# A Holy Secular Institution

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## 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.

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. This article's overriding goal is to illuminate the playing field, not to score points for one side or the other.

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## A Holy Secular Institution

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.[1] 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 "State civil marriage is exactly that, a ... civil (not religious) institution."[2] More pithily and powerfully, Evan Wolfson, a long-time activist and analyst, and the founder and director of the "Freedom to Marry" organization,[3] argues that the "freedom-to-marry

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[1] It bears emphasis that many explicitly religious voices have argued strenuously *in favor of* same-sex marriage, see, *e.g.*, MARVIN 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); Gary Chamberlain, *A Religious Argument for Same-Sex Marriage*, 2 SEATTLE J. SOC. JUST. 495 (2004); *In Support of Equal Marriage Rights for All*, Resolution of General Synod 25 of the United Church of Christ (July 4, 2005), *available at* http://www.ucc.org/synod/resolutions/gsrev25-7.pdf *See also, e.g.,* GRAY TEMPLE, GAY UNIONS IN THE LIGHT OF SCRIPTURE, TRADITION AND REASON (2004); xxxx

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

[3] I should mention, in the interests 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 the 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*, Washington Times, Dec. 12, 2006, at B1; Interview with Bishop John Guernsey, Religion & Ethics Newsweekly, available at 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); LAMBETH REFLECTIONS GROUP, LAMBETH INDABA: CAPTURING CONVERSATIONS AND REFLECTIONS FROM THE LAMBETH CONFERENCE 2008: EQUIPPING BISHOPS FOR MISSION AND STRENGTHENING ANGLICAN IDENTITY (2008).



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movement ... is about legal *rights*, not diverse religious *rites*."[4]

Most consequentially, perhaps, the Massachusetts Supreme Judicial Court, in its opinion in *Goodridge v. Department of Public Health*,[5] 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.[6] 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 since pre-Colonial days has been, precisely what its name implies: *a wholly secular institution*.[7]

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[4]EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 108 (2005). He goes on: "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

> Religious 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.

[5]798 N.E.2d 941 (Mass. 2003).

[6]For example, near the beginning of the opinion, the Court wrote that:

> 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 that

> 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 (emphasis added).

[7]*Id.*, at 954. The paragraph 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

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.[8] This claim that civil 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*

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> 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).

[8] 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), though it did emphasize in a footnote the conceptually different argument that from "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 at *infra* note ____, to apply strict scrutiny rather that 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 (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. *Id*., at 886-87 ("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."). *See also* 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.")

marriage are just confused, guilty of a species of category mistake.[9] 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."[10]

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.[11] More important, one should always be suspicious of any effort to explain a controversy away. As often as not, the proffered explanation will turn out to be just another position in the same old debate.[12]

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[9] 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.

[10] This classic exchange was one example:

> Emily Litella: 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, Season 1, Episode 7, http://snltranscripts.jt.org/75/75gupdate.phtml

[11] *See supra* pp. ____ & ____.

[12] An evocative object lesson here is that Gilbert 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 supra* note ____, ended up, not disposing of the problem, but merely staking out one of the positions in the continuing, still intense, debate. *See* DAVID CHALMERS, THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY 23 (1996).

It might also be helpful to keep in mind here, though again only evocatively, the efforts of some philosophical theories, such as logical positivism, to make certain disputes about religion or morality or aesthetics simply "go away." THOMAS NAGEL,

The purpose of this article is to sort out, 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. 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 assume 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.

All this is not to suggest that religious objectors should have a veto, in either the policy debate or constitutional discourse, 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.

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THE VIEW FROM NOWHERE 11 (1986). As Nagel puts it,

> To the extent that such no-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 "intractable" 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.*

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 any piece of the same-sex marriage debate easier. If anything, it will make it harder. 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.[13] 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[14] 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.[15] At the same time, though, it strengthens the argument for 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. Finally, as I argued in an earlier paper, the multi-dimensional meaning of marriage suggests that some State's efforts to opt out of the larger debate over marriage by creating same-sex "civil unions" that carry all the civil legal incidents of marriage but not the name, are, whether or not wise

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[13]For a powerful argument along these lines, see Paul F. Campos, *Advocacy and Scholarship*, 81 CALIF. L. REV. 817, 849-50 (1993):

> so 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.

