jurisprudence*, in CHRISTIANITY AND LAW: AN INTRODUCTION 163, 177 (John Witte, Jr. & Frank S. Alexander eds., 2008); Evangelical Presbyterian Church, Position Paper on the Sanctity of Marriage (June 2005), <http://www.epc.org/about-the-epc/position-papers/sanctity-of-marriage> (“Marriage is a covenant between one man and one woman and between the participants and God (*Malachi* 2:14–16). It is therefore more than a temporary agreement of convenience, a contract or a well-intentioned promise. As a binding relationship established by promises, the marriage covenant is solemnly sealed by a ceremony witnessed by family and friends and regulated by the state.”).

For a more complex view that still, however, emphasizes the religious centrality of the civil aspect of marriage, see, for example, LUTHERAN OFFICE FOR PUBLIC POLICY, A STATEMENT ON SEX, MARRIAGE, AND FAMILY 61–68 (1970), *available at* [http://www.elcic-lopp.ca/policies\\_400.shtml](http://www.elcic-lopp.ca/policies_400.shtml):

Christian faith affirms marriage as a covenant of fidelity—a dynamic, lifelong commitment of one man and one woman in a personal and sexual union. . . .

This view transcends the civil understanding of marriage as a legal contract. A marital union can be legally valid yet not be a covenant of fidelity, just as it can be a covenant of fidelity and not a legal contract. Such a covenant is also to be distinguished from an identification with the marriage pattern of any particular culture, from the idea that an established structure is normative for all times, and from the legalistic notion that because two people have had sexual intercourse they are bound together forever. The existence of a true covenant of fidelity outside marriage as a legal contract is extremely hard to identify.

Marriage is ordained by God as a structure of the created order. Thus the sanction of civil law and public recognition are important and beneficial in marriage, as checks against social injustice and personal sin. The marriage covenant, therefore, should be certified by a legal contract, and Christian participants should seek the blessings of the church.

<sup>109</sup> *See* Browning, *supra* note 108, at 177 (“After the [Protestant] Reformation, the legal registration, public witness, and certification of valid marriage became a function of the state, even though the church blessed it and gave it additional meaning and sanctity.”); EPISCOPAL DIOCESE OF WASH., BISHOP’S GUIDELINES FOR MARRIAGE AND REMARRIAGE 2 (2006), *available at* [http://www.edow.org/marriage/Marriage%20Guidelines\\_april%202006.doc](http://www.edow.org/marriage/Marriage%20Guidelines_april%202006.doc) (“The officiating priest has a dual role and stands before the couple with authority conferred by civil law to marry the couple and with pastoral authority conferred by the Church to bless the marriage as the chief witness for the congregation.”); STANLEY J. GRENZ, *SEXUAL ETHICS: AN EVANGELICAL PERSPECTIVE* 76 (1997) (describing the “dual role of the clergy” in a marriage ceremony as both a representative of the church and an agent of the civil magistrate).

<sup>110</sup> Divorce poses a more complicated issue. Protestant churches do not generally purport to have the power to dissolve marriages, even “religiously,” and they generally recognize the efficacy of civil dissolution.

by, and enforce, its own theology or canon law regarding who can get married, and can even insist that some aspect of the civil law of marriage is so unjust or misguided as to violate natural or divine law. But the important point, to repeat, is that in the mainstream Protestant religious imagination, marriage is one institution, not two.

These differing conceptions of marriage, and the relation between the religious and civil role in marriage, have some very specific operational consequences. Consider, to begin with, the case of a couple that has had a purely secular marriage ceremony, but subsequently feels the need for a religious ceremony. If this couple were Jewish and consulted a rabbi, he or she would likely happily offer them a full-fledged Jewish wedding ceremony. Indeed, many traditional rabbis would insist on such a ceremony before considering the couple to be “married” in a Jewishly significant sense. A Protestant couple, however, posing the same problem to a mainline Protestant minister would be told that they are already married, and that a religious marriage ceremony would be superfluous. The minister would offer them a ceremony recognizing or “blessing” an existing civil marriage. This ceremony, variations of which are set out in the various mainline denominational liturgical books, is superficially very similar to a wedding ceremony. It is designed specifically to satisfy the emotional and spiritual needs of the couple, and to impress on them and on the community the significance of Christian marriage. But its language carefully makes clear that it is blessing an existing marriage, not creating a new one.<sup>111</sup>

---

Some denominations, however, following a strict reading of the New Testament’s restrictions on divorce, will, depending on the circumstances, not necessarily be willing to bless the remarriage of divorced persons with living ex-spouses. See generally JULIE HANLON RUBIO, *A CHRISTIAN THEOLOGY OF MARRIAGE AND FAMILY* 165–82 (2003); *DIVORCE AND REMARRIAGE: FOUR CHRISTIAN VIEWS* (H. Wayne House ed., 1990).

<sup>111</sup> For example, in the Episcopal wedding ceremony, the celebrant begins with these words:

Dearly beloved: We have come together in the presence of God to witness and bless the joining together of this man and this woman in Holy Matrimony. The bond and covenant of marriage was established by God in creation, and our Lord Jesus Christ adorned this manner of life by his presence and first miracle at a wedding in Cana of Galilee. It signifies to us the mystery of the union between Christ and his Church, and Holy Scripture commends it to be honored among all people.

The union of husband and wife in heart, body, and mind is intended by God for their mutual joy; for the help and comfort given one another in prosperity and adversity; and, when it is God’s will, for the procreation of children and their nurture in the knowledge and love of the Lord. Therefore marriage is not to be entered into unadvisedly or lightly, but reverently, deliberately, and in accordance with the purposes for which it was instituted by God.

The celebrant then asks the bride and groom, in turn:

*N.*, will you have this man[/woman] to be your husband[/wife]; to live together in the covenant of marriage? Will you love him[/her], comfort him[/her], honor and keep him[/her], in sickness and in health; and, forsaking all others, be faithful to him[/her] as long as you both shall live?

Later in the ceremony, the celebrant declares:

Now that *N.* and *N.* have given themselves to each other by solemn vows, with the joining of hands and the giving and receiving of a ring, I pronounce that they are husband and wife, in the Name of the Father, and of the Son, and of the Holy Spirit.

Those whom God has joined together let no one put asunder.

THE BOOK OF COMMON PRAYER ACCORDING TO THE ADMINISTRATION OF THE SACRAMENTS AND OTHER RITES AND CEREMONIES OF THE CHURCH ACCORDING TO THE USE OF THE EPISCOPAL CHURCH 423–28 (1985).

In the corresponding section of the “Blessing of a Civil Marriage,” however, the celebrant begins with these words:

*N.* and *N.*, you have come here today to seek the blessing of God and of his Church upon your marriage. I require, therefore, that you promise, with the help of God, to fulfill the obligations which Christian Marriage demands.

He or she then asks the groom and bride in turn:

*N.*, you have taken *N.* to be your wife[/husband]. Do you promise to love her[/him], comfort her[/him], honor and keep her[/him], in sickness and in health; and, forsaking all others, to be faithful to her[/him] as long as you both shall live?

And, subsequently, the celebrant declares:

Bless, O Lord, *this ring* to be a *sign* of the vows by which this man and this woman have bound themselves to each other; through Jesus Christ our Lord. *Amen.*

Those whom God has joined together let no one put asunder.

*Id.* at 433–34.

In short, the wedding ceremony establishes the marital bond, while the “blessing of a civil marriage” consecrates and confirms the religious obligation present in an already-existing marital bond. See Ian D. Anderson, Blessing of the Marriage Ceremony, <http://www.idotaketwo.com/blessing-of-marriage.html> (last visited Feb. 18, 2009) (“Some couples, for reasons they may see as valid, choose a civil ceremony, opting for a church blessing at a later time. If that is their choice, then the church recognizes and provides for that choice in the form of a Blessing of a Civil Ceremony. . . . However, the Blessing of the Marriage is not a wedding. . . . [It] should never be thought of as the ‘real’ wedding later on so, if you’re considering marrying civilly, but really want the big white church wedding, please make your choice beforehand.”); see also ASS’N OF EVANGELICAL LUTHERAN CHURCHES, OCCASIONAL SERVICES: A COMPANION TO LUTHERAN BOOK OF WORSHIP 36 (16th prt. 2007) (“The pastor should discuss with the couple the nature of a blessing of a civil marriage, making clear that it is not a remarriage.”).

The liturgical books of other longstanding American Protestant denominations similarly distinguish between marriage ceremonies and blessings of existing civil marriages. See, e.g., THEOLOGY & WORSHIP MINISTRY UNIT FOR THE PRESBYTERIAN CHURCH (U.S.A.) & THE CUMBERLAND PRESBYTERIAN CHURCH, *A Service for Those Previously Married in a Civil Ceremony*, in BOOK OF COMMON WORSHIP 883–92 (1993); UNITED METHODIST CHURCH, *A Service for the Recognition of the Blessing of a Civil Marriage*, in BOOK OF WORSHIP 37, 37–39 (Pastor’s pocket ed. 2002); UNITED CHURCH OF CHRIST OFFICE FOR CHURCH LIFE AND LEADERSHIP, BOOK OF WORSHIP 347, 347–51 (1986) (“This order is provided for couples who have entered marriage in a civil ceremony. . . . The couple may [instead] wish to use the Order for Marriage as the basis for the blessing of their civil marriage. If so, it will be necessary to reword that text. . . . It is the responsibility of

Conversely, consider a couple that wants to marry “in the eyes of God,” but does not want to be civilly married, possibly to avoid the financial or legal complications that a civil marriage would produce.<sup>112</sup> A rabbi would very likely refuse to officiate at such a “religious but not civil” ceremony for several reasons, including respect for civil law and fear of civil legal repercussions.<sup>113</sup> That in itself is notable, for it is hard to imagine any other religious liturgical act for which such deference to the state is taken for granted. Nevertheless, the rabbi would not find the *idea* of a religious marriage without a civil component to be *conceptually* challenging. A mainline Protestant minister would, however, if she took her theology seriously, find the suggestion of a marriage “only in the eyes of God” to be difficult or even incoherent at its roots, since she would consider marriage to be one institution, not two separable ones. This is not to say that a mainline, mainstream, Protestant minister could not find some way to rationalize such a ceremony, either by treating the marriage as fictive or by invoking a concept of “natural” marriage, or by insisting that marriage is fundamentally an agreement of the parties themselves. But these would be intellectually and spiritually difficult moves, and would not in any event involve vesting the church with independent juridical authority to “marry” a couple.

Now consider same-sex marriage. For Jews, the right of same-sex couples to marry civilly and their right to marry religiously are conceptually and practically distinct.<sup>114</sup> Thus, for example, the Reform movement in Judaism supported civil same-sex marriages several years before it authorized religious ceremonies for same-sex couples, and even then, it remained uncertain as to

---

the one presiding to confirm that a civil ceremony already has taken place and that the marriage laws of the place in which the blessing of the marriage is to be held are fully respected.”); ASS’N OF EVANGELICAL LUTHERAN CHURCHES, *supra*, at 32–36. For a cross-denominational version of the service, see BAKER’S WEDDING HANDBOOK: RESOURCES FOR PASTORS 100–02 (Paul E. Engle ed., 1994) (beginning with the minister declaring: “Brothers and sisters in Christ, \_\_\_\_ and \_\_\_\_ have been married by the law of the state, and they have taken vows to be husband and wife. Now, in faith, they come before the church to acknowledge their marriage covenant and to bear witness to their common purpose in Christ.”).

