Case Comment

Courting Leviathan

Limited Government and Social Freedom in *Reference re Same-Sex Marriage*[1]

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We garb Leviathan with legality not only to legitimize his powers, but to restrain them, and to protect each of us at our most vulnerable….

- J.R. Lucas[2]

[I]f despotism were to be established among the democratic nations of our days, … it would be more extensive and mild; it would degrade men without tormenting them. … [I]n an age of instruction and equality like our own, sovereigns might more easily succeed in collecting all political power into their own hands and might interfere more habitually and decidedly with the circle of private interests than any sovereign of antiquity could ever do. […] [T]he supreme power then extends its arm over the whole community. … Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.

- Alexis de Tocqueville[3]

1. Introduction

In the *Same-Sex Reference* case, the Supreme Court of Canada had before it the following, four questions:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

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[1] 2004 SCC 79 (hereinafter, *Same-Sex Reference*).
[2] J.R. Lucas, *Responsibility* (Oxford: Clarendon Press, 1993) at 118.
[3] Alexis de Tocqueville, *Democracy in America*, Vol. 2 (New York: Vintage Classics, 1990) at 317, 319.

3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s.5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?[4]

The proposed legislation – which then Justice Minister Martin Cauchon released on 17 July, 2003 – reads as follows:

> WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;
> WHEREAS, in order to reflect the values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended to couples of the same sex;
> AND WHEREAS everyone has the freedom of conscience and religion under the *Canadian Charter of Rights and Freedoms* and officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs;
> NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:
>
> 1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
> 2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.[5]

This proposal was drafted, the questions framed, and the entire bundle forwarded to the Court, as the federal executive's response, in lieu of appeal, to the Ontario Court of Appeal's ukase in *Halpern v. Canada (Attorney General),*[6] which directed that thereafter and immediately,[7] marriage at law must be "reformulate[d] ... as 'the voluntary union for life of two persons to the exclusion of all others.'"[8]

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[4] Order in Council P.C. 2003-1055, dated 16 July, 2003 (File No. 29866) as amended by Notice of Amended Reference, dated 28 January, 2004. The amendment, which added the fourth question, was at the initiative of the minority Martin government; the first three questions are those of the former Chretien government.
[5] *Ibid.*
[6] (2003), 225 D.L.R. (4th) 529, O.R (3d) 161 (hereinafter, *Halpern*).
[7] In this, the Ontario Court of Appeal distinguished itself from the British Columbia Court of Appeal in *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 and from the Quebec Superior Court in *Hendricks v. Quebec (Procureur general)*, [2002] R.J.Q. 2506, both of which courts --

The Supreme Court heard arguments[9] on the four reference questions on 6-8 October, 2004, and delivered its *en banc* opinion,[10] which follows, on 9 December, 2004:

> With respect to Question 1, we conclude that s. 1 of the *Proposed Act* is within the exclusive jurisdiction legislative competence of Parliament, while s.2 is not.
>
> With respect to Question 2, we conclude that s. 1 of the *Proposed Act*, which defines marriage as the union of two persons, is consistent with the *Canadian Charter of Rights and Freedoms*.
>
> With respect to Question 3, we conclude that the guarantee of freedom of religion in the *Charter* affords religious officials protection against being compelled by the state to perform marriages between two persons of the same sex contrary to their religious beliefs.
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> For reasons to be explained, the Court declines to answer Question 4.[11]

Though I shall comment briefly on the significance of the latter in the third part of this comment, my primary concern is the first three, excepting only the Court's opinion as regards s. 2 of the proposed legislation, which opinion appears to me to be plainly and completely correct.[12] More specifically, it will be my purpose, first, to construct and, then, to condemn, the reasoning from which arises the Court's disastrous advice on the remainder of the proposed legislation.

2. Proposal & Premises

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though each reached the same result, and by the same means, as did the Ontario Court, regarding what constitutes a constitutionally proper definition of marriage -- provided Parliament with a period of grace in which to enact proper legislation. Following *Halpern*, a three-member panel of the B.C. Court of Appeal set aside the grace period, in order to allow same-sex couples to marry immediately. As well, during the period following *Halpern* and before the release of the Supreme Court's opinion in the *Same-Sex Marriage Reference*, courts in Saskatchewan, Manitoba, Nova Scotia, Yukon, and Newfoundland & Labrador joined the Courts in *Halpern* and *EGALE* in declaring discriminatory, under s. 15(1) of the *Charter,* the opposite-sex definition of marriage and in putting in its place the *Halpern* definition.

[8] *Halpern* at para. 148. For a summary of, and comment on, the Ontario Court's reasoning to this result, see, DeCoste, "The *Halpern* Transformation: Same-Sex Marriage, Civil Society, and The Limits of Liberal Law" (2003), 41 Alberta L. Rev. 619-642 (hereinafter, *Transformation*).

[9] These arguments were tendered by counsel (all counted, thirty-one of them) representing both the Attorney General of Canada and a host of interveners (nineteen in all, several of which were multi-party).

[10] 'Opinion' in a very precise sense, since reference cases are productive of advice and not of judgments that bind, alter, or otherwise affect the law.

[11] *Same-Sex Reference*, paras. 4-7.

[12] On this, the Court reasoned as follows: because "section 2 relates to those who may (or must) perform marriages," because that matter "necessarily relates to the solemnization of marriage," because authority over that "matter [is] allocated to the provinces" under s. 92(12) the *Constitution Act, 1867*, section 2 of the proposed legislation "does not fall within the *exclusive* legislative competence of Parliament" under its s. 92 (26) authority with respect to 'Marriage and Divorce'. See: *Same-Sex Reference*, paras. 36-39 (emphasis is the Court's).

The pith and substance of the *Same-Sex Reference* resides, of course, in the Court's advice on the constitutional propriety – if not, indeed, the constitutional necessity – of same-sex marriage (Question 2). That advice it puts in a fashion at once succinct and grand (and, one should note, with a veritable flourish of certainty and conviction):[13] "the purpose of s. 1 of the *Proposed Act* is to extend the right to civil marriage to same-sex couples," and that is "a purpose which, far from violating the *Charter*, flows from it."[14] The remainder of the opinion consists of argumentative premises that together, and alone, allow the Court to articulate this view of the constitutional status and significance of same-sex marriage. Those premises are: (a) that there is a distinction that counts, in law and in life as well, between what the Court terms civil marriage and religious marriage; (b) that the authority to define civil marriage resides exclusively with the state through Parliament; (c) that the state through Parliament may define civil marriage in any fashion it wishes, since marriage of that state sort has no fixed constitutional or legal meaning; and (d) that premises 'b' and 'c' are proper, because each is a requirement of a proper understanding of the place and function of the constitution in the Canadian polity. I shall dwell at some length on each, before then proceeding, in the third part of this comment, to the difference all of this makes to the delicate matters, faith and family, that are here the stuff of the Court's charge.

a. The Distinction Between 'Civil' and 'Religious' Marriage

Though the Court hinges the whole of its enterprise on the distinction between civil and religious marriage – straightaway we are told to note that "section 1 of the *Proposed Act* deals only with civil marriage, not religious marriage"[15] -- it avoids both definition and defense.[16] In consequence, neither the sense or senses in which the Court thinks civil and religious marriage different, nor its view of the origins of the difference, is anywhere on display. Indeed, the best that the Court can muster in either regard is armchair sociology and tautology, *to wit*: that times have changed from those when "marriage and religion were thought to be inseparable";[17] that "[m]arriage, from the perspective of the state,[18] is

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[13] *Same-Sex Reference*, para. 43 (emphasis added):

> Turning to the substance of the provision itself, we note that s. 1 embodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the *Proposed Act* and the Preamble thereto, points *unequivocally* to a purpose which, far from violating the Charter, flows from it.

[14] *Ibid.*, paras. 41 & 43.

[15] *Ibid.*, para. 1.

[16] As of course did the executive, initially in its framing of the reference and subsequently in its written submission. Regarding the latter, see *Factum of the Attorney General of Canada* (dated 24 October, 2003) paras. 1-2 & 11-16 (available at: http://canada.justice.gc.ca).

[17] *Same-Sex Reference*, para. 22.