This is not to say that legal scholarship should eschew the normative discourse of legal argument. For a critique closer to that position, see, *e.g.*, PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 1-30, 86-88 (1999). Rather, I am simply suggesting that the 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.

[14]798 N.E.2d, at 961.

[15]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, 401-402, 443-45, 451 (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 (1986) (criticizing *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 least accorded religious objections to abortion the dignity of being included, however peripherally, in the normative conversation. *See infra* note ____.

and sufficient, "at least coherent, neither empty nor hopelessly obscure."[16] Nevertheless, in the end, my principal aim in this paper is not to press any of these conclusions, but rather to demonstrate the complexity of the problem, to elaborate some important analytic tools (including the notion of "religious capital"), and to help illuminate the issues, the arguments, and the imaginative possibilities for all concerned.[17]

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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 "meant" by its use of the phrase. But it will be useful, heuristically, to organize the discussion here by way of these different possible shades of meaning. Part I of this paper will look, briefly, at the general claim that religious values should be irrelevant to any public debate, whether about marriage or anything else. Part II will look at three shades of meaning that, though distinct, are closely related to each other by the way of the overarching question of whether religious believers are, in some special sense, distinctive legitimate stakeholders in the debate over the meaning of civil marriage. First, it will examine whether the legal meaning of civil marriage can be understood entirely apart from religious ideas, religious values, religious history, and continuing religious debates. Then it will ask whether the notion of "marriage" in the civil context can be walled off from a more general fund of meaning in which religious believers, as well as others, might be deeply invested. Finally, it will critique the idea that "civil marriage" and "religious marriage" are obviously separate *institutions*.[18] Part III of the paper

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[16] Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, in LAW AND RELIGION: CURRENT LEGAL ISSUES, VOL. 4, at 385, 406 (Richard O'Dair & Andrew Lewis, eds., 2001).

[17] I am, for what it's worth, sympathetic to the political, constitution, *and* religious arguments that either marriage or something close to it should be available to same-sex couples.

[18] 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 it is enacted, or positive, law.

At least some of the 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). More broadly, this view would 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 its decision 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.

This set of arguments is evocative and significant, though 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* p. ____. More important, it ignores some of the important complexities in the very idea of positive law. *See generally* JAMES 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. 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. "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." Darlene C. Goring, *the History of Slave Marriage in the United States,* 39 J. MARSHALL L. REV. 299, 301 (2006).

Most important, the assumption that the positive law of marriage necessarily stands on one side of a bright conceptual line, with "religious" and "natural" conceptions of marriage both on the other side, runs up against 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 strands is Dalrymple v. Dalrymple, 2 Hagg. C. R. 54 (Consistory Court of London 1811):

> 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. . . .
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> 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

will then discuss some of the consequences of this analysis and will also try to fit it into a richer account of the Establishment Clause and the separation of church and state in the American constitutional imagination.

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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 second sense in mind when it wrote that, although "many 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."[19]

The problem raised here is relevant and important. I do not want to linger on it in this paper, however. Whether there should be limits to religious discourse in the public square, and what those limits

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> 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.

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* (in progress). For now, however, I will put this variation on the theme to one side.

[19] *Goodridge*, 798 N.E.2d, at 948. For the complete quotation, see *supra* note ____. *Cf. id.* 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.")

might be, have by now become among the most exhaustively cogitated questions in contemporary political and constitutional theory,[20] and I do not think there is much useful to add to their general consideration. 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,[21] the death penalty,[22] tax policy,[23] or the

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[20] For a long but still selective list of sources on both sides of this question, see Perry Dane, *Separation Anxiety,* 22 JOURNAL OF LAW AND RELIGION 545,550 n. 11 (2007) (review essay on NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM (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 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.*, AUSTIN DACEY, THE SECULAR CONSCIENCE: WHY BELIEF BELONGS IN PUBLIC LIFE (2008); JACQUES BERLINERBLAU, THE SECULAR BIBLE: WHY NONBELIEVERS MUST TAKE RELIGION SERIOUSLY (2005). For a more related argument, though one more sympathetic to religion and its values, see WILLIAM E. CONNOLLY, WHY I AM NOT A SECULARIST (1999).