<sup>112</sup> This can be an issue, for example, for widows and widowers who might risk losing some social security benefits if they remarry.

<sup>113</sup> Cf. MYRON S. GELLER ET AL., THE HALAKHAH OF SAME-SEX RELATIONS IN A NEW CONTEXT 22 (2006), [http://www.rabbinicalassembly.org/teshuvot/docs/20052010/geller\\_fine\\_fine\\_dissent.pdf](http://www.rabbinicalassembly.org/teshuvot/docs/20052010/geller_fine_fine_dissent.pdf) (“Because of . . . the respect given to the law of the land, we cannot authorize rabbis and cantors to solemnize same-sex marriages where the civil jurisdiction forbids.”).

<sup>114</sup> See generally ELLIOT N. DORFF ET AL., HOMOSEXUALITY, HUMAN DIGNITY, & HALAKHAH: A COMBINED RESPONSUM FOR THE COMMITTEE ON JEWISH LAW AND STANDARDS (2006), available at [http://www.rabbinicalassembly.org/docs/Dorff\\_Nevins\\_Reisner\\_Final.pdf](http://www.rabbinicalassembly.org/docs/Dorff_Nevins_Reisner_Final.pdf).

whether such ceremonies should constitute *kiddushin*.<sup>115</sup> For mainline, mainstream, Protestants, however, the two issues are much more difficult to separate. Thus, the United Church of Christ has declared its support for civil marriage for same-sex couples as part of the same process by which it urged its own congregations to consider performing such marriages.<sup>116</sup> And, conversely, the Presbyterian Church USA (PCUSA) forbids its ministers from officiating at same-sex marriage ceremonies, whether civil or religious, and also forbids the “blessing” of an existing civil same-sex marriage.<sup>117</sup> More significantly, while the PCUSA does authorize so-called “holy union” ceremonies that celebrate same-sex relationships, but without reference to any change in juridical status, a Presbyterian minister could not, consistent with the norms of the denomination, try to fashion a ceremony that combined a “religious” holy union with a “civil” marriage because, from the religious point of view, even a merely civil marriage *is* a marriage.<sup>118</sup>

Consider now the situation in the vast majority of states that do not recognize civil same-sex marriages. A rabbi in such a state who supported same-sex marriage could, again without conceptual difficulty, officiate at a Jewish wedding ceremony for a gay couple, though perhaps cautioning them that the ceremony would give them no rights or benefits under civil law.<sup>119</sup> A

---

<sup>115</sup> See Union for Reform Judaism, *Civil Marriage for Gay and Lesbian Jewish Couples* (Oct. 29–Nov. 2, 1997), <http://urj.org/Articles/index.cfm?id=7214> (resolution adopted by umbrella organization of Reform congregations in the United States supporting both “secular efforts to promote legislation which would provide through civil marriage equal opportunity for gay men and lesbians” and the continuing study by the Reform rabbinate of “the appropriateness of religious ceremonies for use in a celebration of commitment recognizing a monogamous domestic relationship between two Jewish gay men or two Jewish lesbians”); Cent. Conference of Am. Rabbis, *Resolution on Same Gender Officiation* (Mar. 2000), <http://data.ccarnet.org/cgi-bin/resodisp.pl?file=gender&year=2000> (resolving, *inter alia*, “that the relationship of a Jewish, same gender couple is worthy of affirmation through appropriate Jewish ritual, . . . that we recognize the diversity of opinions within our ranks on this issue[,] . . . [and] that we also call upon the CCAR to develop both educational and liturgical resources in this area”).

<sup>116</sup> See UNITED CHURCH OF CHRIST, *EQUAL MARRIAGE RIGHTS FOR ALL* (2005), available at <http://www.ucc.org/assets/pdfs/2005-equal-marriage-rights-for-all-1.pdf> (resolution adopted at the Twenty-Fifth General Synod of the United Church of Christ); UNITED CHURCH OF CHRIST, *EQUAL MARRIAGE RIGHTS FOR SAME-SEX COUPLES* (1996), available at <http://www.ucc.org/assets/pdfs/1996-EQUAL-MARRIAGE-RIGHTS-FOR-SAME-SEX-COUPLES.pdf>.

<sup>117</sup> *Benton v. Presbytery of Hudson River*, Remedial Case No. 212-11 (Permanent Judicial Commission of the General Assembly of the Presbyterian Church (U.S.A.) May 22, 2000), available at <http://www.pcusa.org/gapjc/decisions/pjc21211.pdf>.

<sup>118</sup> See Dane, *Intersecting Worlds*, *supra* note 100, at 397.

<sup>119</sup> See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). Indeed, it might even leave them open to sanctions under civil law. See *infra* note 130. For my take on this fascinating and troubling case, see Perry Dane, *The Varieties of Religious Autonomy*, in *CHURCH AUTONOMY: A COMPARATIVE SURVEY* 117, 142 (Gerhard Robbers ed., 2001); Dane, *Intersecting Worlds*, *supra* note 100, at 401.

mainline, mainstream, Protestant minister, however—even one wholeheartedly in support of same-sex marriage—would find the problem much more difficult, similar though not identical with the challenge of the heterosexual couple that wanted to marry only “in the eyes of God.”<sup>120</sup> Indeed, at least one reason for the resort to “commitment ceremonies” and similar quasi-marital rituals is precisely to deal with this juridical and theological challenge. In fact, it bears witness to the point I am making that gay couples entering into a religiously sanctioned bond in states that do not recognize same-sex marriage have typically had “commitment ceremonies,” not “religious marriages,” precisely because they typically identify “marriage” as such with the state.<sup>121</sup> Again, I

---

<sup>120</sup> One Presbyterian church in Virginia that calls itself “progressive, inclusive, diverse,” and that has gone so far as to refuse to sign civil marriage licenses for heterosexual couples until same-sex marriage is also recognized, puts the matter this way:

Much of the present discrimination against sexual minorities in our culture focuses on the rights of same-sex couples to enter into committed life relationships that will have standing in civil courts. The church understands this legal aspect of marriage, and defines marriage, in part, in the Book of Order as a “civil contract between a woman and a man. For Christians marriage is a covenant through which a man and a woman are called to faithfully live out together before God their lives of discipleship. In a service of Christian marriage a lifelong commitment is made by a woman and a man to each other, publicly witnessed and acknowledged by the community of faith” . . . .

. . . .

For same-gender couples, the Commonwealth of Virginia . . . refuses to issue marriage licenses or to recognize equivalent legal rights or obligations . . . . Therefore, it remains impossible to speak of “marriage” for same gender couples.

Clarendon Presbyterian Church, Policy on Celebrations of the Covenant Union of Two People (Sept. 2005), <http://web.archive.org/web/20080131210027/http://www.clarendonpresbyterian.org/facilities.html> (emphasis added).

<sup>121</sup> Thus, for example, one Chicago congregation affiliated with the gay-centered Metropolitan Community Church celebrates gay unions but nevertheless takes for granted that the “primary difference between *Holy Matrimony* / ‘legal wedding’ and a *Holy Union* is that when a couple is joined together in *Holy Matrimony* the state of Illinois and Federal government explicitly recognizes the couple’s union and bestows legal benefits, rights and obligations upon the individuals.” A Church 4 Me?, Ceremonies and Celebrations, [http://achurch4me.org/joomla/index.php?option=com\\_content&view=category&layout=blog&id=39&Itemid=74](http://achurch4me.org/joomla/index.php?option=com_content&view=category&layout=blog&id=39&Itemid=74) (last visited Feb. 6, 2009).

Similarly, a Milwaukee minister advertising his services to officiate at gay unions writes that a “commitment ceremony is a public affirmation ritual in which two people declare their love and devotion to each other. It is identical to a wedding ceremony in that the couple is often joined together by a religious or spiritual ritual with symbolic element such as the making of oaths and vows. The difference is that it is not legally binding.” Milwaukee Clergy, Commitment Ceremonies, <http://www.milwaukeeclergy.com/commitment.htm> (last visited Feb. 6, 2009).

To be sure, more and more gay unions, even in non-same-sex-marriage states, are termed marriages. See, e.g., Rock Spring Congregational United Church of Christ, Proposals and Questions Regarding the Marriage Equality Process at Rock Spring Church, <http://www.rockspringcongucc.org/html/ProposalsQuestions.htm> (last visited Feb. 6, 2009) (endorsing an amendment to the church’s *Open and*

do not mean to suggest that a Protestant minister could not find his or her way to performing a religious *marriage* ceremony in a state that did not recognize civil same-sex marriages. Such a ceremony might be understood as fictive, or symbolic, or as asserting a natural right even in the absence of state authority, or even as an act of civil disobedience looking forward to a day when civil law caught up. But none of these paths would be, to a Protestant who took theology seriously, easy or straightforward.

Finally, consider a Protestant who opposed same-sex marriage trying to make sense of the laws of a state, such as Massachusetts, that has come to recognize it. The entirely non-trivial challenge for such a person would be whether the institution of marriage, as now defined in civil law, still constitutes “marriage” in the Christian sense of the term. If it does not, then this particular Protestant will find himself in something of a theological crisis, in that the consequence would be to taint the legitimacy of even heterosexual marriages in that state.

---

*Affirming Statement* “replacing the words ‘ceremonies of traditional marriage and of committed union’ with ‘marriage ceremonies for all couples regardless of gender.’”).

Again, though, my point here is not to state any sort of universal truth, but only to advance the modest observation that a clear distinction between the institution of “civil marriage” and the institution of “religious marriage” does not come as naturally to many Christians or others as the *Goodridge* court, for example, seems to have supposed. Cf. UNITED CHURCH OF CHRIST, ORDER FOR MARRIAGE: AN INCLUSIVE VERSION (2008), available at [http://www.ucc.org/worship/323\\_346i\\_order-for-marriage-inclusive.pdf](http://www.ucc.org/worship/323_346i_order-for-marriage-inclusive.pdf) (providing new liturgical “language that may be used for any marriage, regardless of gender,” but also adding in a footnote that “[s]ome may choose, for legal or personal reasons, to substitute other terms such as ‘holy union’ or ‘sacred covenant’ throughout this order”).