[18] That it speaks in this way knowing full well that when Parliament has twice spoken on the matter, it did so to affirm heterosexual marriage, renders its speech both disingenuous and a remarkable departure from the separation of powers. These affirmations were each, of course, in response to judicial initiative on same-sex marriage. The first was by way of a Commons motion, which was passed on 8 June, 1999 by a vote of 216 to 55 in favour, and read as follows: "[M]arriage is and should remain the union of one man and one woman to the exclusion of all others, and … Parliament will take all necessary steps to preserve this definition of marriage in Canada." For the second, which was no mere motion, see *infra* note 86.

a civil institution";[19] and that "civil marriage" is (presumably in consequence) "a legal institution."[20] The distinction, then, *must* be taken simply as an assertion, a claim, that civil and religious marriage are free-standing institutions,[21] which is to say, that they each exist (the former in the political sphere and the latter in social life) and that they are both separate one from the other and unrelated the one to the other.[22]

This bald assertion is the critical first step towards the Court's constitutional destination. Firstly, so to assert is to establish, by mere *fiat*, the required state jurisdiction over – indeed, its ownership of -- some form of marriage. Secondly, mere and simple statement of the distinction handily elides matters that might otherwise have complicated the jurisdictional claim. Chief among these is the question of the relationship that *ought* properly to obtain between the (liberal) state and the institution and practices of marriage.[23] Clearly, had the Court framed that question, other, wider questions concerning the relationship of the state to social life generally and to religious and family life specifically, would have appeared. And had they appeared, the Court, I should think, would have been led to compose an opinion very different, in tone if not in substance, from the opinion it finally rendered.[24] Rather than mature normative analysis of this sort, the Court appears instead content to play on, and then to cede legal and constitutional authority to, the common sense that there is a difference between marriage at city hall and marriage at a church (or synagogue, temple, or mosque). Common sense, however, makes for poor political philosophy and practice, and, in any event, it ought not, ever, to serve as a basis for judicial opinion on the proper reaches of state power. Or, so at least I shall argue when I again take up the distinction in the third part of this comment.

b. State Authority over 'Civil' Marriage

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[19] *Same-Sex Reference*, para. 22. This formulation will be considered in the third part of this comment.
[20] *Ibid.*, para. 42.
[21] See for example, *ibid.*, para. 16 ("The dominant characteristic of s. 1 of the *Proposed Act* is apparent from its plain text: marriage as a civil institution. … [T]his section stipulates the threshold requirements of that institution.).
[22] As put by the Court: "The *Proposed Act* is limited in its effect to marriage for civil purposes: see s. 1. It cannot be interpreted as affecting religious marriage or its solemnization." (*ibid.*, para. 55). Yet, there may be some uncertainty here: see, *ibid.*, para. 52 ("The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law….").
[23] Incidentally, that first the executive and then the Court monikers the marriage over which the state has authority 'civil' lends a note of irony to matters, since in our tradition the adjective 'civil' – as in civil rights – is generally meant to impart that the matter so described exists prior to, and independent from, the state. See for example: Lloyd L. Weinrib, "What Are *Civil* Rights?" (1991), 8 *Social Philosophy & Policy* 1 at 2 (arguing as follows: "Civil rights are … prior and independent from law. Laws are enacted to protect civil rights; failing enactment, the law is said to deny them. They seem, therefore, not to depend upon the law for existence, but only for their recognition"). For the notion of the civil more widely considered as civil society, see *infra* Part 3 (a).
[24] The tone of the Court's text is at once summary and dismissive. See for *e.g. Same-Sex Reference*, paras. 24 ("none of these arguments persuade"); 25 ("the appeal to history in this particular matter is not conclusive"); 30 ("it is therefore distinguishable and does not apply here"); 33 ("this is clearly not the case"); 48 ("this argument was discussed above … and rejected"). This tone is not incidental hubris; it is instead a necessary consequence, and expression, of the Court's conviction about the moral stature and place of the constitution. About which see *infra* Part 2 (d) & *Transformation supra* note 8 at 641.

After birthing 'civil' marriage by these meager means, the Court next delivers 'civil' marriage to the care of the state. Its reasoning to this consignment is simple enough: (a) section 1 of the *Proposed Act* "pertains to the capacity for marriage";[25] (b) section 91(26) of the *Constitution Act, 1867* "confers on Parliament legislative competence in respect of the capacity to marry";[26] (c) consequently, "s. 1 of the *Proposed Act* … falls within a subject matter allocated exclusively to Parliament."[27] Yes, simple, it is; but as do all such syllogistic flourishes in law, this one too hides and shelters an absence that makes mockery of the certainty being tendered.

Over the past several years, the Supreme Court of Canada has made much of purposive, contextual reasoning, especially so as regards the interpretation of constitutional provisions. Proper interpretation of a constitutional provision, the Court has declared, begins with an examination of "… the meaning of its words, considered in context and with a view to the purpose they were intended to serve."[28] Had this imperative been honoured here,[29] the Court would have sought to establish the purpose served by the relevant provisions of the *Constitution Act, 1867*,[30] which is to say, the purpose served by the split authority over marriage erected by s. 91(26), which confers authority over 'Marriage and Divorce' to Parliament, and s. 92(12), which confers on the Provinces authority over 'Solemnization of Marriage in the Province'. In so doing, the Court would have been driven to examine the legal history of the state's involvement in marriage, not just here in Canada,[31] but more importantly in Britain, whose constitution the *Constitution Act, 1867* declares its model. It would have then confronted the legal and social facts which would be the very stuff of purposive interpretation, namely, that because the date of the state's first involvement in marriage is available, and because marriage as a social practice and institution of course existed prior to that date, and therefore independently from the state, the state's purposes, including the purpose authorized by s. 91(26), might concern matters other than exercising power over marriage and subjecting it to its will.[32]

That the Court offers slick syllogism in the place of serious inquiry does, however, pay dividends, since it makes both easy and intelligible its next mission, the sounding of the depths of the state's authority over 'civil' marriage.

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[25] *Ibid.*, para. 16.
[26] *Ibid.*, para. 18.
[27] *Ibid.*, para. 19.
[28] *R. v. Blais*, 2003 SCC 44 at para. 16.
[29] Incidentally, the Court distinguishes *Blais* in manner both curt and specious: see *Same-Sex Reference*, para. 30.
[30] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
[31] In its *Factum* , the federal executive put before the Court a not-very-helpful, and very brief, legal history of the state and marriage in British North America: see *supra* note 16, paras. 12, 25-27, 29. A better history would direct the Court to proceed in its interpretation from the facts of social and especially religious life in Canada at that time. Viewed from that vantage, the split constitutional authority over marriage would appear designed to recognize and preserve the differing social practices of marriage and in that way to prevent either order of government from favouring one at the expense of the other. That interpretation, of course, would preclude rendering the provisions, as the Court does here, so as to vest ownership of marriage in the state.
[32] For more on the social and legal history of marriage, see *infra* notes 79 to 86 and accompanying text.

c. The State's Authority Over 'Civil' Marriage is Limitless

Several interveners confronted the Court with the following argument: that Parliament's authority over civil marriage under s. 91(26) excludes the authority to define marriage in any fashion it wishes, either because the word 'marriage' as used in s. 91(26) has a fixed meaning[33] or because a same-sex definition "would trench upon subject matters clearly allocated to the provincial legislatures" under s. 92(12).[34] It is not important for present purposes to dwell on the arguments proffered by the interveners in support of these submissions, and not only because they are so woefully unimaginative.[35] Nor, need we dwell, on the Court's response to them. Rather, what is important so far as the overall structure of the opinion is concerned is the Court's conclusion, namely, that "the meaning of marriage is not constitutionally fixed."[36]

This must to be taken to mean that, subject to judicial oversight[37] (and one wonders upon what, having granted the legislative branch such a plenary authority, the judicial gaze could then fix),[38] the state through Parliament may make of marriage anything it wishes. Now, this goes well beyond parliamentary supremacy in the Diceyan sense.[39] What the Court is here endorsing, rather, is a positivism writ so large that the sovereign's power is bled of any normative content or constraint and so permitted, as matter of constitutional principle, to pursue whatever instrumentalism, however coarse, it wishes, for any reason it may wish.

d. Constitution as Encomium

The Court secures its view of state authority over civil marriage (and subsequently its view of the constitutional propriety of same-sex marriage) through a political epistemology which, though it has established itself as the *idée recue* among