[21] *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)).

[22] *Cf.* Atkins v. Virginia, 536 U.S. 304, 316 n. 21 (2002) (holding 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, a 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)).

[23] *Cf.* U.S. CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: A PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY par. 202(d) (1986); Statement of "Religious Community for Responsible Tax Policy," April 5, 2001 ("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

Rule Against Perpetuities.

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.[24] 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.[25] 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."[26] 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,[27] even when they have ended up trumping those

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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 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."), available at http://www.ncccusa.org/news/01news33.html. *See also* Michael Livingston, The Preferential Option, Solidarity, and the Virtue of Paying Taxes: Reflections on the Catholic Vision of a Just Tax System, unpublished paper available at http://ssrn.com/abstract=958806.

[24] *See* Dane, *Separation Anxiety, supra* note ____,, at 106-109.

[25] The last part of the sentence in text paraphrases Dane, *Separation Anxiety, supra* note ____, at 106.

[26] Dane, *Separation Anxiety, supra* note ____, at 108.

[27] *See* Perry Dane, *Spirited Debate: A Comment on Edward Foley's* Jurisprudence and Theology, 66 FORDHAM L. REV. 1213, 1221 (1998)("to 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." (footnote omitted)).

A particularly interesting example of such use of religious materials appeared in

normative claims by other considerations.[28]

Third, though, *whatever* view one has about the *general* place of religious discourse in public debate, that question is separable from the more specific 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, or debt-equity swaps, are "wholly secular institutions." 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

In shifting the discussion from the general to the particular, I also mean to consider the relevance of religion, not only to views *about* civil marriage, but to the nature of civil marriage *itself*. 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, and the relation between civil and religious institutions of marriage.

### A.

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several of the court's important cases on the Fifth Amendment privilege against self-incrimination. *See infra* pp. ____ (discussing *Miranda* and *Garrity* cases).

[28] *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, 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 state could not, "by adopting one theory of life, ... override the rights of the pregnant woman that are at stake.") *But cf.* AUSTIN DACEY, THE SECULAR CONSCIENCE: WHY BELIEF BELONGS IN PUBLIC LIFE 36-39 (2008) (criticizing use of "Bracketing Strategy" in *Roe*).

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 is what the court meant, however, its view is too simple, and probably just wrong.

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.[29] No other civil institution is structured quite this way. The Massachusetts court did emphasize that "No religious ceremony has ever been *required* to validate a Massachusetts marriage."[30] 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.[31] 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 be an administrative convenience, or even a commandeering of religious ritual to provide the necessary formality to the sealing of the marital contract.

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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 the sense employed here, 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 religion

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[29] *See* xxxx

[30] *Goodridge*, 798 N.E.2d, at 954 (emphasis added).

[31] More crudely put, the court mistook a glass that is half-full for one that is wholly empty.

influences, religious views, or a religious dimension into account. Some examples might help.

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. 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 of the fundamental 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.[32] I do not 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.

The same can be said even of some of the pieces of constitutional law whose religious connections seem more 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.[33] This insight is, again, important and fascinating. But little in the contemporary shape of the doctrine turns on it. Indeed, the Supreme Court itself 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

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[32] Particularly relevant here is the recent work of Michael Perry, *see* MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (2007); Michael J. Perry, *Morality and Normativity*, 13 LEGAL THEORY 211 (2007) and Jürgen Habermas, *see* JÜRGEN HABERMAS, TIME OF TRANSITIONS (2006).

[33] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 458 & n. 27 (1966); Asherman v. Meachum, 957 F.2d 978, 990 (Cardamone, J., dissenting) (2d Cir. 1992); Moses v. Allard, 779 F. Supp. 857, 870 (E.D. Mich. 1991).

genuinely voluntary self-incrimination is just fine.[34]

Finally, consider a more offbeat but suggestive example – the christening of Navy ships.[35] The practice of "christening" ships as they begin their service 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.[36] 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 broad assertion is belied by the range of statutes and other legal rules that specifically reference religion, religious institutions, and religious ideas. Most evocative for present purposes 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,

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[34] *See* Garrity v. New Jersey, 385 U.S. 493, 497 n. 5 (1967).