Indeed, one last example, from a legal academic, might make this point more effectively than several tomes of theology: Anthony C. Infanti, in a moving description of a ceremony, officiated by a minister, uniting his sister to another woman, does not hesitate to insist that the two women “got married.” ANTHONY C. INFANTI, EVERYDAY LAW FOR GAYS AND LESBIANS AND THOSE WHO CARE ABOUT THEM 142–44 (2007). But he *also* several times refers to the ceremony as a “commitment ceremony” rather than a “marriage ceremony” or a “wedding.” The juxtaposition sometimes occurs even in a single sentence, as in “My feelings about same-sex marriage changed drastically after I attended Elyse and Cindy’s commitment ceremony.” *Id.* at 143. Infanti’s perhaps unconscious failure to settle on one form of language rather than another seems designed to acknowledge, if with regret, that his sister’s ceremony was not one recognized by the state or affirmed by much of society. Significantly, though, he did not think to try to make the same point by dropping the language of “commitment ceremony” entirely and instead referring to his sister’s ceremony as a “religious” in contradistinction to a “civil” marriage or wedding. Finally, toward the end of the account, Infanti reports that, sometime after his sister’s ceremony, he and his own same-sex partner “were married in Toronto, Ontario, Canada, in a small, private ceremony at Toronto City Hall.” *Id.* at 144. This ceremony took place in a jurisdiction that recognizes same-sex marriages, and the language of “commitment ceremony” does finally disappear entirely from his description. *Id.*

## 2. *The Unmarked State*

I have gone on at some length about religious views of the institution of civil marriage. But it should not be surprising, given the Protestant influence on the American law of marriage, that the civil view of religious marriage in the United States has, traditionally at least, not been entirely different.<sup>122</sup> The law, to be sure, does not speak clearly or with one voice on the matter. Cases can be found on both sides of any of a variety of pertinent questions. I want to be careful not to overstate my argument. Nevertheless, it is fair to conclude, and it is all I need to conclude to make my point, that various trends in American law, in a variety of jurisdictions, have resisted any simple and unproblematic division between “civil marriage” and “religious marriage.” (It bears emphasis, yet again, that the point of this exercise is only to evaluate the claim that civil marriage in the American legal imagination is a “*wholly* secular institution.” That absolute claim would be effectively rebutted even if, as gladly conceded, civil marriage in the United States is a “mostly secular” or even “ambivalently secular” institution.)

Consider the case of a couple that *only* has a religious marriage ceremony, without benefit of a marriage license.<sup>123</sup> Some states do, concededly, refuse to recognize a marriage without a marriage license or other civilly mandated formalities.<sup>124</sup> But other states treat the ceremony, along with intent to be married, and not the license, as civilly dispositive.<sup>125</sup> Thus, for example, in one particularly evocative New York case,<sup>126</sup>

---

<sup>122</sup> The account here is consciously limited to the United States. The secular law of marriage in many other countries is quite different. Some countries, for example, influenced by the Ottoman millet system or the British colonial regime, accord religious judges or religious law substantial autonomy and control over marriage and certain other family law matters within their respective communities. See John McGarry & Margaret Moore, *Karl Renner, Power Sharing, and Non-Territorial Autonomy*, in NATIONAL CULTURAL AUTONOMY AND ITS CONTEMPORARY CRITICS 74, 79 (Ephraim Nimni ed., 2005). Other countries, influenced by the French secularist tradition, accord no effect to religious marriage ceremonies at all, and require couples to appear before a state official to enter into a civil contract of marriage. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 71 (1989).

<sup>123</sup> I am assuming here one of the large majority of states that has abolished common law marriage. See *supra* note 61. In a state that still does recognize common law marriage, a purely religious ceremony might well be taken simply as evidence of the requisite intent to be married. See, e.g., *In re Estate of Trigg*, 414 P.2d 988 (Ariz. 1966) (interpreting Florida law); *Bradley v. Bradley*, No. 78400, 2001 Ohio App. LEXIS 3028 (Ohio Ct. App. July 5, 2001). But this, by itself, does not prove much of anything.

<sup>124</sup> See, e.g., *Herd v. Herd*, 69 So. 885 (Ala. 1915); *Moran v. Moran*, 933 P.2d 1207 (Ariz. App. 1996); *In re Litzky's Estate*, 296 So.2d 638 (Fla. Dist. Ct. App. 1974).

<sup>125</sup> A majority of states either require only substantial compliance with the procedures set out in their statutes to establish a valid marriage, or provide that defects can be cured if parties “consummate their

the plaintiff and defendant participated in a Hindu marriage or “prayer” ceremony . . . . The Hindu prayer ceremony . . . was attended by 100 to 150 guests. . . . During the ceremony, the parties were adorned in traditional Hindu wedding garments, prayers were articulated, the defendant’s parent’s [sic] symbolically gave her to the plaintiff, vows were made and rings and a flower garland were exchanged. The ceremony lasted approximately two hours.<sup>127</sup>

This couple did not obtain a marriage license, though they made some abortive efforts to do so. Moreover, the officiant at their ceremony was not licensed by the state to perform wedding ceremonies. Nevertheless, the court, resting on the explicit language of the New York statute, wrote:

There is an old cliché that goes “if it walks like a duck and quacks like a duck, and looks like a duck, it’s a duck.” This familiar maxim appears perfectly suited to the case at bar, as it conforms with the intent underlying the statutory structure enacted by the Legislature. Essentially, the Domestic Relation Law establishes that where parties participate in a solemn marriage ceremony officiated by a clergyman or magistrate wherein they exchange vows, they are married in the eyes of the law. It is the opinion of the Court that this is precisely what occurred in the instant case.<sup>128</sup>

The larger point, of course, is that in the court’s view, and the legislature’s, there is, in fact, only one duck.<sup>129</sup>

---

marriage with a good faith belief that they have been lawfully joined in marriage.” JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 38 (3d ed. 2005). In particular, many (though far from all) states will treat marriages as valid if solemnized in a religious ceremony, even in the absence of a wedding license. See, e.g., *In re Estate of Wright*, 613 S.W.2d 850, 851 (Ark. Ct. App. 1981) (lack of marriage license does not invalidate marriage when parties are married “in a ceremonial wedding performed by a minister”); *Carabetta v. Carabetta*, 438 A.2d 109, 112 (Conn. 1980) (couple who exchanged marital vows before a Catholic priest were legally married even though they had not obtained a marriage license); *Browning v. Browning*, 168 A.2d 506, 507 (Md. 1961); *State v. Denton*, 983 P.2d 693 (Wash. Ct. App. 1999).

To be sure, civil law will not ordinarily treat a religious marriage as valid if it violates a *substantive* provision of state law, such as an incest prohibition. Even here, though, the discussion requires some nuance. See, e.g., *In re Estate of Simms*, 257 N.E.2d 627, 629 (N.Y. 1970) (even though the marriage of an uncle and niece in a religious marriage ceremony with a state license was nullified under state law, their antenuptial contract was valid and enforceable).

<sup>126</sup> *Persad v. Balram*, 724 N.Y.S.2d 560 (N.Y. Sup. Ct. 2001).

<sup>127</sup> *Id.* at 562.

<sup>128</sup> *Id.* at 562–63 (citation omitted).

<sup>129</sup> *Cf. supra* note 125 (citing cases on validity of ceremonial marriage in absence of marriage license). *But cf., e.g., In re Marriage of Vryonis*, 202 Cal. App. 3d 712 (Cal. Dist. Ct. App. 1988) (although couple went through a private, secret “Muta,” or temporary, Islamic marriage ceremony, the evidence did not support a conclusion that they held an objectively reasonable good-faith belief that they had entered into a lawful California marriage).

The darker underside of this legal attitude is that, even when the civil state has not recognized “religious marriages,” it has still sought a monopoly over the meaning and significance of marriage. In most states, for example, even the effort to officiate at, or participate in, a marriage ceremony without going through the formalities required by the state, is an offense,<sup>130</sup> whether or not

---

<sup>130</sup> See, e.g., ALASKA STAT. § 25.05.361 (2006) (“A person who solemnizes a marriage without first receiving a proper marriage license from the parties as provided in this chapter . . . is guilty of a misdemeanor . . .”); IOWA CODE § 595.9 (2001) (“If a marriage is solemnized without procuring a license, the parties married, and all persons aiding them, are guilty of a simple misdemeanor.”); MICH. COMP. LAWS § 551.106 (2005) (“Any clergyman or magistrate who shall join together in marriage, parties who have not delivered to him a properly issued license, as provided for in this act, or who shall violate any of the provisions of this act, shall be adjudged guilty of a misdemeanor . . .”); N.C. GEN. STAT. § 51-6 (2001) (“No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to that person a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant. . . . Whenever a man and woman have been lawfully married in accordance with the laws of the state in which the marriage ceremony took place, and said marriage was performed by a magistrate or some other civil official duly authorized to perform such ceremony, and the parties thereafter wish to confirm their marriage vows before an ordained minister or minister authorized by a church, or in a ceremony recognized by any religious denomination, federally or State recognized Indian Nation or Tribe, nothing herein shall be deemed to prohibit such confirmation ceremony; provided, however, that such confirmation ceremony shall not be deemed in law to be a marriage ceremony, such confirmation ceremony shall in no way affect the validity or invalidity of the prior marriage ceremony performed by a civil official, no license for such confirmation ceremony shall be issued by a register of deeds, and no record of such confirmation ceremony may be kept by a register of deeds.”); S.D. CODIFIED LAWS § 25-1-31 (2008) (“If any marriage is solemnized without the license required by this title being procured, the parties so married and all persons aiding in such marriage are guilty of a Class 1 misdemeanor.”); WASH. REV. CODE. § 26.04.240 (2005) (punishing “[a]ny person who shall undertake to join others in marriage knowing that he is not lawfully authorized so to do, or any person authorized to solemnize marriage, who shall join persons in marriage contrary to the provisions of this chapter”); see also Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1794 n.145 (2005) (“[The] laws of many states make it a criminal offense for anyone authorized to perform marriages, including members of the clergy, to do so in the absence of a valid civil marriage license. A man and woman who wish to be married in the eyes of their faith, but not of the state, risk making criminals of clergy who accommodate their wish. Consider, for example, a couple of California senior citizens, widow and widower, who wish to enter only into registered domestic partnership under state law, and not into a new civil marriage, so as not to lose Social Security, pension, and other benefits accrued through their deceased spouses. If they also wish to avoid living in sin in the eyes of their faith or to be married to each other under a chuppah, California makes it difficult for their minister or rabbi legally to accommodate them because, unlike same-sex couples, these two senior citizens can clearly enter into a legal marriage.”).

To be sure, actual prosecutions under these statutes are rare. Possibly the most famous prosecution of this sort occurred in *State v. Walker*, 13 P. 279, 280 (Kan. 1887), in which E.C. Walker and Lillian Harman participated in a ceremony by which they entered into an “autonomistic marriage” without the benefit of either a civil or religious officiant, while explicitly declaring that marriage, “being a strictly personal matter, we deny the right of society, in the form of church and state, to regulate it or interfere with the individual man and woman in this relation.” *Id.* at 281. The majority held that the couple was legally married, but that they should nevertheless be punished for not “being married in the manner and upon the conditions that the legislature has declared marriage should be contracted.” *Id.* at 285. One of the concurring judges, though

the law recognizes the marriage as valid. Put another way, in most states, it is not completely clear that the civil law would necessarily allow a couple to marry “only in the eyes of God.”<sup>131</sup> Very possibly, the state will treat the marriage as civilly binding, or it will punish the participants, or both. Similarly, Utah still punishes persons who enter into polygamous marriages, even when those marriages were only “religious” and no effort was made to obtain civil recognition or civil benefits, and even when similar non-marital relationships would, in today’s world, not be punished.<sup>132</sup>

Again, though, one particularly evocative case tells the story: A couple in Washington State—Peter and Corrine Dickson—was divorced.<sup>133</sup> Peter Dickson’s religious views did not recognize divorce, and he continued to refer to Corrine Dickson as his wife.<sup>134</sup> This, along with other behavior, became the basis for an injunction: Peter could no longer refer to Corrine as his wife or

---

believing that the “autonomistic” ceremony did not create a legally valid marriage, nevertheless agreed with the majority that Walker and Harman “deserve all the punishment which has been inflicted upon them.” *Id.* at 289 (Valentine, J., concurring).