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[33] *Same-Sex Reference*, para. 20. Fully stated the argument was that "the meaning of marriage is constitutionally fixed, necessarily incorporating an opposite-sex requirement," because s. 91(26) 'effectively entrenches the common law definition of 'marriage' as it stood in 1867" (*ibid.*, paras. 20-21).
[34] For full statement and Court's rejection of this submission, see *ibid.* paras. 31-33.
[35] Unimaginative: the first because intentionalist interpretation remains so in disfavour and so easily set aside (but see: L. M. Solan, "Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation", *Brooklyn Law School Public Law and Legal Theory Research Paper Series: Research Paper No. 5, March 2004* (available at: http://ssrn.com/abstract=515022); and the second because it both misses the real point and makes the point it does address so badly.
[36] This conclusion appears in the opinion as a sub-heading between paras. 20 and 21, *Same-Sex Reference*.
[37] As put by the Court: "In essence, there is no topic that cannot be legislated upon, though the particulars of such legislation may be limited by, for instance, the Charter" (*ibid.*, para. 34).
[38] Though having nothing upon which to fix judicial action has deterred none of the courts whose machinations have led to the present. Take, for instance, the Court in *Halpern*: it credentialized its directive concerning the law of marriage by latching onto the House of Lords judgment in *Hyde* (*infra* note 87) which through cynicism or stupidity (and on the necessarily implied premise that before 1866, neither the state nor the law had any conception of what marriage might be), it read as constituting marriage at law as the union of one man and one woman to the exclusion of all other. For commentary on this aspect of *Halpern*, see *Transformation supra* note 8 at 622-625.
[39] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillian & Co., 1924), Chp. 1.

constitutional lawyers and judges in Canada, is most peculiar indeed. Under this view of matters, the Canadian constitution – the whole of it: the *Constitution Act, 1867* [40]every bit as much as the *Canadian Charter of Rights and Freedoms*[41] – has a purpose deeper and wider than, and different from, the limitation of state power over individuals and social life. In Canada, rather, the constitution aims at "structuring the exercise of power by the organs of the state"[42] in order, first, to secure "the continued relevance and … legitimacy" of the state's "constituting document"[43] and, then, to "promot[e] [constitutional] rights and values" so as to "enrich … our society as a whole."[44] To achieve these ends, judicial interpretation of constitutional provisions must be "large and liberal, or progressive,"[45] by which is meant, at least, that provisions must be rendered so as to "accommodate and address [the judicial branch's view of] the realities of modern life."[46]

This view, which, borrowing from Lord Sankey's speech in *Edwards v. Attorney-General for Canada*,[47] devotees term the "'living tree' principle,"[48] informs an "ambitious enterprise"[49] that serves to expand state power and aims to bond those subject to its rule to its values in the place of their own. That this turns liberal political and legal philosophy and practice upside-down and sideways should be obvious, but the reasons bear reiteration.

There are two. So far as the law generally is concerned, to think that its proper purpose is somehow about moving forward – about making better and more perfect and whole and complete the life-world – is to commit, in equal and fateful measure, to political perfectionism[50] and to unlimited government.[51] Both of those precepts, of course, violate commitments constitutive of the liberal state, the commitment, on the one hand, to leave alone those subject to its rule provided only they cause no harm, and the commitment, on the other hand, that follows ineluctably from this, namely, the commitment to limited and moderate government. I shall pursue these matters at greater length in the next section of this comment. It is the second reason, which concerns the place and status of a constitution in the liberal state, that is of more immediate concern.

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[40] *Supra* note 30. For the Court's declaration that heads of power are subject to "progressive interpretation," see *Same-Sex Reference*, paras. 22 & 29.
[41] *Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982* (U.K.), 1982, c. 11.
[42] *Same-Sex Reference*, para. 23.
[43] *Ibid.*
[44] *Ibid.*, para. 46.
[45] *Ibid.*, para. 23.
[46] *Ibid.*, para. 22.
[47] [1930] A. C. 124 (P.C.).
[48] *Same-Sex Reference*, para. 24.
[49] *Ibid.*, para. 23.
[50] For recent work concerning, see: Steven Wall & George Klosko, eds., *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, MD: Rowman & Littlefield Pub., 2003); & George Sher, *Beyond Neutrality: Perfectionism and Politics* (New York: Cambridge University Press, 1997).
[51] See *e.g.*: Arthur A. Shenfield, *Limited Government, Individual Liberty and the Rule of Law* (Chettenham, UK: Edward Elgar Pub., 1998); & Eugene W. Hickok *et al.*, eds., *Our Peculiar Security: The Written Constitution and Limited Government* (Lanham, MD: Rowman & Littlefield Pub., 1993).

In addition to (and even as part of) securing limited government, the constitution of a liberal state may, as does the American constitution,[52] serve as a myth of origin in the sense that it tells people about where their political arrangements came from and how the situation in which they live came about. What a liberal constitution may not do is create a caesura that separates a people from its past or propose a future for them that betrays limited government. Under the custodianship of Canada's judicial branch – and, increasingly, with the connivance of an ideologically committed federal executive[53] and a weakened Parliament (and always, I should add, with endless applause from the legal academy) – the constitution of Canada has, since the advent of the *Charter* in 1982, been interpreted so as to commit both these cardinal sins.

Authoritarian states are revolutionary states of a specific sort. They defend and articulate their legitimacy in terms of their over-throwing of forms of life, political and private, which, according to their revolutionary calculus and consciousness, have in the past subjugated the 'people'. Revolution of this variety makes good its promise of a new and renewed life of (generally social) justice by erasing the *ancien regime* and cleansing the people of any remaining affection for it. And because their legitimacy resides only and always in this, authoritarian states are activist states, bent perpetually to the task of weeding the garden of life of the past.

Because they seek legitimacy in the consent of the governed, liberal states, even those born of revolution, take a very different attitude to the past. For a start, they take seriously the real past of the people and do not, in consequence, seek its erasure, even when, under exceptional circumstances, they may for good reason judge parts of that past wanting.[54] Nor, therefore, do they seek to reconstruct the received past in service to any dream that conjures up a life-world begun anew from scratch. Liberal states, rather, honour the people's past by seeking their consent in terms that acknowledge and proceed

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[52] See for example, Bruce A. Ackerman, *We The People, Vol. 1: Foundations* (Cambridge, MA: Harvard University Press, 1991).

[53] Minister of Justice Cotler has, since his elevation to the federal executive, quickly established himself the poster-boy of this ideological fervour. Recently, he intoned as follows: "The Charter is the expression and entrenchment of our rights and freedoms, the codification of the best of Canadian values and aspirations. It defines us as to who we are as a people and what we aspire to be" ("Tories vow to amend new bill" *National Post*, 2 February, 2005, A8). Even were this view not preposterous as political philosophy – and in a moment I shall attempt to convince that it is – it would remain silly, both because the provisions of *Charter* are no more than a local iteration of standard constitutional protections and because Canadian political and social history did not begin in 1982. Concerning the latter, in a news release attending the tabling of Bill C-38 (about which see *infra Postscript*), the Minister persists, with pride, in this historical revisionism: "Canada," he is quoted as declaring, "is a land built on a tradition of tolerance and respect, rooted in a Charter…." (available at: http://canada.justice.gc.ca/en/news/nr/2005/doc_31374.html).

[54] There is a caveat here, a narrow but nonetheless essential one: if a social institution stands so egregiously at odds with liberal political morality that its continuance clearly compromises the liberal credentials of the state and so its status as a liberal state – such as was the case with slavery in antebellum America – then a liberal state has an obligation, just because it is a liberal state, to take on the task of abolishing the institution. For an exploration of the proper response of the liberal state to 'bad civil society' of a less threatening sort – there defined as civil associations that "actively and publicly challenge [the value of reciprocity] through the promotion of hatred, bigotry, racism, anti-Semitism, and aggressive xenophobia" (839-840) – see, Simone Chambers & Jeffrey Kopstein, "Bad Civil Society" (2001), 29 *Political Theory* 837.

from that past. For just this reason, in liberal states, the law is viewed as belonging to the people: it embodies *their* whole way of life, and it originates not in the will of the sovereign, in any of its three guises, but in the traditions and practices of the people whose law it is.