[35] For an account of the history of the practice, and the customs and rules now attached to it, see JOHN C. REILLY, JR., NAVAL HISTORY DIVISION, DEPARTMENT OF THE NAVY, CHRISTENING, LAUNCHING, AND COMMISSIONING: SHIPS OF THE UNITED STATES NAVY (2d ed., 1975). As this pamphlet points out, the practice has its roots in both Christian and pagan precedents.

[36] *See, e.g.*, ROBERT ROBINSON, THE HISTORY OF BAPTISM 362 (David Benedtict, ed., 1817) ("The ridiculous ceremony of christening ships, and blessing fleets, seems to have flowed from a principle of justice 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.")

or the Church of Jesus Christ of Latter-Day Saints (Mormons).[37] In a corporation sole, the Bishop or similar figure *is* a religious corporation – not merely the director or trustee of a religious 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 multivalent example of that encounter is an institution like the seven-day week.[38] 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. Imagine an effort, on the model of one of the least successful innovations of the French revolutionary government in 1792,[39] to change the week to ten days. Or imagine an effort to change the weekend to Monday and Tuesday, or eliminate it

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[37] 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 (Nicholas Jay Demerath III, Peter Dobkin Hall, Terry Schmitt, & Rhys H. Williams., eds., 1998).

[38] *See generally* EVIATAR ZERUBAVEL, THE SEVEN DAY CIRCLE: THE HISTORY AND MEANING OF THE WEEK (1989); *see also* BONNIE BLACKBURN & LEOFRANC HOLFORD STEVENS, THE OXFORD COMPANION TO THE YEAR 566-82 (1999); E.G. RICHARDS, MAPPING TIME: THE CALENDAR AND ITS HISTORY (2000).

[39] *See* NORMAN HAMPSON, A SOCIAL HISTORY OF THE FRENCH REVOLUTION 200 (1963); ZERUBAVEL, *supra* note ____, 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 *et al, supra* note ____, AT 688-89; ZERUBAVEL, *supra* note ____, at 35-37, were explicitly grounded in anti-religious motivations. ZERUBAVEL, *supra* note ____, 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.")

entirely.[40]

There is, of course, a separate question about exactly how far civil deference to the religious dimension of the seven-day week can and should go. The United States Supreme Court famously upheld Sunday Blue Laws, despite the Establishment Clause.[41] The Canadian Supreme Court, even without an Establishment Clause, struck some of them down.[42] 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 held 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.[43] 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.[44] These religious accessories, even if they do not convey any proposition 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."[45]

Even if the Court is right, however, the purely civil Christmas would still have religious meaning in the sense suggested here. As the Court itself has acknowledged, no adequate account of Christmas could reasonably leave out its religious connections. Congress could not turn the civil Christmas into a "Monday holiday" with the same ease that it took to change the official day for celebrating George Washington's Birthday or Memorial Day. Nor could it credibly try to inject a new and revised meaning into it, as it did with Armistice Day, now Veterans Day.

Again, understanding the religious dimension of the civic celebration of Christmas helps, but does not conclude, its

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[40] 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."

[41] McGowan v. Maryland, 366 U.S. 420 (1961).

[42] R. v. Big M Drug Mart, [1985] 1 S.C.R. 295.

[43] *See, e.g.*, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

[44] Perry Dane, "Christmas," unpublished paper available at http://ssrn.com/abstract=947613

[45] Perry Dane, "Christmas," unpublished paper available at http://ssrn.com/abstract=947613

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 creches or crosses, but no Christmas trees, no Santa, no decorations. Nothing."[46] But even a response that rejected the "bracing austerity" of such strict separationism[47] would still need to acknowledge the religious meaning, 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. 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 nonpreferential aid to religious schools; if American constitutional doctrine is more suspicious of such aid, it is largely because of the evangelical theology of the Establishment Clause. 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,[48] 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 itself embody religious commitments, but there is no actual paradox here, only a certain measure of healthy irony.[49]

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[46] Perry Dane, "Christmas," unpublished paper available at http://ssrn.com/abstract=947613

[47] *Id.*

[48] *See* Dane, *Separation Anxiety*, *supra* note ____, at 122-32.