In a more recent case, directly implicating the debate over same-sex marriage, several New Paltz, New York, ministers “performed marriage ceremonies for 13 same-sex couples who did not have marriage licenses.” *People v. Greenleaf*, 780 N.Y.S.2d 899, 900 (N.Y. Just. Ct. 2004). The ministers were charged with the crime of solemnizing marriages without licenses being presented to them. *Id.* The local court dismissed the charges, but only because, in its view, the bar on same-sex marriages unconstitutionally prevented the couples from obtaining licenses. *Id.* Notable, though, is that neither the court nor any of the parties disputed the assumption that the ministers *would have been* guilty of a crime *if* the bar on same-sex marriages were valid. *See id.* at 899. Indeed, the defendants explicitly acknowledged “that the state has an interest in regulating marriage.” *Id.* Moreover, while the local prosecutor commented to the press: “It is not our intention to interfere with anyone’s right to express their religious beliefs, including the right of members of the clergy to perform ceremonies where couples are united solely in the eyes of the church or any other faith,” Thomas Crampton, *Two Ministers Are Charged in Gay Nuptials*, N.Y. TIMES, Mar. 16, 2004, at B1, the question of whether the ceremony should have been treated as “merely” religious does not appear to have been raised in the legal proceedings themselves. *But cf., e.g., State v. Brown*, 25 S.E. 820, 821 (N.C. 1896) (holding that no crime occurs when a private citizen who is *not* an ordained minister or a justice of the peace conducts a “marriage” ceremony between a man and a woman with their consent and “they are not complaining, and are presumably satisfied, and enjoying their new relation”).

<sup>131</sup> *But cf., e.g., Commonwealth v. White*, 14 Pa. D. & C.3d 434, 438 (1978) (noting, in the context of a rape prosecution, that a priest’s “renewal of vows” for a divorced couple was not the equivalent of a legal marriage, and was not understood to be such by the priest or the couple).

<sup>132</sup> *See State v. Holm*, 137 P.3d 726, 737, 752 (Utah 2006); *State v. Green*, 99 P.3d 820, 822, 827, 831 (Utah 2004). To be sure, other states’ bigamy statutes or court decisions are more restrictive, but this is at least in part a product of the principle of the requirement of proof beyond a reasonable doubt to sustain a criminal conviction. *See, e.g., State v. Lynch*, 272 S.E.2d 349, 352–55 (N.C. 1980) (holding that the State did not prove beyond a reasonable doubt that the defendant’s first marriage was valid under state law).

<sup>133</sup> *Dickson v. Dickson*, 529 P.2d 476, 477 (Wash. Ct. App. 1974).

<sup>134</sup> *Id.*

represent that she was his wife.<sup>135</sup> As modified by the state appellate court, the injunction did

not restrain Mr. Dickson from contending that she is his wife in the eyes of God, that according to the tenets of his religion, she is still his wife, or that because of his religious views he does not recognize the validity of the divorce. To state his religious beliefs in this respect is his right under the free exercise of religion and free speech clauses of the First Amendment. He may not, however, unqualifiedly represent that she is “his wife” or that she is his legal wife.<sup>136</sup>

The profound kernel of this case is the court’s assumption that civil marriage is what linguists and social theorists refer to as the “unmarked form.”<sup>137</sup> While the *Goodridge* court, for its own strategic reasons, was careful always to refer to “civil marriage,” thus suggesting that marriage under civil law was the “marked” category, the more usual trend in American law has been just the opposite: civil marriage is simply “marriage”; anything else requires qualification.

### III. CONSEQUENCES

#### A. *Stakes*

Civil marriage in the United States is a secular institution. But it is not a “wholly secular institution.” The more difficult question, however, is what follows from this observation. That *something* follows seems likely, if only because some courts and advocates insist so strenuously that civil marriage *is* a

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 480–81.

<sup>137</sup> “Generally speaking, a marked form is any linguistic form which is less usual or less neutral than some other form—the unmarked form—from any of a number of points of view.” R.L. TRASK, LANGUAGE AND LINGUISTICS: THE KEY CONCEPTS 163 (Peter Stockwell ed., Routledge 2007) (emphasis omitted). “In every language, some linguistic forms are said to be ‘marked,’ their correlates ‘unmarked,’ . . . . Marking [often] implies extra meaning and complexity.” ROBIN TOLMACH LAKOFF, THE LANGUAGE WAR 44 (2001). See generally EDWIN L. BATTISTELLA, THE LOGIC OF MARKEDNESS (1996). For examples of the use of the concept in the race, gender, and sexual preference literature, see Ross Chambers, *The Unexamined, in WHITENESS: A CRITICAL READER* 187–203 (Mike Hill ed., 1997); DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 94–96 (1992); Deborah Tannen, *There Is No Unmarked Woman, in SIGNS OF LIFE IN THE USA: READINGS ON POPULAR CULTURE FOR WRITERS* 452–58 (Sonia Maasik & Jack Solomon eds., 1997); and DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 43–44 (1995).

The dissent in *Dickson* would have in effect reversed the marked and unmarked states, allowing Peter to refer to Corrine as his wife as long as he did not represent that she was still his wife in the eyes of the law. *Dickson*, 529 P.2d at 481–82 (Petrie, J., dissenting).

“wholly secular institution” or that “civil marriage is exactly that, a . . . civil (not religious) institution.”<sup>138</sup> Indeed, it is tempting at this point just to flip the burden of going forward and argue that, if nothing else, the arguments in this Article would complicate whatever conclusions—rhetorical or doctrinal—are intended to inhere in such absolute claims about the nature of civil marriage. But there might be more to say than that.

At the very least, it should be evident, in the light of the genuinely religious meaning and dimension of American civil marriage, that religious believers, and religious views, are what I want to call legitimate stakeholders in the same-sex marriage debate. To explain what I mean, let me again refer to the usual analogies.

Imagine that the United States Navy decided that the practice of only asking women to be “sponsors” at ship christenings was sexist, and that henceforth it would ask both men and women to play the role.<sup>139</sup> While some religious believers might have views about this change of policy, their views would not deserve any special attention. They would not be stakeholders. On the other hand, imagine that a legislature or court decided that the seven-day week had to go. Here, religious believers *would* be stakeholders, in at least two senses: First, changing to a different calendar would make the exercise of most religious faiths in the United States considerably more difficult in purely practical terms. Second, changing to a different calendar would, even apart from its immediate practical consequences, specifically and uniquely threaten the value of the religious and cultural capital bound up with the seven-day week. That is to say, even if observant Jews, Christians, and Muslims continued to use the seven-day calendar for religious purposes, they would come to think of it as aberrant, exotic, and sectarian. This might not be a bad thing, religiously speaking.<sup>140</sup> But, good or bad, it would have a profound effect on religious life and the religious worldview. Much the same might be said, though perhaps not on the same scale, about changes in the “civic” celebration of Christmas, or in the constitutional interpretation of the

---

<sup>138</sup> See Schaffner, *supra* note 2, at 1527.

<sup>139</sup> It might also help such a decision along to note that the women-only rule, in common with many other apparently ancient traditions, actually only dates back to the late nineteenth century. See REILLY, *supra* note 38.

<sup>140</sup> See generally STANLEY HAUERWAS & WILLIAM H. WILLIMON, *RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY* (1989) (arguing that a faithful and authentic Christian life should not rely on the crutch of a state and society grounded in a shallow, merely cultural, commitment to “Christendom”).

Establishment Clause. Again, it bears emphasis that the stakes in all these cases are both immediately practical and more broadly cultural.

Religious believers have a stake in the same-sex marriage debate in the same sense. That stake is partly practical, roughly corresponding to my discussion of the institutional relation between “civil marriage” and “religious marriage.”<sup>141</sup> For example, some believers, on *either* side of the same-sex marriage debate might, depending on the outcome of that debate, literally “lose faith” in the civil institution of marriage, and, in the light of their theology, be in a sense left without a backup. But the stake, as with Christmas or the Establishment Clause, is also more broadly cultural and normative, roughly corresponding to my discussion of the religious “meaning” of civil marriage and its implications for the meaning of marriage *simpliciter*.<sup>142</sup>

To be sure, the polity might be inclined to tell religious folk, and in particular Protestant believers for whom civil marriage *is* marriage: “Tough. You got yourself into existential difficulty by staking so much on civil marriage. So live with it if marriage is radically altered, or not altered enough, or wholly secularized, or even abolished. Moreover, why should a particular version of Protestant theology govern American constitutional law or the American polity?” But, as I have argued throughout this Article, the intertwining of the religious and secular dimensions of civil marriage, and the connections between civil marriage and marriage *simpliciter*, have historically been a joint project of both church and state. The church has relied on the state to give juridical form to marriage, but the state has relied on the religious valence of marriage to give the institution meaning and depth. Moreover, it is not clear to me where one would draw the line in trying to extricate theological assumptions about marriage from American law and polity. After all, the same Protestant theological tradition that understands civil marriage to have religious significance also emphasized that marriage should be a civil institution in the first place.<sup>143</sup> Most important, given the entire argument here, the religious stake in the definition of civil marriage implies, more generally, that the religious dimension of marriage can and should be relevant to the civil

---

<sup>141</sup> See *supra* Part II.C.1.

<sup>142</sup> See *supra* Part II.A–B.

<sup>143</sup> As I have emphasized, that same tradition, in at least some of its forms, also inspired and shaped the tradition of separation of church and state that makes it seem so deceptively straightforward just to say “Tough!” I have more to say *infra* notes 180–82 about how the Establishment Clause might figure into the overall argument of this Article.

polity's understanding of the institution and its own arguments regarding the struggle for same-sex marriage.

### *B. Arguments*

As I insisted at the beginning of this Article, however, having a stake is not the same as having a veto or, for that matter, even a vote. So let me try to be more precise, and more rigorous, about what might follow from the claim that religious believers are legitimate stakeholders in the same-sex marriage debate, and the more general claim that the religious dimension of marriage is relevant to the debate over civil same-sex marriage.