States resign their liberal credentials when they succumb to the temptation to reject the people's past in service to delivering them to a better, because cleansed, future. With rare exception,[55] the vast constitutional jurisprudence excreted by the judicial branch since 1982, has revealed a Canadian state quick to reject the past in just such a service. This is very much on display in the opinion here at issue. When it is argued that the people's past has proper normative and legal bite on the present, the Court declares that past now unacceptable[56] and opines that the present must be managed, and the future defined, in terms of its view of the present circumstances of the people.[57] When it is submitted that "marriage is a pre-legal institution and thus cannot be fundamentally modified by law,"[58] the Court once again musters poor old Lord Sankey[59] to construct, irony entirely absent and certainty fairly oozing, this reason for rejecting in its entirety the people's past: "Several centuries ago it would have been understood that marriage should be available only to opposite-sex couples. The recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies this assertion today."[60] When, finally, it is submitted that marriage has a natural meaning – which is to say, the meaning conferred upon it by the traditions and practices of the past – the Court declares that it falls to the "proponents" of this view to "identify an objective core meaning";[61] that different proponents proffered "competing opinions on what the natural limits of marriage may be";[62] and that, because Lord Sankey – yes, His Lordship yet again – "did not impose an obligation to determine, in the abstract and absolutely, the core meaning of constitutional terms … it is not for the Court to determine in the abstract what the natural limits of marriage must be."[63] So, with and for reasons such as these, does this Court trivialize, reject, and erase the people's past. And with them as well, it abandons, not only those who would cleave to this past, but also its core and abiding obligation "to preserve the community of law, to discover and articulate the conditions under which political

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[55] As regards the instant matter, I think of Justice LaForest's comments in *Egan v. Canada*, [1995] 2 S. C. R. 513. In a remarkably short period, LaForest's concession of marriage to the realities of social life and human biology has been everywhere erased from judicial and governmental memory.

[56] That the Court, in an off-handed manner, pinned the past's unacceptability on its association with Christianity will be addressed in the third part of this comment. As put by the Court, after what appears to be a reiteration of the silliness in *Halpern* (see *supra* notes 8 & 38) with respect to the significance of the decision in *Hyde*: "The reference to 'Christendom' is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society." *Same-Sex Reference*, para. 22.

[57] *Same-Sex Reference ibid.*

[58] *Ibid.*, para. 24.

[59] *Supra* note 47.

[60] *Same-Sex Reference*, para. 25.

[61] *Ibid.*, para. 27.

[62] *Ibid.*

[63] *Ibid.*, para. 28.

fraternity is possible."[64] No such fraternity is possible, of course, where the discovery articulated is that the views of some – that, in this case, they appear to be the many is no matter[65] – are so beyond the constitutional pale that they represent a now dead, because unacceptable, history.

The sub-text of this abandonment of the past, the grammar that lends it whatever cogency it may have, is the Court's view of the positive contribution of the constitution. But the sketch that I have so far offered of this understanding[66] is not enough, since the devil of unlimited government very much resides in the details to which we must now briefly attend.

The 'living tree' notion of the place and status of the constitution is saved from demagoguery just and only because the values that it aims to articulate, legitimize, promote, and spread, all remember for the continuing enrichment of society, are *state values*. Thus, does the Canadian constitution become an encomium to the state, and the judicial branch its solipsistic choirmaster. Thus too does the state, through its constitution, commit itself to a redemptive politics that, by means and medium both, makes jest of limited government.

Redemptive politics is a politics of conviction. The redemptive state is a state convinced that its proper purpose is to improve its subjects by imprinting on them, on their projects and character, the values that the state has made its own and declared superior. Such a state is not merely a custodian and guardian of the people's proper values, though it is clearly both. The redemptive state, rather, conceives of itself as the personification of those values and, with that, of the lives of the governed properly lived. Which is to say, state and people are, in theory, one, and so do they in fact become to the extent that the state succeeds in disarming the people of values that contradict or diminish its values. But this transformation, of the state into a person and persons into expressions of the state, comes at the cost, in equal measure, of moral arrogance by the state and of the moral disablement of the people. "[T]o make [of the state] a unity and a person and then to attribute to it moral existence and moral rights" requires an arrogant analogical leap – that the state has this existence and those rights because it is *like* a person – that cheapens and distorts real existence, not least because it "creates a world" in which politics is no longer, in the fashion required by liberal political morality, "discontinuous with everyday life."[67]

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[64] Anthony Kronman, "Living in the Law" in David Luban, ed., *The Ethics of Lawyers* (New York: New York University Press, 1994) 835 at 870. If Habermas is correct, then this view of judicial obligation has deep roots indeed: see, Jurgen Habermas, *Moral Consciousness and Communicative Action*, trans. Christian Lendhardt *et al* (Cambridge, MA: MIT Press, 1990) at 68 ("the justification of norms and commands requires that a real discourse be carried out") 103 ("only those norms may claim to be valid that could meet with the consent of all affected") and – especially apposite here – 109 (rejecting judgments that are "dissociated from the local conventions and historical coloration of a particular form of life").

[65] According to a poll published by the *National Post* (2 February, 2005, A1), 66% of Canadians support what the pollsters termed 'the traditional definition of marriage'.

[66] *Supra* notes 41-45 & associated text.

[67] George Kateb, *The Inner Ocean: Individualism and Democratic Culture* (Ithaca, NY: Cornell University Press, 1992) at 207 & 211.

This morally laden and motivated Leviathan has as its means, everywhere it is constructed, a reconceived citizenship and, in liberal democratic states such as ours, it is always legitimated through the soothing medium of human rights. Consistent with the its view of the constitution as an encomium to its values, the redemptive state considers citizenship, not as a burdensome cost of liberty, but as a celebration of, and, in its proper conduct, as a commitment to, those values. Citizens are for it the means of its moral mission, and their commitment is the test of its moral accomplishment.

That those values are often, as in Canada now, conflated with human rights and human dignity, makes declining the state's offer of neo-citizenship a tricky and sticky affair. Though those human rights, and the dignity they are said to protect, are never conclusively defined nor ever finally disclosed,[68] by declaring its values to be expressive of them, the neo-liberal state, ours especially included, repositions itself in fundamentally important ways with respect to its subjects. Whereas under the liberal view, a constitution has as its proper object the constraint of executive and legislative power, takes as its object the validity of legal rules, and has as its focus the relationship between the state and its subjects as citizens (and *not* as persons), the neo-constitution of human rights and dignity produces a very different normative typography. If the constitution is about human rights, then the concern of constitutional discourse and decision is the settlement of state norms concerning those rights and, with that, the consolidation of state power with respect to them; its focus is the relationship, as regards those norms, between the state and its subjects, *not* as citizens, but as human persons; and the entire enterprise is finally informed, not by the constrain of state power, but by those very state norms, the settlement of which is the constitution's mission.[69]

In this morally engorged and socially imperialist state, law becomes the bride and pride of power and ceases to be "the bridle of power" that, since Bracton, our tradition has named it to be.[70] No longer does it shield the people from the state; the abnormal[71] law of the neo-liberal, redemptive state, rather, renders them, through its insistent demands on them as persons, expressions of the state's power.

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[68] Disclosure of both the unintelligibility and the ideology of human dignity and rights, happily, has recently begun. To sample the former, see Timothy Caulfield, "Human Cloning Laws, Human Dignity, and the Poverty of the Policy Making Dialogue" (2003), 4(3) *BMC Medical Ethics* 1; and for the latter, see James Q. Whitman, "On Nazi Honour and the New European 'Dignity'" in Christian Joerges & Navraj Singh Ghaleigh, eds., *Darker Legacies of Law in Europe* (Oxford: Hart Pub., 2003) 243.

[69] I have explored these matters in more detail elsewhere: see, DeCoste, "Law Transcendent: The Judicial Conquest of Ordinary Life" (2004), 8(1) *The Newman Rambler* 1.

[70] I refer here of course to, and the quoted phrase is taken from, Henri de Bracton, *De Legibus Et Consuetudinibus Angliae* (1220-1230) which is available redacted and in translation in Daniel R. Coquilette, *The Anglo-American Legal Heritage* (Durham, NC: Carolina Academic Press, 1999) 88 at 92.

[71] I mean 'abnormal' in the Kuhnian sense of paradigm shifting: see Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago: University of Chicago Press, 1970) esp. Chp. 8.

These four premises, along with the concepts and conceptions on which they depend, are, then, the powder that ignites the Court's constitutional mission and compels it to its constitutional destination. At first blush, that destination might appear a curious one. As mentioned earlier, the Court opines that same-sex marriage is not merely consistent with the *Charter*, but that it "flows from it."[72] The curiosity resides in the notion, on display here, that the constitution of a liberal state is properly conceived as a foundry of values *to* which the state is bound and not merely as a bulwark *by* which it is bound. In the liberal view, of course, the constitution plays no such positive purpose: it is no more and no less than an institutional strategy to limit state power. Under the Court's view, the constitution serves the very different purpose of instructing the state on how properly to exercise its power. Viewed from that vantage, the Court's opinion must, I think, be read as declaring that same-sex marriage is a constitutional necessity.