[49] 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, IDEA OF NATURE (1945); PETER HARRISON, THE BIBLE, PROTESTANTISM, AND THE RISE OF NATURAL SCIENCE (1998); Dorothy Stimson, *Puritanism and the New Philosophy in 17th Century England*, 3 BULLETIN OF THE INSTITUTE OF THE HISTORY OF MEDICINE 321 (1935); *see also* JOHN HEDLEY BROOKE, SCIENCE AND RELIGION: SOME HISTORICAL PERSPECTIVES (1991), and secular pluralist politics, *see* KRISTEN DEEDE JOHNSON, THEOLOGY, POLITICAL THEORY, AND PLURALISM (2007); PETER ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST (2003); Elizabeth Mensch, *Religion and the Roots of Liberalism*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 54 (Michael W. McConnell, Robert F. Cochran, & Angela C. Carmella, eds., 2001); *see also* MICHAEL J. PERRY, TOWARD A

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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; 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. 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 or "common law" marriages,[50] even as against state statutes (some older than the Marriage Act in England) that seemed to require that marriages be solemnized to be valid.[51] 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

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THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (2007.) For a magisterial effort to unearth the complex character of modern secularity as a whole, see CHARLES TAYLOR, A SECULAR AGE (2007).

[50] 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, however, through the 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 specific purposes. *See* TONY IHARA, RALPH WARNER, & FREDERICK HERTZ, LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES, at ch. 2, p. 3 (13th ed., 2006).

[51] *See, e.g.*, Askew v. Dupree, 30 Ga. 173 (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 (N.Y. 1809) (Kent., J.). *See also* Meister v. Moore, 96 U.S. 76, 78 (1878) ("Marriage is everywhere regarded as a civil contract.")

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 the non-ceremonial or common-law marriage is justified by the nature of civil marriage as a "civil contract," the account in many (though not all[52]) cases had the story directly backwards.

Non-ceremonial marriage was a possibility in England, through much of the late middle ages, not because marriage was conceptualized as a "civil contract," but because canon law, of its own force and incorporated into English law, though it condemned informal marriages, nevertheless treated them as valid and binding. The Church was willing to treat non-ceremonial marriages as valid partly under the influence of principles 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 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."[53]

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.[54] 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,[55] the British Parliament abolished common-law marriage. The Marriage Act, however, did not extend to Scotland, where

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[52]For a particularly learned discussion, see In Re Robert's Estate, 133 P.2d 492 (1943). Judge Blume's opinion for the court in this case argued that Chancellor Kent's opinion in Fenton v. Reed, 4 Johns. 52 (N.Y. 1809), which drove the widespread recognition of common law marriage in many States, was "wrong."

[53]J. A. Andrews, *The Common Law Marriage*, 22 MODERN L. REV. 396, 396 (1959) (British spelling in original).

[54]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.

[55]26 Geo. II, c. 33.

non-ceremonial marriage was not fully abandoned until 2006.[56] 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, as well as 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 years since its nineteenth-century heyday 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 logistic ease in modern America of requiring marrying couples to go through the procedures set out in law.

One lesson of this tale is partly that the question of common law marriage cuts across any divide between "secular" and "religious" characterizations of civil marriage. There are powerful religious arguments for and against common law marriage, and there are powerful secular arguments for and against common law 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, parallel to the trope that marriage is a civil contract, a counter-trope emphasizing its distinctively religious character.[57] 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

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[56]The act also exempted Jews and Quakers from the requirement that marriages be celebrated in the Church of England.

[57]For similar arguments, *see generally* Charles J. Reid, Jr., *Marriage: Its Relation to Religion, Law, and the State*, 68 THE JURIST 252 (2008); John Witte, *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).

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."[58] 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."[59] But does a statute of limitations apply to a claim of adultery in an action for divorce? No, partly because marriage is a religious institution, and not only a civil contract.[60] 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.[61] Why

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[58] De La Hay v. De La Hay, 21 Ill. 251, 254 (1859) (emphasis added).

[59] Pain v. Pain, 37 Mo. App. 110, 114 (1889).