#### *1. Sufficient Reason*

On the one hand, in the light of this religious stake, the argument that the traditional definition of marriage is simply "irrational" cannot be sustained. If "rationality" only requires a considered reason, then maintaining the status quo when there are legitimate stakeholders in that status quo, and when those legitimate stakeholders give voice to legitimate and long-held values and conceptions, must be, if nothing else, rational.<sup>144</sup> Moreover, while some have

---

<sup>144</sup> Cf. *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (arguing that though laws criminalizing private, consensual, homosexual conduct are unconstitutional under the Equal Protection Clause, a state might still be able to assert a legitimate state interest in preserving "the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest . . . [invoked to defend the Texas sodomy statute]—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group"); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 161–62 (1993) (describing and extolling the "lawyer-statesman" who "is temperamentally inclined to see a value in the irregularities of the existing order and to proceed with caution in leveling them out" and who possesses "a reverence for the variety of irreconcilable human goods and for the genius of unprincipled invention that has made it possible for people to live together despite the incompatibility of their conceptions of what is valuable in life"); JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984) ("Tradition is the living faith of the dead, traditionalism is the dead faith of the living."); Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 460–62 (1987) (arguing that, although society should never merely be "content with unreflective conventional morality," the process of critical reflection on morality, if embedded in a communitarian ethos, needs to remain "dialectical or reflexive. . . . The discovery of general principles does not excuse us from the demands of anchored rationality. Such principles are not alien to the community of reason, because they vindicate the objectivity of genuine, life-enhancing values. At the same time, every system of morality must be judged concretely, by particular outcomes. This primacy of the particular reaffirms our appreciation of contingency and circumstance, including the compromises and tradeoffs every community must make and the special vision any community may have"); Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1098 (2005) (pointing out, as part of a larger, highly textured discussion, that "[f]or many ordinary citizens, not everything is open to question and not all institutions demand the same form of support or justification. . . . Habit, custom, tradition, and settled

suggested that religious and other objections to same-sex marriage can only reflect invidious animus,<sup>145</sup> the range of religious arguments and religious views suggests that this is simply not true; indeed, religious arguments against same-sex marriage need bear no relation at all to any devaluation of gay love or homosexual sex.<sup>146</sup> Even more clearly, they need not have anything to do with prejudice against homosexuals as people.<sup>147</sup>

To be honest, defending the not necessarily invidious rationality of opposition to same-sex marriage does not, strictly speaking, even require invoking religious arguments at all. The most straightforward basis for defining marriage in heterosexual terms is that the state can reasonably decide to constitute marriage and family, not merely as a set of privileges and obligations attaching to affective or even sexual bonds, but as, in the iconic liberal philosopher John Rawls's words, parts of the basic structure of the polity, one of whose "essential roles is to establish the orderly production and reproduction of society and of its culture from one generation to the next."<sup>148</sup> More specifically, "the role of the family" in Rawls's formulation, "is the arrangement in a reasonable and effective way of the raising and caring for children, ensuring their moral development and education into the wider culture."<sup>149</sup> To be sure, Rawls emphasizes that "no particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a

---

understandings are far from irrelevant in most lives, and those who would work a radical change in marriage must confront their hold even in the present age").

<sup>145</sup> See, e.g., Samuel A. Marcossan, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense,"* 35 U. LOUISVILLE J. FAM. L. 721, 742 (1997); Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 597-603 (2007).

<sup>146</sup> For a balanced account of the stakes, at least for Christians, see BROWNING, *supra* note 106, at 219.

<sup>147</sup> Some empirical evidence suggests that, controlling for other important variables, the effective internalization of orthodox Christian beliefs actually correlates with "positive, tolerant attitudes toward homosexuals," though not with approval of homosexuality as a behavior. See Thomas E. Ford et al., *The Unmaking of Prejudice: How Christian Beliefs Relate to Attitudes Toward Homosexuals*, 48 J. SCI. STUDY RELIGION 146, 156, 158 (2009).

<sup>148</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 162 (Erin Kelly ed., 2001). I am obviously citing Rawls here with a certain wry malice aforethought precisely because his work is so thoroughgoingly liberal and secular that it is the last place one would expect to find even the seed of an argument against extending marriage to homosexual couples. I am grateful to an unpublished paper by Matthew O'Brien for alerting me to these passages in *Justice as Fairness*, though I do not find convincing, as I suspect Rawls would not, O'Brien's effort to draw from these passages and others a definitive "Rawlsian" argument against same-sex marriage.

For a more extended discussion of the relation of marriage to family and procreation, and the possible implications of that relation for the same-sex marriage debate, see DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* (2007).

<sup>149</sup> RAWLS, *supra* note 148, at 163.

political conception of justice so long as it is arranged to fulfill these tasks effectively and does not run afoul of other political values.”<sup>150</sup> But this is, in Rawls’s view, a contingent matter,<sup>151</sup> and as long as the constitutional test is mere rationality, it would seem reasonable to suggest that such contingent judgments should not be judicially overturned.

In particular, it bears emphasis that the issue at hand is not whether homosexuals can be good parents or whether same-sex couples can lead strong families. Of course they can. But defining marriage in heterosexual terms can still be defended, at least in substantial part, on the simple claim that because heterosexual sex is distinctly connected to the possibility of procreation, including unintended procreation, heterosexual sexual relations—and not homosexual sexual relations—need to be channeled, at least to some degree, into the framework of a distinct legal relation that enforces a set of rights and obligations between the parties to that relation and their potential offspring, between each of the parties to the other, and between themselves and the family they create and the larger society.<sup>152</sup> Crucially, understanding how marriage can channel (and not merely support or protect) heterosexual sex and its potential consequences renders fallacious or just irrelevant the stock argument of some courts and commentators that procreation cannot be “rationally” central to the meaning of marriage because, after all, not all heterosexual married couples have or even can have children and not all children are born to heterosexual married couples.<sup>153</sup>

---

<sup>150</sup> *Id.*

<sup>151</sup> As Rawls puts it, his observations regarding the forms that family might take set “the way in which justice as fairness deals with the question of gay and lesbian rights and duties, and how they affect the family. If these rights and duties are consistent with orderly family life and the education of children, they are, *ceteris paribus*, fully admissible.” *Id.* at 163 n.42 (emphasis added).

<sup>152</sup> For important discussions of the “channeling function” of marriage and family law, see generally Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771 (2001). For judicial decisions that have explicitly relied on the “channeling” argument in rejecting constitutional arguments for same-sex marriage, see, for example, *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

<sup>153</sup> See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961–62 (Mass. 2003); Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813, 852–53 (2007); cf. *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (echoing this argument in warning that the Court’s recognition of a constitutional right to engage in private, consensual, homosexual sex “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned”).

The religious piece of the puzzle, then, emphasizes how this instrumental argument is profoundly intertwined with, without by any means exhausting, the much larger dignitary and symbolic frame of meaning that I discussed earlier.<sup>154</sup> That frame of meaning—the traditional religious and religiously influenced understanding of marriage—is broad, deep, and powerful. For Jews and Christians, it is bound up with the very mythos of creation and the Garden of Eden.<sup>155</sup> But it is also potentially fragile, and society’s hesitation to tamper with it—to redefine marriage in ways that change its practical attachment to procreative possibility and its symbolic attachment to traditions that tie human reproduction and human love to each other and tie both to divine creation—is, if nothing else, understandable.

## 2. *Rightful Dignity*

So much for the alleged “irrationality” of refusing same-sex marriage. The analysis might be different, however, if such refusal is subject to stricter scrutiny, either by treating gay couples as belonging to a suspect class, or by emphasizing the fundamental character of the right to marry. Through the lens of such stricter scrutiny, the religious dimensions of civil marriage might

---

<sup>154</sup> See *supra* Part I.C.1.

<sup>155</sup> The basic text for both traditions is *Genesis* 2:21–24 (The Contemporary Torah: A Gender-Sensitive Adaptation of the JPS Translation):

So God . . . sent a deep sleep upon the Human; and while he slept, [God] took one of his sides and closed up the flesh at the site. And God . . . fashioned the side that had been taken from the Human into a woman, bringing her to the Human. Then the Human said,

“This one at last  
Is bone of my bones  
And flesh of my flesh.  
This one shall be called Woman,  
For from a Human was she taken.”

Hence a man leave his father and his mother and clings to his wife, so that they become one flesh.

Jews incorporate this primordial romance into the “seven blessings” of the wedding ceremony: “Grant perfect joy to these loving companions, and You did your creations in the Garden of Eden. Blessed are You, Lord, who brings gladness to the bridegroom and the bride.” SCOTT-MARTIN KOSOFSKY, *THE BOOK OF CUSTOMS: A COMPLETE HANDBOOK FOR THE JEWISH YEAR* 371 (2004).

For Christians, the crucial gloss is *Ephesians* 5:28–32 (Revised Standard Version):

Even so husbands should love their wives as their own bodies. He who loves his wife loves himself. For no man ever hates his own flesh, but nourishes and cherishes it, as Christ does the church, because we are members of his body. “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh.” This mystery is a profound one, and I am saying that it refers to Christ and the church.

actually suggest *more* rather than less potent arguments for allowing or requiring same-sex marriage. The analysis here might have three pieces:

First, as a general matter, the religious history and resonance of American civil marriage helps, as already discussed,<sup>156</sup> justify and flesh out the idea that marriage, which is in so many respects a positive institution whose details vary across time and space, can also be a substantive (and not merely comparative<sup>157</sup>) “fundamental right.”

Second, and more particularly, if civil marriage is understood as conferring on the parties to it more than merely instrumental or even emotional benefits—indeed as being a potential religious and cultural resource without, for at least some believers, an easy or obvious substitute—then the demands of human dignity might require that an entire group not, even for otherwise sound and rational reasons, be deprived of access to that resource.<sup>158</sup> Perhaps just as important, appreciating the religious significance of civil marriage admits more clearly and forcefully into the public debate not only religious arguments against same-sex marriage, which have already been there in force, but emerging, vibrant, religious voices in its favor.<sup>159</sup>

Third, the dignitary, non-instrumental, propositional character of the religiously influenced idea of marriage, which I have emphasized here,<sup>160</sup> provides, it seems to me, the most persuasive response to the knottiest and

---

<sup>156</sup> See *supra* notes 78–88 and accompanying text.

<sup>157</sup> For sources debating whether the right to marry is substantive or merely comparative, see *supra* notes 80, 82.

<sup>158</sup> See Emily R. Gill, *Coercion, Neutrality, and Same-Sex Marriage*, in *COERCION AND THE STATE* 115 (David A. Reidy & Walter J. Riker eds., 2008). The California Supreme Court came close to this form of argument when it held: “Whether or not the state’s interest in encouraging responsible procreation properly can be viewed as a reasonably conceivable justification for the statutory limitation of marriage to a man and a woman for purposes of the rational basis equal protection standard, this interest clearly does not provide an appropriate basis for defining or limiting the scope of the constitutional right to marry.” *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008).

<sup>159</sup> Cf. Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 *CAP. U. L. REV.* 221, 260–61 (2002) (“Recasting the debate in religious terms takes battle for human dignity back to the heart of the religious communities that hold themselves out as divinely appointed experts in this field of cultural production. It changes the focus of the debate from the conduct of sexual non-conformists to the moral worthiness of religious communities. In this context, the fundamental barriers to equal social and cultural dignity for sexual non-conformists, at the core of secular liberal toleration, may be overcome. Sexual non-conformists once sought liberation from religion as a means of securing even a limited form of personal freedom. It is clear to me that sexual non-conformists must now seek the liberation of religion from their interpretive error as a means of raising sexual conformist and non-conformist alike to that level of human dignity which forms the bedrock of the divine purpose for humans on earth.”).