Yet, given these premises, this should not surprise. If the state is indeed the personification of communal values and if it is therefore pledged to seed those values amongst its subjects, then it makes abundant sense to articulate, in ever finer detail, which values it must personify and promote. That this is at loggerheads with representative government and majoritarian rule appears to be of no moment to this Court or to any of the many other devotees of Canada's recently minted constitutional tradition.[73]

3. The Proper Place of the Political

As noted previously, the Court at one point opines that "marriage, *from the perspective of the state*, is a civil institution."[74] This assertion conceals two premises, namely, that it is proper for the state to take a view on social institutions like marriage, and that the view taken by it here is the proper one. The real and revolutionary importance of the Court's opinion in the *Same-Sex Reference* resides, in my view, in its answer to the executive's views on these matters. I shall proceed as follows: first, I shall take the first premise to concern the relationship that ought properly to obtain between the liberal state and the institutions and traditions of private life and examine the executive's and the Court's views as responses to that concern; second, I shall examine the Court's views of how that relationship works out with respect to those two fundaments of private life, family and faith. In all of this, it will be my purpose to convince, so far as space will permit, that, by establishing the primacy of the political over the social, the same-sex marriage initiative has set the Canadian state on a path that threatens social freedom generally and the freedoms of family and religious life particularly.

a. State and Civil Society[75]

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[72] *Same-Sex Reference*, para. 43.
[73] I have explored the implications of the value-positive view of the constitution at some length in "The Separation of Powers in Liberal Polity: *Vriend v. Alberta* (1999), 44 *McGill Law Journal* 231.
[74] *Same-Sex Reference*, para. 22 (emphasis added).
[75] I can here only sketch this relationship. For a more detailed account, see DeCoste, *Transformation supra* note 8 and "What's the *Charter* Got to Do With It?" in Daniel Cere & Douglas Farrow, eds., *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* (Montreal & Kingston: McGill-Queens University Press, 2004) 120.

Liberal politics expresses, and proceeds from, two core commitments, namely: that the state exists for the sake of persons, for their good and not its own (*the priority of persons*); and that, since the good of persons resides in their authoring their own lives through their freely chosen interactions with other persons, social life is prior, and superior, to politics (*the primacy of the social*). From these two commitments arise the moral sense and the institutional architecture of the liberal state. So far as the first is concerned, the state is, on the liberal view, a "negative virtue" whose character and legitimacy resides in "what it prevents rather than what it engenders."[76] This conception of political goodness alone accounts for the institutional forms so familiar and so intertwined in liberal states, limited government and social freedom. A limited state, a liberal state, is one that acknowledges its devolution from, and containment by, the social and it is, therefore, one for which the social serves as a moral-ethical power greater and higher than its own. Such a state erects barriers to its own power in order to honour the primacy of the social. But its governance does not necessarily end there. The liberal states may also act to preserve and to protect the personal sovereignty of those subject to its rule by supporting the life-forms through which that sovereignty is exercised and accomplished. In this fashion does it deliver its primary good, social freedom, which is but the positive freedom of a free people to construct their lives and affairs by means freely chosen by each of them.

The sphere of social freedom, which the state in this way exists to preserve, is known in liberal political and legal philosophy as civil society.[77] But nothing turns on the name. What is important is the message, at once moral and institutional, that that name is meant to send: first, that there exists a life-world beyond law and politics for the sake of which the state exists and from which it draws its legitimacy; and, second, that the state acts for the sake of that life-world and, therefore, with authority, only when its actions neither diminish nor dominate the life-world. What a liberal state may not do, therefore, is manage the life-world by imposing values, whatever the reason and whatever their source, upon it. And what a liberal state must do, if it does anything at all, is recognize and acknowledge, and in that fashion, honour and preserve, the life-world.[78]

That, in the *Same-Sex Reference*, the federal executive and the Court answered the state-society question in a tone and grammar very different from this should, I hope, be clear. Rather than parsing the argument of the second part of this comment, I wish instead to consider in finer detail the method the state here deployed to claim sovereignty over marriage. From that exploration, one may learn how neo-liberal states like ours seek to

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[76] Stuart Hampshire, *Innocence and Experience* (Cambridge, MA: Harvard University Press, 1989) at 68.
[77] And there is a rich, and steadily growing, literature devoted to it. See for example: Jean L. Cohen & Andrew Arato, *CivilSociety and Political Theory* (Cambridge, MA: MIT Press, 1992); John Ehrenberg, *Civil Society: The Critical History of An Idea* (New York: New York University Press, 1999); Don E. Eberly, ed., *The Essential Civil Society Reader* (Lanham, MD: Rowman & Littlefield Pub., 2000); Simone Chambers & Will Kymlicka, eds., *Alternative Conceptions of Civil Society* (Princeton: Princeton University Press, 2002); & Nancy L. Rosenblum & Robert C. Post, eds., *Civil Society and Government* (Princeton: Princeton University Press, 2002).
[78] The caveat noted earlier – see *supra* note 54 – of course continues here to apply.

maintain legitimacy despite their transgression of fundamental precepts of liberal governance. One might also learn something of the consequences of their so doing.

What such states do, and what the Canadian state has done here, is to pretend that their perfectionist programmes and policies conform to, and sound in, the commandments of liberal governance. In the *Same-Sex Reference*, there are two such pretenses: first, that the state remains constrained by a higher moral-ethical power; and, second, that legal history secures the state's view that marriage exists in two forms, a political form (civil marriage) and a social form (religious marriage). The first is pretense because it identifies that higher power, not with the life-world beyond law and politics, but with the state's own perfectionist values as they reside in the state's own redemptive constitution. The second, on which I will dwell, is pretense because legal history, honestly and seriously considered, supports no such distinction between civil and religious marriage.

Let me make three things painfully clear: first, there can be no marriage in the required political sense, just because liberal states cannot claim ownership over social institutions (rather – and on the pain otherwise of the loss of their legitimacy -- theirs is either to ignore or else to recognize and to preserve those institutions); second, the civil/religious marriage distinction is fiction, not, note, a legal fiction, but a political fiction, plain, pure, and simple; and, third, the judicial branch has, over the last several years, spun that fiction whole-cloth through its wholesale misinterpretation and misrepresentation of legal and social history.

So far as the latter is concerned, the facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and (c) the Catholic Church only began requiring the attendance of a priest for valid marriage in 1563, after the Reformation.[79] The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke's *Marriage Act*, that the British state became a significant player in the joining together of men and women as husbands and wives.[80] However, the manufacture of the distinction is not a consequence alone of a

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[79] In 1563, the Council of Trent adopted the decree *Tametsi*, which, certain exceptions aside, invalidated marriages that did not take place in the presence of the parish priest of one of the couple and of at least two witnesses. The decree reversed what had been the Church's law since at least the twelfth century, that marriages entered into clandestinely, without ceremony and without the presence of a priest, were valid, even if unlawful. By the sixteenth century, virtually every European state had either adopted the decree *Tametsi* or promulgated secular legislation to the same effect, to invalidate clandestine marriage. England remained the exception, until the promulgation in 1753 of Lord Hardwicke's Act: see *infra* note 80. See: Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, abr. ed. (London: Penguin, 1979) at 30. See also Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press., 1983) c.6.

[80] With this *Act,* England finally joined Europe in invalidating clandestine marriage. The *Act* was replaced in 1873 with a statute that remains in force in England and that, in one fashion or another, is the law in every Anglo-American legal jurisdiction. The lesson of the *Act,* and its continuing influence, for present purposes, is this: that the *Act* was intended, by in effect replicating Church law, to support marriage and not to proclaim state sovereignty over it. See: R. B. Outhwaite, *Clandestine Marriage in England, 1500-1850* (London: Hambledon Press, 1995); Rebecca Probert, "The Judicial Interpretation of Lord Hardwicke's Act

failure by our judges to acknowledge and address the history of the institution on which they had set their constitutional sights. Alas, they had also to manhandle, in fashion approaching deceit, the state's relationship to marriage, over the wealth of our tradition and since 1753 particularly.

The distinction between civil and religious marriage can serve as permission to make marriage pass (neo-)constitutional muster, only if civil marriage might somehow be construed as a positive act of the state. But this is no easy matter. None of the classics of our legal tradition – not Bracton,[81] Fortescue,[82] Coke,[83] or Blackstone[84] – at all helps in construing marriage as a construction of the state: though each of them deals with marriage,[85] none of them defines marriage nor reports any court as having done so. Nor does legislative history assist. Until quite recently,[86] the legislative branch found it unnecessary to define marriage; rather, whenever the state spoke of marriage, it apparently proceeded on the assumption that marriage had a social and legal meaning so plain that taxing it with definition was besides any point.