[60] 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 co-eval 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.

Mosely v. Mosely, 67 Ga. 92 (1881)

[61] 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

are incest and polygamy 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 the religious dimension of marriage is also relevant to 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,[62] and then gained new prominence in a series of cases beginning with

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> 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 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.
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> 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.

Goodrich v. Goodrich, 44 Ala. 670 (1870).

[62] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 ("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.")

*Loving v. Virginia*.[63]

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,[64] and for that matter, as some have put it,[65] merely a "licensing 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."[66] 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." It claimed that "the State could, in theory, abolish all civil marriage" though not "without chaotic consequences."[67]

Nevertheless, the United States Supreme Court has treated marriage as more than merely a "State-conferred benefit." Indeed, in *Zablocki v. Redhail*,[68] one of the most interesting of its modern "right to marry" cases, it seemed at least to lean to the view that marriage was a basic, and 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 this apparent "paradox," of course, is to appreciate the religious dimension that constitutional law recognizes in civil marriage. For example, in *Griswold v. Connecticut*, the pivotal case

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[63] 388 U.S. 1 (1967).

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

[65] *Goodridge*, 798 N.E.2d, at 952.

[66] Dane, *Zablocki*, *supra* note ____, at 1811. For various views on this question, *compare*, *e.g.*, Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2096 (2005) ("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, *Same-Sex Marriage and the Right to 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).

[67] *Goodridge*, 798 N.E.2d, at 957 n. 14.

[68] 434 U.S. 374 (1978).

that grounded the constitutional right to use contraceptives on the right of privacy of married couples, 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 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.[69]

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."[70]

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[69] 381 U.S. 479, 486 (1965).

[70] 482 U.S. 78, 95 (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.

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* itself, 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 strike down a statute that prohibited prisoners incarcerated for life from entering into a marriage while in prison.[71]

*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 itself is, ironically but importantly, 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 itself, 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 as one of the seven sacraments – the external rituals established by Christ and given to the Church for conferring sanctifying grace.[72] Most Protestants, however, came to believe that marriage, though sacred, was not a sacrament.[73] 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.

In the original heat of the split between Catholics and Protestants, the debate over marriage was part of a larger, often heated, polemic. Indeed, Calvin famously compared marriage to "farming, building, cobbling, and barbering" as a "good and holy ordinance of

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Even under that more deferential standard, however, the Court struck down the challenged regulation.

[71] Langone v. Coughlin, 712 F. Supp. 1061 (N.D.N.Y. 1989)

[72] 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.

[73] Indeed, part of the Protestant 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.

God" that was, nevertheless, not a sacrament.[74] In a similar spirit, the early Massachusetts Puritans actually prohibited ministers from conducting marriage ceremonies, and assigned the celebration of marriage entirely to civil officials.[75] 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 as 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.[76] It is more implicit in some later cases, in which courts

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[74]"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, Ch. xix, at 1481 (John T. McNeil, ed., Ford Lewis Battles, trans. 1960).

[75]*See* FELDMAN, *supra* note ____, at ____; Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 295 (2002). For a more general discussion of competing and complementary religious conceptions of marriage, see JOHN WITTE, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997).

[76]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, Mohammedan 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

rejected as simply irrelevant to the adjudication of marital questions, even among Catholics, specifically Catholic sensibilities about the institution and its pre-requisites.[77]

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.

B.

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 have been suggesting that arguments about the meaning and limits of *civil* marriage have no direct implications for larger debates about the meaning and limits of marriage *in some broader sense*. This, in fact, would be the quintessential Emily Litella move, 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."

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

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> 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).

[77] *See, e.g.*, Mirizio v. Mirizio, 150 N.E. 605 (N.Y. 1926). *See also, e.g.,* Cassin v. Cassin, 161 N.E. 603 (Mass. 1928).

classic, theologically and liturgically resonant debates is likely to effected 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 much as they banned the religious celebration of marriages. 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 that in which individuals and societies have invested their time and energy, and which in turn plays a complex set of roles in the lives of those individuals and societies. The meaning of 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 creches 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. 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."[78]

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 the that capital, and the decisions that others make effect the 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

[78] Perry Dane, "Christmas," unpublished paper available at http://ssrn.com/abstract=947613 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."