<sup>160</sup> See *supra* notes 73–77 and accompanying text.

stubbornest difficulty that confronts the argument for same-sex marriage. This difficulty, which I will refer to as the “line-drawing problem,” is this: Once marriage is severed from any necessary constitutive connection to the model of procreative pair-bonding between men and women, is there is any logical reason to broaden the scope of marriage only to gay and lesbian sexual partners? Why not extend the possibility of marriage to any group of persons sharing a household, joined to each emotionally and economically, who might be well-served by the rights and obligations attendant on marriage? Why not, for example, allow two adult siblings, not sexually involved, to marry so they can more effectively care for each other in illness or old age?<sup>161</sup> Or why not extend the institution of marriage to groups of any number of adults who, without sexual involvement with each other, form a household so they can share in the raising of their children? Or what about two longtime friends, one of whom is facing the ravages of dementia and seeks the help of the other to care for him and make decisions on his behalf, and then reap the financial benefits of being his spouse survivor on his death?<sup>162</sup>

---

<sup>161</sup> A much-noted recent instance (concerning civil partnership rather than marriage, but to the same effect) involved two sisters in Wiltshire, England, who sued in the European Court of Human Rights claiming discrimination because they, unlike a registered homosexual couple, would incur

a hefty bill for inheritance tax when the first of them dies . . . . The test case is the first of its kind since the law was changed to allow gay and lesbian partners the same inheritance rights as married couples. Joyce Burden, 88, and her sister Sybil, 81, inherited their house, near Marlborough, Wilts, from their parents . . . . They have lived together all their lives and made wills in favour of each other. . . . Property left by one spouse to the other or inherited by a civil partner is exempt from the [inheritance] tax. However, close relatives, such as siblings and descendants, are not eligible to register as civil partners. . . . “I don’t have the status of a lesbian,” [Joyce Burden] said. “This is an insult to single people who have looked after elderly parents. I don’t call that justice.”

Joshua Rozenberg, *Sisters Go to Court over ‘Gay Bias’ in Tax Laws*, DAILY TELEGRAPH (London), Sept. 2, 2006, at 4. The Burden sisters lost their case. See Richard Savill, *Sisters Lose Inheritance Tax Battle; Elderly Pair Wanted Same Rights as Gay Couples*, DAILY TELEGRAPH (London), Apr. 30, 2008, at 11.

In a statement, the sisters said they were “bitterly disappointed” . . . . “We have been fighting for 32 years just to gain the same rights, as regards inheritance tax, as married couples and now couples in civil partnerships. We are still struggling to understand why two single sisters in their old age, whose only crime was to choose to stay single and look after their parents and two aunts to the end, should find themselves in such a position in the United Kingdom in the 21st century.” . . . After losing the case, Joyce Burden said: “If we were lesbians we would have all the rights in the world. But we are sisters, and it seems we have no rights at all.”

*Id.*

<sup>162</sup> This last possibility figured prominently in the concluding episode of the television series *Boston Legal*, in which the decidedly heterosexual Denny Crane (played by William Shatner) and Alan Shore (played by James Spader), whose friendship and shenanigans as law partners formed a major running motif of the entire series, end up marrying. See Matthew Gilbert, *‘Legal’ Comes to an Offbeat End*, BOSTON GLOBE, Dec.

The line-drawing problem is invoked most often by traditionalist opponents of same-sex marriage as part of their argument for the logic and necessity of limiting marriage to opposite-sex couples.<sup>163</sup> But it is also raised by commentators on the other side of the ideological spectrum either to challenge the coherence of the institution of marriage or at least to argue that marriage equality for same-sex couples is less important than a radical reconsideration of the central role that marriage (however defined) has historically played in law and society.<sup>164</sup>

---

11, 2008, at G25. Appropriately enough, the plot included an unsuccessful effort by the “Massachusetts Chapter of the Gay and Lesbian League” to convince a Massachusetts judge to enjoin the marriage on the grounds that it constituted a “mockery” of marriage and threatened the legitimacy of the advances that gay and lesbian couples had achieved in obtaining the right to marry. *Id.*

<sup>163</sup> See, e.g., Scott FitzGibbon, *The Principles of Justice in Procreative Affiliations, in WHAT’S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY?* 125, 140–41 (Lynn D. Wardle ed., 2008); Ryan T. Anderson, *Friends with Benefits*, FIRST THINGS BLOG, June 10, 2008, <http://www.firstthings.com/blog/2008/06/10/friends-with-benefits/> (“By embracing same sex relationships as marriage, you undercut any rational basis for limiting marriage to two people or viewing marriage as an inherently sexual relationship. If we reject the idea that marriage is founded on a two-in-one-flesh union between sexually complementary spouses—which is what we would do if we encourage the state to legally recognize same sex ‘marriage’—then why shouldn’t the state recognize other ‘marriages’ that venture slightly further away from this norm—‘marriages’ with more than two people, ‘marriages’ that don’t entail sex, ‘marriages’ that amount to little more than being roommates.”).

<sup>164</sup> See, e.g., NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 5 (2008) (arguing for importance of “valuing all families” by establishing legal regimes that protect and benefit a variety of relationships “without creating a special status for married couples”); *id.* at 98–100 (“[T]he generation of gay and straight young adults who have grown up during the culture war over same-sex marriage has no idea that the gay rights movement was once part of coalition efforts to make marriage matter less.”); Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State’s Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 62–63 (2007); see also Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 141–43 (2005); MIMI ABRAMOVITZ ET AL., *BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES AND RELATIONSHIPS* 2 (2006), available at <http://www.beyondmarriage.org/BeyondMarriage.pdf>.

Both the traditionalists and the marriage critics often point, in putative confirmation of their fears or hopes, to statutory efforts in a variety of jurisdictions to create expansive “reciprocal beneficiary,” “domestic partnership,” and similar regimes. See, e.g., VT. STAT. ANN. tit. 15, §§ 1301–1306 (2002) (reciprocal beneficiary statute); N.J. STAT. ANN. §§ 26:8A-1 to 12 (West 2004) (domestic partnership statute); Relationships Act 2008, Vict. Acts. No. 12 of 2008, (Victoria, Austl.); Adult Interdependent Relationships Act, S.A., ch. A-4.5 (2002) (Alberta, Can.). See generally Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J.L. & POL’Y 79 (2007); LAW COMM’N OF CAN., CANADIAN MINISTRY OF JUSTICE, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* 139–40 (2001) (proposing that Canadian governments “re-evaluate the way in which personal adult relationships are regulated”). Significantly, though, these new regimes, though they blur the legal distinctiveness of marriage, do not go as far as some have proposed, which would be to burst open the bounds of marriage itself, or eliminate it as a legal category. Indeed, the cited Vermont, New Jersey, and Alberta statutes were enacted *in addition* to legal rules extending marriage itself to same-sex couples (and not others) or allowing such couples (and not others) to enter into more explicitly marriage-like civil unions.

The line-drawing problem needs to be distinguished from the more notorious “slippery-slope” or “parade of horrors” argument that allowing same-sex marriage will open the door to polygamy, incestuous marriages, and the like. The “parade of horrors” argument can, in principle, be rebutted simply by demonstrating that polygamy or incest are “bad” in a way that homosexual relations are not. But the line-drawing problem is much trickier, because there is nothing even arguably undesirable about siblings or friends living together in a state of non-conjugal interdependency, and there are plausible instrumental arguments for affording such relationships at least some of the legal protections and other benefits that come with marriage. Hence the dilemma.

If there is any adequate response to the line-drawing difficulty, as articulated by both defenders of “traditional marriage” and critics of all marriage, it must, I think, focus not on the instrumental features of marriage, but on the demand of committed homosexual couples to be afforded a place, just like committed heterosexual couples, in the symbolic economy—the scaffolding of values—of law and society. Seen from that perspective, it needs to be noted, to begin with, that the dignitary dimension of the call for same-sex marriage has no immediate analogy in the other cases mentioned. Biological family relationships, for example, have always had a clear place in the symbolic economy, with a distinct cultural charge and legal definition. To be sure, the legal rights and obligations surrounding close relatives are different from the rules surrounding marriage—and incest laws keep the two realms sharply distinct—but they nevertheless have a history that is just as long and a dignity that is just as deep. Close friendship, meanwhile, is accorded a distinct and honored place in our culture precisely because of its lack, on the whole, of legal form. As Cicero famously put it, “relatives may lose their goodwill, friends cannot, for once goodwill has been lost, the friend is no longer a friend, but the relative is still a relative.”<sup>165</sup> Committed, conjugal, same-sex unions,

---

<sup>165</sup> SANDRA LYNCH, PHILOSOPHY AND FRIENDSHIP 115 (2005) (quoting CICERO, ON FRIENDSHIP (44 BCE), *reprinted in* OTHER SELVES: PHILOSOPHERS ON FRIENDSHIP 86–87 (Michael Pakaluk ed., 1991)). Lynch herself argues, along similar lines, that

friendship differs from relationships predicated on formal ties. It is regarded as a relationship of choice. It flourishes in reciprocity, in free and mutual cultivation, and is dependent upon friends’ liking and concern for one another for their own sakes. Its difference from relationships which are established on the basis of formal ties or obligations—whether biological, commercial, occupational, or culturally determined—is undoubtedly parts of its value and appeal.

*Id.* at 114–15. Other philosophers of friendship also emphasize the extent to which free choice and the absence of externally imposed obligation are central to friendship’s essence and dignity as an institution. *See,*

by contrast, even when they have not been actively persecuted, have until recently been accorded no place at all on that scaffolding of values around which the polity constructs itself. Filling that gap or lacuna, more than a claim to specific legal rights and obligations, is necessarily central to the struggle for same-sex marriage.

Even more fundamental, though, is that most same-sex couples who seek to marry aspire to participate in, and be officially recognized by society as participating in, an institution defined by a distinct set of values—including fidelity, sexual exclusivity, continuity, and perseverance even under radically changed circumstances, and (at least in paradigmatic aspiration) unity of soul

---

*e.g.*, Laurence Thomas, *Friendship and Other Loves*, in *FRIENDSHIP: A PHILOSOPHICAL READER* 48, 49–51 (Neera Kapur Badhwar ed., 1993). For a philosophical account that tries to detach the description of the morality of friendship even from the realm of non-legal obligation, see LAWRENCE A. BLUM, *FRIENDSHIP, ALTRUISM AND MORALITY* (1980).

Legal scholars have made similar arguments. Consider, for example, this account of why the law might choose not to enforce donative promises:

[T]he world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices. The impersonal organs of the state are an appropriate means to enforce promises made in such a world. In contrast, much of the world of gift . . . would be impoverished if it were to be collapsed into the world of contract. . . . [T]he principle that simple donative promises are unenforceable does not show that the law fails to value donative promises. Just the opposite is true. [That] principle . . . is justified not because simple donative promises are less important than bargain promises, but because they are more important. The world of gift is a world of our better selves, in which affective values like love, friendship, affection, gratitude, and comradeship are the prime motivating forces. These values are too important to be enforced by law and would be undermined if the enforcement of simple, affective donative promises were to be mandated by the law. It is just because these values are usually missing from the more impoverished world of contract that the law must play a central role in that world.

Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 *CAL. L. REV.* 821, 847–49 (1997); *cf.* Peter Goodrich, *Laws of Friendship*, 15 *LAW & LITERATURE* 23, 27–28 (2003) (“The principal treatises on friendship [including Cicero’s] have been authored by lawyers. . . . [Nevertheless, f]riendship exists in a double sense outside of law. . . . It is lawyers who write of friendship because it is what they most lack.”).