None of this, however, has served to impede our committed judiciary. On the bare basis of an 1866 House of Lords decision, it has, rather, sought to convince that civil marriage is indeed a state-created entity that might, unlike religious marriage, properly be made to dance to the state's constitutional tune. *Hyde v. Hyde and Woodmansee*[87] concerned whether a party to a polygamous marriage contracted in a foreign jurisdiction (there Utah) was entitled to matrimonial relief or to a declaration as to the validity of the marriage in the English courts under the Divorce Act then governing those matters in England.[88] The Court in *Hyde* answered negatively in both regards, and those answers remained the rule in *Hyde* until abolished by statute. *En passant*,[89] the Court delivered itself of the following opinion on the nature of marriage:

1753" (2002), 23(2) *Journal of Legal History* 129; Stone, *ibid.* at 29-34; & John R. Gillis, *For Better, For Worse: British Marriages 1600 to the Present* (Oxford: Oxford University Press., 1985), esp. 17-31, 88-89.

[81] *Supra* note 70.

[82] Sir John Fortescue, *On the Laws and Governance of England* (*circa* 1470) ed. by Shelley Lockwood (New York: Cambridge University Press, 1997).

[83] Sir Edward Coke, *Institutes of the Laws of England* (1628, 1642, 1644) (London: W. Clarke & Sons, 1817).

[84] Sir William Blackstone, *Commentaries on the Laws of England*, (1765-1769) (Chicago: University of Chicago Press, 1979).

[85] Each, rather, deals with the rights and obligations attaching to the status of husband and wife and, in so doing, with the doctrines of unity and consortium that together defined the nature and content of the marital relationship at common law.

[86] The move to definition was a response to judicial occupation with same-sex marriage. This response took shape first in a Commons motion (see *supra* note 18) and subsequently in Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations* [now: *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12], s. 1.1 of which reads as follows: "for greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage,' that is, the lawful union of one man and one woman to the exclusion of all others."

[87] (1866), LR 1 P&D 130 (hereinafter, *Hyde*).

[88] This analysis of *Hyde* is taken in large part from *Transformation supra* note 8 at 623.

[89] I say 'in passing', because, since the matter at issue in *Hyde* was polygamy and not heterosexuality, the definition, on a strict reading, is *obiter* as regards the latter.

> What then is the nature of this institution as it is understood in Christendom? Its incidents vary in different nations; but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some prevailing identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.[90]

According to our judges – including, apparently, those sitting in the *Same-Sex Reference*[91] – these words prove that marriage, in its civil form, is a positive creation of the state. But, of course, the definition in *Hyde*, on *any* responsible reading, proves no such thing. Just the contrary: what the Court was, by its own account, about in *Hyde* was not prescription, but *recognition*. That is, the Court was undertaking, not to legislate what constitutes marriage, but rather to determine what in societies such as ours is recognized as constituting the form of life, the "institution,"[92] we know as marriage. That the Court takes pains to distinguish the institution itself from "the variety of legal incidents" that "the laws … throw about" the institution makes plain, I should think, that it was not conflating marriage as a cultural practice with the law of marriage, and, still less, claiming state sovereignty over marriage.[93] So viewed, the rule in *Hyde*, if there be there a rule at all, is that marriage is a form of life to which the state in certain measure responds, but which it does not itself create.

There *is* a distinction that is properly at play here, but that distinction does not reside in the *faux* distinction, concocted by the judicial branch, between civil and religious marriage. The distinction that counts is, rather, the distinction between state and society. The Supreme Court, of course, hides behind its investment in the civil-religious distinction, in order not once to acknowledge that this is so. Yet, by the same means, it *does* nonetheless provide an answer to the law and society question, at least so far as marriage is concerned. That answer is this: that, as regards this form of life, the political has primacy over the social. Nor is this answer modestly delivered: because marriage has no fixed political or legal meaning, it stands now entirely as the handmaiden of the state, at beck and call to the state's always revisable interests and values. Whether this commitment to the primordiality of political causation can be made, as the Court appears to think, without cost to the remainder of social life – and to family and religious life particularly – is the matter to which we must now turn. That this now becomes a necessary concern discloses, without more, the significance of the departure undertaken by the Supreme Court in the *Same-Sex Reference*.

b. Faith and Family: Place and Consequences

Faith and family – the practices of transcendence and of the transmission of cultural attachments – stand at the very heart of autonomous social life and, because they do, they

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[90] *Hyde*, at 133.
[91] *Same-Sex Reference*, paras. 21 & 22.
[92] *Hyde*, at 133.
[93] *Ibid.*

are together the primary elements of that moral-ethical order which alone can tame Leviathan and render it the modest and moderate enterprise that liberal political morality commands it to be. Before proceeding to the effects that the present claim of state supremacy over marriage might have on each of these, it will be prudent first to explore, however briefly, the contributions of faith and family to limited government.

-i- Place

As noted earlier,[94] in rejecting what it (incorrectly) took to be the common law legislation regarding marriage in *Hyde*, the Court took exception to the *Hyde* Court's reference to Christendom. As put by the Court: "The reference to Christendom is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society."[95] Now, this is of present interest, not because, assuming the Court meant to declare the *Hyde* Court sectarian, it is clearly wrong.[96] The interest resides, rather, in the passage's display of a woeful historical illiteracy, and in its disclosure of a fundamental misapprehension of the place of religious life in the liberal project.

So far as the former is concerned, it is remarkable indeed that our highest Court appears entirely unaware of the importance, historically, of Judeo-Christian culture to the development of the Euro-American legal tradition. Because space prevents my parsing the relevant literature,[97] two comments will have to suffice. First, it is everywhere (else) accepted that "as a matter of historical fact … the legal systems that are heirs to the Western legal tradition have been rooted in certain beliefs or postulates … such as the structural integrity of law, its continuity, its religious roots, its transcendent qualities…."[98] Second, it is everywhere (else) understood that certain central commitments of that tradition – and here especially included are moral equality and constitutional governance[99] – are unintelligible, both as historical accomplishments and as normative ends, without the sustenance of Euro-American religious culture.

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[94] *Supra* note 56.
[95] *Same-Sex Reference*, para. 22.
[96] Wrong on the following two counts: first, it is very likely, given the text of the entire judgment in *Hyde*, that the Court meant by Christendom simply to refer to states kindred to the U.K because they, like it, are states in the Euro-American legal tradition; second, even were that not the case, the derogatory 'sectarian' would be proper only were it applied with discipline and such discipline would preclude its use as regards the Court in *Hyde*. Regarding the latter, see for example Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (New York: Oxford University Press, 1991) at 106 (defining sectarian argument as one that "relies on experiences or premises that have little if any authority beyond the confines of one's own moral or religious community").
[97] Of which Harold Berman's groundbreaking work is the start and the center. See: *Law and Revolution, supra* note 79 & *Law and Revolution II: The Impact of the Protestant Revolutions on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2003).
[98] Harold J. Berman, "Religious Foundations of Law in the West: An Historical Investigation" (1983), 1 *Journal of Law & Religion* 1 at 41.
[99] See for example: Michael J. Perry, *Under God? Religious Faith and Liberal Democratic Politics* (Cambridge: Cambridge University Press, 2003); Christopher L. Eisgruber & Lawrence Sager, "Religious Liberty and the Moral Structure of Constitutional Rights" (2000), 6(3) *Legal Theory* 253; J. P. Day, "Collective Liberty and Religious Liberty" (1986), 23 *American Philosophical Quarterly* 243; and,

Not only is religion central historically in these ways, the project of modest governance is impossible to conceive without the sorts of persons marked by the self-conception that religion makes possible. Human beings are transcendence needy beings every bit as much as they are resource dependent beings;[100] and the institutions of private religious life are a response to the former every bit as much as the institutions of private property are a response to the latter. Nor only that: modest government is no more possible in the absence of private religious life than it is possible in the absence of private property. This is so, in both regards, because modest governance, limited government, requires subjects who conceive of themselves as independent from the state and who seek their spiritual and material ends, not through and in the state, but by means of the institutions, the patrimony of private life, which exist beyond the state.

All of this holds, historically and normatively, for family as well. The Western ideal of the family arises, simultaneously, from the acknowledgement of, and from an attempt to overcome, the frailty of human knowledge and judgment and the ambiguous worth of human creations. Our faith in the family is, for these reasons, at root a rejection of the artifice and arrogance of politics.[101] At the same time, however, the practices of family life have been thought crucial to proper politics because those practices alone are thought capable of forming persons seized of the character and disposition necessary for the flourishing of liberal political culture.[102]

Faith and family, then, are central to the project of liberal governance. They are the sites most subversive of the tendency of states to imperial expansion and despotic consolidation. And they are this both because they are, by nature and stature, the practices most removed from the spirit of politics and because each is, for that very reason, a foundry in which persons of the sort required for limited government are alone to be formed.

-ii- Consequences

The single most important condition of human freedom is the diffusion of power in a society. In societies served by liberal states, power is diffused in two fashions. So far as the state itself is concerned, it is constructed in fashion so that power is spread between its own branches. And so far as society is concerned, the life-world is preserved as the realm of freedom by disenabling politics there and by according special, and indeed sacred, sovereignty to the practices of faith and family. I want to suggest that the

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especially, Emmanuel Levinas, "Reflections on the Philosophy of Hitlerism" (1990), 17 *Critical Inquiry* 63 (trans. Sean Hand).

[100] In the cause of abundant caution, I should add that these claims are made with Hartian modesty in the sense that they arise from "reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live … as long as these hold good…." See: H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 188.

[101] See *e.g.* Philip T. Neisser, "The Will to Harmony and the Pursuit of Family" (1994), 20(3) *Social Theory and Practice* 253.

[102] See *e.g.* Jennifer Roback Morse, "No Families, No Freedom: Human Flourishing in a Free Society" (1999), 16 *Social Philosophy & Policy* 290.

Canadian state's same-sex marriage initiative changes these, the structures of public and private life of free societies.

Committed states – those that believe in a socio-political ideal rather than in always-transient policy ideals[103] – are ideological states, and ideological states are morally unified and structurally consolidated states. I have already characterized the Canadian state as a state unified under the banner of an expansionary, social constitution.[104] Brief attention must now be paid to how a state of that sort degrades and erodes the separation of powers.

Montesquieu claimed that "political liberty … is present only when power is not abused," and that for power not to be abused, "power must check power by the arrangement of things."[105] "In order," he thought, "to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power ballast, so to speak, to put it in a position to resist the other."[106] Thus was he led to distinguish between the legislative, executive, and judicial powers and to propose that "liberty is formed by a certain distribution of the three powers."[107] "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty. … Nor is there liberty if the power of judging is not separate from the legislative power and from the executive power."[108] This must be so, he thought, because power will inevitably be abused, unless one power "is chained to the other by their reciprocal power of vetoing"[109] or unless they are "counter-balance."[110]

According, then, to the classic agonistic view of the separation of powers, the proper relationship between the powers of a state devoted to, and fit for, liberty is one of struggle and resistance. Each of the powers, that is, should be a centre of resistance, one against the other, to the proclivity of the state as a whole to serve its own good rather than the good of the liberty of its subjects. The Canadian state, as delivered in the *Same-Sex Reference*, is no such state. That state, rather, speaks with unified constitutional voice, in service to its settlement of constitutional values, and by means of its assessment of "the realities of modern life."[111] And the branches of this state are, each of them separately and all of them together, bound to the task of "structuring the exercise of [their] power"[112] so as to promote the state's values and, in that way, to enrich society.[113] Such a

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[103] I take the ideal/ideals distinction from Fishkin. See James S. Fishkin, *Justice, Equal Opportunity, and the Family* (New Haven: Yale University Press, 1983) (arguing for a "limited liberalism" which offers conflicting principles without any single vision of the just society).
[104] See *supra* Part 1(d).
[105] Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone, eds., *Montestquieu: The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) at 155 (Book XI, c. 4).
[106] *Ibid.* at 63 (Book V, c. 14).
[107] *Ibid.* at 187 (Book XII, c. 1).
[108] *Ibid.* at 157 (Book XI, c. 6).
[109] *Ibid.* at 164 (Book XI, c. 6).
[110] *Ibid.* at 182 (Book XI, c. 18).
[111] *Same-Sex Reference*, para. 22.
[112] *Ibid.*, para. 23.
[113] *Ibid.*, para. 46.

state, of course, makes jest of the separation of powers and of the liberty that state structure aims to honour and preserve.

The structure of the life-world, faith and family especially, fares no better than does the structure of the public realm under the new day of state governance fully announced and finally accomplished in the *Same-Sex Reference*. My argument in this regard, I should note, is not based on the Court's uncertainty as regards the ambit of religious liberty, as threatening to some as that might (properly)[114] appear.[115] Nor does it arise from the Court's insouciant carriage of objections arising from the maintenance of the traditions of marriage and family life[116] or concerning the effects same-sex marriage may have on marriage.[117] My argument, rather, concerns the socio-legal position in which faith and family are now placed.

Two matters provide entry. When it was argued that "the *Proposed Act* will have the effect of imposing a dominant ethos,"[118] the Court would have none of it and summarily dismissed the concern.[119] Yet, the Court also announced as a value of our constitutional jurisprudence that the *Charter* never be "trivialize[d]."[120] It is in the confluence of these two – the dismissal of concerns over the impact of state on social life, on the one hand, and the cloying solicitude about the status of state values, on the other – that my argument emerges. Simply put, the argument is this: that the Court has elevated politics over social life so as, first, to demand the conversion of the practitioners of faith and marriage to state values and, second, to weaken their fidelity to the life-world.

The elevation arises from the Court's very perspective. For it, social life exists to be located, enclosed, and judged by the state's constitutional values. The practices of social life are, on this view, epiphenomenonal: rather than being seen as prior and superior to state, they are instead reduced to something upon which the state gazes as rights and upon which it may act as of right in service to constitutional equality. So rendered, it is easy, as for this Court, to proceed on the understanding, first, that the state, properly, has a view of social life and, second, that social life has no view of the state,[121] not least any that ought be heard.[122]

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[114] This perception is proper for a variety of reasons, one of which is especially prominent, namely, that Western states have acted as regards religion so as to contain and to diminish religious freedom. See *e.g.* Julien Taieb, "Freedom of Religion: From France to the United States, a National Conflict" (2004), 4(1) *Global Jurist Advances* 1 (Article 1) & Richard W. Garnett, "Assimilation, Tolerations, and The State's Interest in the Development of Religious Doctrine" (2004), 51 *UCLA Law Review* 1.

[115] *Same-Sex Reference*, paras. 58 (freedom of religion subject to "exceptional circumstances which we cannot at present foresee") & 60 (subject to "unique circumstances with respect to which we will not speculate").

[116] *Ibid.*, paras. 24-28.

[117] *Ibid.*, paras. 45-46.

[118] *Ibid.*, para. 47.

[119] *Ibid.*, para. 48.

[120] *Ibid.*, para. 51.

[121] For just such a view – there of the state from the perspective of faith – see James Fergusson, *Church, State and Civil Society* (Cambridge: Cambridge University Press, 2004).

[122] Foreign Affairs Minister Pettigrew recently rendered this with crude and cruel candour: see "Church Told To Butt Out – Same-sex debate no place for religion: Pettigrew" *National Post* 28 January, 2005, A1.

This message – state declared and constitutionally enforced – asks much of its recipients. Minimally, it demands that the state's subjects, as persons, acknowledge the final and binding authority of the state over the life-world. And, to the extent that it succeeds in that demand, it also will effect a conversion among its subjects from the values of private life to public values, at least to the extent that the former, in the state's assessment, conflict with the latter. This, in turn, works the moral weakness mentioned. Fidelity to one's world becomes contingent because fidelity is always subject to state supervision and denunciation.

As the unified state makes jest of limited government, the elevation of the state over social life in these ways makes jest of social freedom. For the test of social freedom is its defense of freedom from and against the claims of law: it does not exist where its dominion is whatever remains, for the time being, beyond the law's empire. Freedom is not concocted from, nor can it be preserved as, crumbs of tolerance from Caesar's table.

c. The Court's Caveat

As noted previously, the Court declined to answer the question, added by the Martin government, concerning the constitutional acceptability of the opposite-sex definition of marriage. My concern here is not the arguments that the Court offers in support of its decision to decline (which, in my view, are, each and all, bootstrapping of a very unhappy sort). My object rather is to examine the difference, if any, its decision on this matter makes to what I am claiming is the overall structure and import of its opinion.