Of course, the categories of marriage, family, friendship, and even contract overlap and influence each other, which both complicates and enriches the challenge of definition and regulation. (Consider, for example, the degree to which modern ideas of marriage have increasingly foregrounded the aspect of friendship in the relationship of spouses. *Cf.* Mary Lyndon Shanley, *Marital Slavery and Friendship: John Stuart Mill’s The Subjection of Women*, in *FRIENDSHIP: A PHILOSOPHICAL READER*, *supra*, at 267 (discussing Mill’s effort to base his argument for marital equality on an account of marital friendship).) Moreover, there might well be sound arguments for thickening the law’s direct cognizance of friendship as a distinct human relationship. *See, e.g.*, Ethan J. Leib, *Friendship & the Law*, 54 *UCLA L. REV.* 631 (2007).

None of this, however, detracts from my basic argument that the formal extension of marriage to committed homosexual couples but not to even economically interdependent non-conjugal friends is, as such, entirely consistent with the elevated place of friendship in society’s moral and symbolic imagination, and represents no devaluation of either friendship as an institution or any particular grouping of friends.

and community of purpose over much of the span of a joint lifetime—that, as a complete package, is obviously inapposite to most other relationships, even of the closest and most interdependent kind. Indeed, in this light, it seems obvious that the purported line-drawing difficulty is, at base, built on a misunderstanding of much of what is at stake in extending marriage to same-sex couples.

The sort of response I have sketched out here can only even begin to work in legal and other normative discourse, however, if the law and polity specifically and directly accept the normative import of homosexual love and relationships. Hence my claim in this section that some form of heightened scrutiny rather than “mere rationality” must be put to work. More to the point, though, the argument can only work if it fully embraces the symbolic and dignitary meaning of marriage over and above its instrumental benefits. And that richer and more essential meaning, I have argued in this Article, will in the last analysis either be directly religious, or be influenced by the religious dimensions of marriage, or at least trade on the deep well of religious significance that has historically attached to marriage.

### *3. The Coherence of Compromise*

I have just proposed that it is the religious piece of the marriage puzzle that is, in one way or another, crucial to completing the circuit in advancing the argument for same-sex marriage. But the religious dimension of marriage can, conversely, also help explain the genuine pull—beyond mere semantic waffling—of efforts to fashion alternatives to same-sex marriage such as civil unions. This is the argument spelled out in more detail in my earlier article, which tried, among other things, to make sense of the then-new institution of civil unions as enacted by the Vermont legislature in response to an opinion of the Vermont Supreme Court.<sup>166</sup> Civil unions, in the form enacted by Vermont, and more recently by several other states, confer all the civil incidents of marriage (insofar as an individual state can confer them) but not the label of “marriage.” My argument was that the

Vermont court and legislature . . . recognize that the state’s law of marriage participates in a complex, pluralistic, web of meaning and juridical consequence, cognizing and being cognized by other laws of marriage. Some of those other laws of marriage belong, like Vermont’s, to “secular” legal systems . . . . But what gives this web

---

<sup>166</sup> Dane, *Intersecting Worlds*, *supra* note 100, at 385.

of meaning particular resonance, and import, is that it also involves religious and quasi-religious normative realms. And that . . . is the key. In creating civil union as something separate from marriage, Vermont was trying to opt out of that larger legal and cultural conversation, a conversation born of the coexistence and interpenetration of normative systems that have long been historically and existentially enmeshed with each other. It was trying, as much as it could while still complying with the constitutional requirement of “common benefit” [in the Vermont constitution], to avoid either drawing meaning from that conversation or projecting meaning into it.<sup>167</sup>

#### 4. *The Urgency of Now*

I still believe that “civil unions” are a conceptually coherent alternative to same-sex marriage. On the fourth hand, however, so to speak, the religious dimension of civil marriage also makes clear why this perfectly coherent compromise might not suffice as a response to the powerful argument for equal access to the benefits of marriage. The problem is not, as some have suggested, that civil unions are stigmatizing<sup>168</sup> or that “separate” cannot be “equal.”<sup>169</sup> Those arguments are, by themselves, little more than conclusory or circular.<sup>170</sup> But it is precisely the religious (and religiously influenced cultural) meaning of marriage that helps explain exactly what might be at stake for gay couples, in a real and deep sense, in the difference between civil unions, even with all their generous legal incidents, and actual marriage.

#### 5. *An Invitation*

Finally, appreciating the complexity and sensitivity of the same-sex marriage debate should invite efforts at *secular* arguments that might somehow

---

<sup>167</sup> *Id.* at 405. Vermont has recently amended its laws again to allow for actual same-sex marriage, see An Act Relating to Civil Marriage, 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis).

<sup>168</sup> See Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004); David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73 (2005); Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 126 (2000); Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL RTS. J. 1, 3, 22 (2000); Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 18, 22.

<sup>169</sup> *Cf. Opinions*, 802 N.E.2d at 569, 580; Michael Mello, *For Today, I’m Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 241–42, 251 (2000).

<sup>170</sup> For a powerful critique of invocations of “stigma” in legal and moral argument, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

conceptualize and even defend same-sex marriage without rejecting or undermining the historically entrenched and religiously resonant place of the heterosexual bond as undergirding the paradigm of marriage. This sort of move—expanding a legal institution while maintaining the centrality and salience of its paradigmatic instance—is certainly possible: For example, our law and culture recognize and celebrate non-biological familial adoption without (at least in mainstream thought) rejecting or undermining the place of biological kinship as undergirding the paradigm of parent–child rights and responsibilities. I explore that inquiry in a separate essay,<sup>171</sup> however, and this is not the place to rehearse that analysis. Suffice it to say that my approach is certainly not the only one, and others need to be forthcoming and forcefully enter public intellectual discourse.

### 6. *A Conclusion of Complexity*

The upshot is this: Understanding the varied and complicated religious meaning of civil marriage makes it harder to attack limitations on same-sex marriage as merely irrational. But it also makes it harder to defend such limitations against heightened scrutiny grounded in arguments from human dignity and fundamental right. It helps clarify the *conceptual coherence* of alternatives to same-sex marriage such as civil unions. But it also clarifies the *normative vulnerabilities* of those alternatives. It counsels skepticism about the most facile arguments for same-sex marriage, but also presses the value of formulating richer arguments. As I suggested at the start, though, the point of this Article is to illuminate the playing field, not to score points for one side or the other. Indeed, in this debate, as in so many others, it turns out that the opposing arguments are often not merely arrayed against each other, but actually interlock and interdepend.<sup>172</sup>

---

<sup>171</sup> Dane, *supra* note 19.

<sup>172</sup> Cf. Arnaud Villani, *Figures of Duality: Hölderlin and Greek Tragedy*, in *THE SOLID LETTER: READINGS OF FRIEDRICH HÖLDERLIN 175, 184* (Aris Fioretos ed., 1999). In the Greek dramatic telling of the Trojan War, Hector and Ajax each gave the other a gift that ultimately contributed to the other's death.

The gifts . . . between these enemies . . . is the mark of an indissociable twin couple . . . each object representing in the other a part of the adversary, Ajax's shoulder-belt establishing in Hector and Hector's dagger establishing in Ajax a bridgehead for the interests of the antagonist. We again find in passing an Oriental principle: yin and yang, the two opposites interlock and cut into each other impurely and asymmetrically.

*Id.*

### C. *The Elephant Clause in the Room*

Some readers will at this point be murmuring something about the Establishment Clause. How can I speak of “religious meaning” and “religious capital” and “religious stakeholders” in the light of the separation of church and state built into the American constitutional scheme?

The question is a legitimate one. I have put it off out of a conviction that the legal treatment of religion must be understood in its widest possible context before reducing it to the limited doctrinal categories afforded by the First Amendment.<sup>173</sup> But it should be addressed now, at least briefly.

#### 1. *Really Hard*

It will help to be precise here. If I am right about the “religious meaning” of civil marriage, does that render civil marriage (as so understood) a violation of the Establishment Clause? The simple answer is no, precisely because that religious meaning is only one part of a larger complex that is also legitimately secular. Similarly, the fact that the ban on same-sex marriage might be, for many citizens and legislators, grounded in religious arguments, does not implicate the Establishment Clause as long as those motives and arguments can be framed in terms of some secular set of purposes also carried by civil marriage.<sup>174</sup>

To be sure, I am threading a fine needle here, suggesting that civil marriage has sufficient “religious meaning” not to be a “wholly secular institution,” but is not so completely religious as to run aground of the Establishment Clause. But the fineness of that needle is, I suggest, built into the particular American dispensation of religion and law. Indeed, it is apparent in many of the examples, including the Establishment Clause itself, discussed earlier in the Article.<sup>175</sup> It also emphasizes the irreducible difference between that American dispensation and purer efforts to create an acidly secularized public realm.

Indeed, the contours of the fine needle thread by marriage in America might even suggest that, if the religion clauses pose a concern here, it would be as much with changing the law of marriage radically as with leaving it in its

---

<sup>173</sup> See generally Perry Dane, *Constitutional Law and Religion*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 113 (Dennis Patterson ed., 1996); Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15 (1996).

<sup>174</sup> See *supra* Part I.

<sup>175</sup> See *supra* notes 40–58 and accompanying text.

present state. The line of reasoning I have in mind, which I can only outline here, draws in part from Justice Brennan's observation that "[t]here are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment."<sup>176</sup> Justice Brennan cited prison and military chaplaincies,<sup>177</sup> but the institution of heterosexually defined civil marriage is, if in an incalculably more complicated way, also a government resource that helps make religious life possible under conditions in which—for the predominant American theological tradition<sup>178</sup>—few substitutes might be available.

The more direct and consequential piece of the argument, however, rests not merely on the right to religious liberty, but on a more structural consideration: Once the state is complicit in the creation of "religious capital" in an institution such as marriage, it should at least be cautious about unnecessarily diluting or diminishing the value of that capital. To put it another way, if there is a religious "stake" in the laws of civil marriage, that "stake" might well find at least *prima facie* protection in the Establishment Clause itself.

The argument here, at the end of the day, is not that same-sex marriage is unconstitutional. Such a conclusion would be both crude and wrong; indeed, there are, as just discussed, powerful arguments the other way drawn from the religious (and other) rights of same-sex couples to a juridical bond appropriate to their needs. But it does seem to me that the same-sex marriage question, understood in Establishment Clause terms, might be one of those intractable problems to which the religion clauses of the First Amendment are prone.<sup>179</sup> The intractability I have in mind is not simply the consequence of interpretive difficulty or uncertainty, but of a fundamental tension built into the religion clauses, and exacerbated in certain contexts such as marriage.

---

<sup>176</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296 (1963) (Brennan, J., concurring).

<sup>177</sup> *Id.*

<sup>178</sup> As I have already emphasized, the story is, in principle, quite different for minority traditions such as Judaism that already understand civil and religious marriage to be distinct and separable. See Novak, *supra* note 102, at 1070, 1078 (arguing that, in the face of what the author considers to be pernicious changes in the institution of civil marriage, "traditional Jews are well advised to totally reconsider the overlapping of religious and secular jurisdictions in the institution of Jewish marriage").

<sup>179</sup> Cf. Dane, *supra* note 40, at 50; Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 *FORDHAM L. REV.* 335, 361 (1986) ("The interrelationships of church and state, therefore, are complex, because churches are both secular and alien institutions. Government aid or regulation of religious organizations is sometimes acceptable and sometimes unacceptable. No general principles offer solutions.").