The Court's decision has been widely hailed as an exhibition of judicial wisdom and statecraft.[123] I think these views profoundly mistaken. Rather than statecraft and, even less, an acknowledgement of Parliamentary authority, the Court's decision to decline to answer to this matter signals its determination to elide delivering the message that its own jurisprudence and the conduct of the lower courts in same-sex marriage cases required of it. On the one hand, it sought, as we have seen with much certainty and conviction, to preserve the judgment of the lower courts as regards the constitutional propriety of same-sex marriage. On the other hand, by declining here, it sought to distance itself from the premise on which those courts made their constitutional determinations, namely, that the opposite-sex definition of marriage is constitutionally diseased because incurably discriminatory. Thus does the Supreme Court deliver instead the constitutional alchemy here on display: same-sex marriage is a constitutional commandment, but that commandment does not require the denunciation of the opposite-sex definition. But of course, as the lower courts rightly acknowledged, it does. And sloughing that necessity off to Parliament or worse still to the now diminished communities of faith, to await another day, is the very opposite of candour, wisdom, and statecraft. It is rather sleight-of-hand and prudence of a self-directed and self-serving sort.

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[123] See *e.g.* "Calling Parliament's bluff" *National Post* 10 December, 2004, A 15; Andrew Coyne, "True to the Charter" *National Post* 11 December, 2004, A18; & "How deferential is the Supreme Court?" *Globe & Mail*, 24 January, 2005.

4. Conclusion

A decent society is one in which institutions do not humiliate.[124] A decent state is one whose institutions do not humiliate their subjects as persons. The Canadian state, in my view, is fast becoming an indecent state in just that sense, and I shall conclude this already too long comment with a brief exploration of the causes and consequences of that most unhappy political circumstance.

The immediate cause is, of course, constitutional paternalism. The Canadian state – unprepared as it was, by dint of its parliamentary nature and history, to handle the republicanism abruptly introduced into it by the *Charter* in 1982 – has seen its constitution become, in very short order, not only a means for the expansion of state power over private life, but also the end towards which both the state and society are properly to strive. Need I say, neither this *de facto* expansion nor this normative elevation was undertaken for the purpose of, or by way of, an assault on the institutions, traditions, and practices of civil society. Just the contrary: as paternalism is wont to do, the motive has been benevolence and the means the gradual pollution and, with that, the inexorable assimilation, of one set of values by another. Yet, paternalism is not, for either reason, saved of the sin of humiliation. This is especially so when the values causing the pollution and assimilation are state articulated and sanctioned. For in that case, the lowering of self-respect and self-reliance of persons in their lives and affairs is not a matter of persuasion, but of coercion.

This novel historical and constitutional narrative of course carries many costs, but two in my view are especially important. The first of these is the sapping away of political conscience. For those seized of high-minded constitutional conviction – and this is everywhere on display in the course of the state's carriage of the same-sex marriage matter – nothing remains of a political conscience that restrains because it acknowledges that some things are impossible and that some aspirations cannot be satisfied.[125] Let loose from tradition and traditional moral viewpoints, political conscience instead becomes permission and, as here, actions and policies inconceivable and incomprehensible barely a generation ago become not just imaginable, but, depending on whichever ideology has replaced tradition, necessary.

The second cost is a cost to qualities and experience of social life. The imperialism of the neo-constitution blurs borders, makes porous barriers, and renders possible the impossible. And in so doing, it scrapes away the bumpy, chaotic surfaces of life lived in freedom beyond the state. In its place, the state constructs a life ordered by decree, a life no longer fragmented by difference but flattened by the iron of coercive norms.[126]

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[124] For a splendid book-length exploration of this precept of civilized life, see Avishai Margalit, *The Decent Society* (Cambridge, MA: Harvard University Press, 1996).

[125] Hampshire (*supra* note 76 at 72) captures this perfectly: "When justice needs to be enforced and is enforced, the scene is not one of harmony; some ambitions are frustrated. A barrier is erected, an impossibility declared."

[126] For an exploration of the effects of equality jurisprudence along these lines, see Deborah L. Brake, "When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law" (2004), 46(2) *William & Mary Law Review* xx.

Canada, of course, is alone in none of this. But, due perhaps to its political circumstances, past and present, it has distinguished itself, as it has once again in the *Same-Sex Reference*, as an exceptionally devoted, if not as a very adept, neo-liberal state.

Postscript

We're talking about changing one of the central and longstanding institutions of society.

- Federal Department of Justice (2 February, 2005)[127]

As he tabled the landmark Civil Marriage Act …, he talked with messianic zeal about the "march towards equality in this country" and "proceeding with a transformative constitutional process."

- John Ivison[128]

On 1 February, 2005, the federal executive tabled in the House its legislative response to the Supreme Court's advice in the *Same-Sex Reference*. It tabled the *Civil Marriage Act* – Bill C-38[129] – it says, in order "to extend legal capacity to marry for civil purposes to same-sex couples while respecting religious freedom."[130] And had to do this, it declares, because it "has responsibility to support [the] institution [of marriage]" because "that institution … strengthens commitments in relationships and represents the foundation of family life for many Canadians."[131] What it is in fact doing, of course, is continuing (with renewed vigour and expanded boldness, yes, but continuing nonetheless) the task of

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[127] See: Department of Justice Canada, "Frequently Asked Questions – *Civil Marriage Act*" (2 February, 2005, at 2) (available at: http://canada.justice.gc.ca/en/news/nr/2005/doc_31378.html).

[128] John Ivison, "Rights crusade continues apace" *National Post* 2 February, 2005 at A1. This has been the only report on the Minister's comments on tabling the Bill that I have been able to uncover. Neither the Department of Justice's web site, nor the web site of the Parliament of Canada, so far offers the text.

[129] After a lengthy, ten-part preamble, and excluding a short title provision (section 1), the Bill consists of fourteen sections, the first three of which concern the re-definition of marriage and the remainder of which concern what the Bill terms (as it turns out modestly) "consequential amendments" to a number of other statutes. The re-definition sections read as follows:

> 2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
>
> 3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.
>
> 4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

The Bill is available at the Justice Canada web site (http://canada.justice.gc.ca) and at the web site of the Parliament of Canada (http://www.parl.gc.ca).

[130] Department of Justice Canada, "Background – *Civil Marriage Act*"(2 February, 2005, at 1) (available at: http://canada.justice.gc.ca/en/news/nr/2005/doc_31376.html).

[131] *Ibid* .at 2.

spreading the good news of the constitutional values of which it sees itself as master and commander. Its methodology is what one would expect. Social life will be further occupied by the state; and, through the state's coercive power, social relationships will be, not just re-defined at law, but changed root and branch by law. I wish by way of final comment briefly to disclose how this task is undertaken in this Bill as regards the family and at what cost..

The majority of the "consequential amendments" contained in sections 5 through 15 of the Bill aim, in the statutes at which the sections are directed, to replace the term "natural parent" with the term "legal parent"[132] and the term "blood relationship" with the term "any legal parent-child relationship."[133] Their aim, that is, is to de-naturalize the family by rendering familial relationships, in their entirety, expressions of law. But relationships of that sort – bled as they are of the stuff of social tradition and experience – are no longer family relationships at all. They are rather policy relationships, defined and imposed by the state.

Ways of life disintegrate for any number of reasons. But, two phenomena, in my view, always attend their decline – alienation and forgetfulness. When practitioners of a way of life become detached from their labours, they become only partially engaged in, and tend no longer to experience themselves as fully revealed through, that way of life. Forgetfulness is no less a corrosive force. When practitioners of a way of life lose a sense of historical depth and connection, their sense of the present, as a moment in moral time, tends to fail as well. Tradition militates against both of these forces. It bestows on practitioners a sense of being located in a continuing way of being, one that existed before they came to it and one that will continue after they depart it; and it arms them with a reason transcendent to themselves and, with that, with the will, to resist the forces that, in modern life especially, would lure them into detachment and forgetfulness.

It occurs to me that the initiatives being carried forward in this Bill are an assault on the traditions of family life and that they risk the disintegration of that way of life, at least to the extent that they lure fathers and mothers, and husbands and wives, into detachment from and forgetfulness about the moral point of family life.

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[132] "[L]egal parent replaces "natural parent" in various sections of the *Income Tax Act*. See Bill C-39, ss. 10, 11, 12.

[133] Section 5 of the Bill makes works this replacement in the *Canada Business Corporations Act*, and section 6 does the same as regards the *Canada Cooperatives Act*.