## 2. *Strictly Inseparate*

Nothing in the argument just outlined is meant to rely, in any direct or simple way at least, on a less strict or more “accommodationist,” view of the Establishment Clause.<sup>180</sup> To the contrary, I support a generally strict separationist reading of the Establishment Clause.

Nevertheless, as I have argued here and elsewhere, the specifically American form of strict separation is best understood, not merely as reflecting anti-religious anxiety, or even liberal neutrality, though those currents figure in it as well, but a deeply theological and practical conviction that a religious society is best nurtured by a strictly secular government.<sup>181</sup> Specifically, strict separationism, as a reading of the Establishment Clause, seeks to understand religion and to take it with utmost seriousness. Thus, official prayers are forbidden because they trivialize prayer.<sup>182</sup> And the official display of distinctively religious symbols should be suspect because it tends to co-opt those symbols to profane use.<sup>183</sup> And government aid to religious institutions

---

<sup>180</sup> See generally Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, in *LAW AND RELIGION* 63 (Rex J. Ahdar ed., 2000); Steven K. Green, *Of (Un)equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 *B.C. L. REV.* 1111 (2002); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DEPAUL L. REV.* 993 (1990); Dallin H. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 *DEPAUL L. REV.* 1 (1985); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 *U. PITT. L. REV.* 83 (1986); see also Steven D. Smith, *Separation and the “Secular”*: *Reconstructing the Disestablishment Decision*, 67 *TEX. L. REV.* 955 (1989).

<sup>181</sup> See Dane, *Separation Anxiety*, *supra* note 21.

<sup>182</sup> See *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962) (“The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.” (quoting James Madison, *Memorial and Remonstrance against Religious Assessments*, in 2 *WRITINGS OF MADISON* 187 (Gaillard Hunt ed., 1901))); see also *Marsh v. Chambers*, 463 U.S. 783, 819 (1983) (Brennan, J., dissenting); Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 *IOWA L. REV.* 35, 70 (1993).

<sup>183</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 711–12 (1984) (Brennan, J., dissenting) (“Unlike such secular figures as Santa Claus, reindeer, and carolers, a nativity scene represents far more than a mere ‘traditional’ symbol of Christmas. The essence of the crèche’s symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah. Contrary to the Court’s suggestion, the crèche is far from a mere representation of a ‘particular historic religious event.’ It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely ‘traditional’ and therefore no different from Santa’s house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of ‘history’ nor an unavoidable element of our national ‘heritage.’”).

should be restricted because it threatens, in several ways, the integrity of a distinctively religious conscience.<sup>184</sup>

Marriage, however, poses a dilemma. For, in the context of marriage, secular state and religious society are tied up in a knot. The intermeshing of the civil and religious dimensions of marriage in Western culture and Anglo-American law predates the Establishment Clause,<sup>185</sup> and the relationship might just be too difficult to disentangle without harming the very values that underlie the Establishment Clause.<sup>186</sup> Taking religion with utmost seriousness requires appreciating the profound costs and often only shallow benefits of entanglement with the civil state. But taking religion with utmost seriousness also requires understanding the deep and inextricable theological structures and complicated commitments undergirding portions of secular law. In that precise dilemma lies the intractability of the problem.

In the much more confined, but still possibly equally intractable, context of Christmas, I have argued, as noted earlier, that one solution would be to get government out of the business of Christmas entirely.<sup>187</sup> Similarly, some commentators have argued that the civil state should get out of the business of marriage, either leaving it entirely to private ordering or, less radically, offering only civil unions to all couples, whether gay or straight.<sup>188</sup> This solution, however, assumes that churches could just take over the marriage

---

<sup>184</sup> See generally William P. Marshall, *Remembering the Values of Separatism and State Funding of Religious Organizations (Charitable Choice): To Aid Is Not Necessarily to Protect*, 18 J.L. & POL. 479 (2002); Derek H. Davis, *Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035 (2002). This financial piece of the separationist impulse was particularly central to the thought of the framing generation. See FELDMAN, *supra* note 21; Madison, *supra* note 182.

<sup>185</sup> Consider again in this connection Justice Douglas's famous peroration in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), which is not directly on point but is resonant nevertheless: "We deal with a right of privacy older than the Bill of Rights . . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." The entire passage is quoted *supra* text accompanying note 86.

<sup>186</sup> This state of affairs can be understood as an extreme, and admittedly atypical, instance of the much-discussed "baseline" problem in Establishment Clause jurisprudence. See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48 (1997); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 506 (2004).

<sup>187</sup> Dane, Christmas, *supra* note 47, at 8.

<sup>188</sup> See, e.g., Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221, 1222 (2006); David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 1024-25 (2001); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1219-20 (2006); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 529-30 (1994); see also Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 43-44 (1996).

business for their own members, and, as I have tried to demonstrate, this view is theologically naive. Indeed, if the civil state did simply abolish civil marriage, the resulting theological crisis, for many traditions, might be profound.<sup>189</sup> And that in turn suggests yet one more reason why the constitutionally protected “fundamental right to marry” might indeed require not merely that the state not unfairly restrict access to marriage, but also that it not retreat from maintaining a law of marriage in the first place,<sup>190</sup> any more than it could retreat from establishing family law or property law or contract law.<sup>191</sup>

## CONCLUSION

When conjoined twins are born, the preferred solution to their dilemma might, in the abstract, be surgical separation. But such separation is not always possible or even optimal, and it is sometimes fatal.<sup>192</sup> If the institution of same-sex marriage is to become a more ordinary and accepted feature of American law, it will not be because civil marriage is a “wholly secular institution.” Rather, same-sex marriage will have to make its way, and find its place, in what will remain, for the foreseeable future at least, both a secular and a holy institution.<sup>193</sup>

---

<sup>189</sup> I do not mean to suggest that such a crisis would be without a solution. But the solution would still be, from a religious point of view, very possibly spiritually painful and conceptually problematic. For one effort at just such a re-imagining, see CHRISTOPHER L. WEBBER, RE-INVENTING MARRIAGE: WHAT MARRIAGE HAS BEEN AND IS AND MIGHT BE 141–62, 201–22 (2007).

<sup>190</sup> See Hohengarten, *supra* note 82, at 1496.

<sup>191</sup> For some relevant discussions, see, for example, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195 (1999); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

<sup>192</sup> Cf. Alice Domurat Dreger, *The Limits of Individuality: Ritual and Sacrifice in the Lives and Medical Treatment of Conjoined Twins*, 29 STUD. HIST. PHIL. BIOL. & BIOMED. SCI. 1 (1998) (arguing that separation surgery is too often performed even when it is unacceptably risky or requires the “sacrifice” of one of the twins). In language remarkably evocative of the argument here, Dreger suggests that the impulse to operate on conjoined twins is based in part on society’s effort to fit conjoined twins into the “singleton” mold that the rest of us inhabit, and its corollary failure to appreciate “that *being conjoined is part of conjoined twins’ individuality.*” *Id.* at 26.

<sup>193</sup> Cf. Backer, *supra* note 159, at 244–48.

## POSTSCRIPT

Just before this Article went to press, the Iowa Supreme Court decided *Varnum v. Brien*,<sup>194</sup> holding that the Iowa statute limiting civil marriage to a union between a man and a woman violated the equal protection clause of the Iowa Constitution. The *Varnum* opinion is particularly interesting for my purposes because the court ventured into an unusually extended discussion of “Religious Opposition to Same-Sex Marriage.”<sup>195</sup> That discussion is notably more nuanced and sensitive than the Massachusetts court’s simplistic assertion that civil marriage is a “wholly secular institution.” But it still misses the mark in ways that deserve at least brief analysis, and which can help again to highlight some of the themes argued in this Article.

Unlike the *Goodridge* court, which treated religious arguments against civil same-sex marriage as merely confused, the Iowa court in *Varnum* acknowledges that it is “quite understandable that religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage, even if only indirectly.”<sup>196</sup> The opinion insightfully points out that the

belief that the “sanctity of marriage” would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief.<sup>197</sup>

If I would add anything to this observation, it is simply, but crucially, that there are not only strong religious *views* regarding same-sex marriage, but also, as detailed in this Article, strong religious *stakes*.

The court then emphasized that there are “equally sincere . . . strong religious views” *in favor* of same-sex marriage.<sup>198</sup> This is importantly true, and is a point I have made repeatedly in this Article. The court also claimed that the diversity of religious views “largely explains the absence of any religion-based rationale to test the constitutionality of Iowa’s same-sex

---

<sup>194</sup> 763 N.W.2d 862 (Iowa 2009).

<sup>195</sup> *Id.* at 904–06.

<sup>196</sup> *Id.* at 904.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 905.

marriage ban” and that the government is not empowered “to resolve these types of religious debates.”<sup>199</sup> Both these statements are true insofar as they go. But they also imply too much. The government, including both courts and legislatures, should not try to resolve religious debates. But a democracy, in appropriate circumstances, can be moved by religiously-grounded arguments, and the presence of those arguments can at least help rebut the simplistic claim that the demand for same-sex marriage is just a matter of “fairness” and “equality” or that a state’s failure to recognize such marriages is just a matter of animus or bigotry.

The real problems, and the platitudes, begin, however, with the next step in the court’s argument:

The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, “Marriage is a civil contract” and then regulates that civil contract. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.<sup>200</sup>

To be sure, civil marriage is “a civil contract.”<sup>201</sup> As this Article has emphasized, however: (1) the “civil contract” of marriage can have religious meaning, (2) the very fact that civil marriage is a civil contract is, for some religious traditions, part of its religious meaning, (3) the legal understanding of civil marriage cannot be entirely divorced from the religious understanding of marriage or from the cultural meaning of marriage *simpliciter*.

The Iowa court goes on to reiterate, correctly but incompletely, that

civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals. This approach does not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union, but considers, as we must, only the

---

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* (citation omitted).

<sup>201</sup> It does bear note, simply as a matter of logic, that there is no necessary connection, as the court suggests there might be, between the diversity of religious views about marriage and the status of civil marriage as a civil contract.

constitutional rights of all people, as expressed by the promise of equal protection for all.<sup>202</sup>

It then ends its discussion by trying to reassure religious objectors that its decision will leave contrary

[r]eligious doctrine and views . . . unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law.<sup>203</sup>

All this assumes, however, precisely the sort of clear conceptual and practical division between "civil marriage" and "religious marriage" about which any reader of this Article should by now at least be skeptical. At least for some religious traditions, changes in the understanding of "civil marriage" *will* affect the meaning of "religious marriage," either directly or indirectly. Such changes even have the potential to provoke a theological crisis. This might be a price worth paying to vindicate other legal and ethical principles. I am inclined to think that it is. But that there is a price to be paid needs to be acknowledged and factored into decision making. The Iowa court in *Varnum* stepped up halfway to such an acknowledgment, which is more than many other courts and commentators have done. But the court would have better served the difficult debate over same-sex marriage, and been better able to assess and even defend the justice of the result it reached, if it had even more squarely faced the real religious stakes in the debate, and the real consequences of its decision.

---

<sup>202</sup> *Varnum*, 763 N.W.2d at 905.

<sup>203</sup> *Id.* at 906.