> 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.[79]

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. Thus, 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 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.

### C.

The claim that civil marriage is a "wholly secular institution" has another possible shade of meaning, which is again related to, but separate from, the other two explored in this Part of the Article. The notion at work here is that, however much the *meaning* of civil marriage might have a religious dimension, civil marriage and

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[79] Dane, *The Intersecting Worlds of Religious and Secular Marriage*, *supra* note ____.

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.

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 – is a juridical institution governed by Jewish law, and bound up, at least in most views,[80] with Jewish rituals, Jewish concepts, and Jewish intentions. When rabbis who take this traditional view officiate at Jewish weddings, they generally comport to the requirements of civil law.[81] 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 divorce does not effectively dissolve the Jewish marital bond, which requires a separate juridical act governed in great detail by Jewish law.[82]

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.[83] In this view, marriage is a sacred institution instituted by God, and one that

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[81] xxxx

[82] *See* ELLIOT N. DORFF & ARTHUR I. ROSETT, A LIVING TREE 470, 523 (1988).

[83] To simplify the exposition, I am, at least for now, leaving the contemporary Catholic view 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.

has special spiritual and theological significance in Christian life.[84] It is also, though, a complex institution, not only sacred but also natural, emotional, and juridical.[85] But, however sacred and complex marriage is, it is *one* institution, simultaneously civil and religious.[86] According to the mainstream, mainline, Protestant interpretation, *juridical* authority over marriage is vested in the civil government.[87] Moreover,

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[84] *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 in law, in service to the common good, and blessed by religion," with "private, personal, and intersubjective dimensions," but also "procreative and educational functions.").

[85] Don S. Browning, xxxx.

[86]
> It is commonly held that marriage is instituted by God.... Although not every Christian tradition defines marriage as a sacrament, it is generally regarded as an institution that God intends and promises to sustain. Marriage is a "holy estate" or a "sacred calling" even when it is understood as a civil institution belonging to the realm of creation rather than redemption.

HERBERT ANDERSON & ROBERT COTTON FITE, BECOMING MARRIED 141 (1993).

[87]
> 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 justly 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.
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> 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.

THE OFFICE OF WORSHIP FOR THE PRESBYTERIAN CHURCH (U.S.A.) AND THE CUMBERLAND PRESBYTERIAN CHURCH, CHRISTIAN MARRIAGE 82 (Supplemental Liturgical Resource 3, 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).

*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, 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, *e.g.,* LUTHERAN OFFICE FOR PUBLIC POLICY, A STATEMENT ON SEX, MARRIAGE, AND FAMILY 1-2 (1970):

there is no such thing, juridically speaking, as a "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.[88] But the church has no independent juridical power, even in a 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.[89] To be sure, a Protestant church can hold 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

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> 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....
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> 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.
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> 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.

[88] *See* Don S. Browning,, *Family Law and Christian Jurisprudence*, in CHRISTIANITY AND LAW: AN INTRODUCTION 163, 177 (John Witte, Jr. & Frank S. Alexander, eds., 2008) ("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 Washington, Bishop's Guidelines for Marriage and Remarriage, 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."); xxxx.

[89] 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. 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 165-182 (2003); H. WAYNE HOUSE, DIVORCE AND REMARRIAGE: FOUR CHRISTIAN VIEWS (1990).

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 went to 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 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.[90]

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[90] 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 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

Conversely, consider a couple that wants to marry "in the eyes of God," but does not want to be civilly married, possibly to avoid some of the financial or legal complications that a civil marriage would produce.[91] A rabbi would very likely refuse to officiate at such a "religious but not civil" ceremony for any number of reasons, including respect for civil law and fear of civil legal repercussions.[92] That in itself is notable, for it is hard to imagine any other religious speech 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

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> 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.

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. Do you promise to love her, comfort her, honor and keep her, in sickness and in health; and, forsaking all others, to be faithful to her 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.

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. The liturgical books of the Presbyterians Church USA, the United Methodists, and the United Church of Christ similarly distinguish between marriage ceremonies and blessings of existing civil marriages.

[91] This can be an issue, for example, for widows and widowers who might risk losing some social security benefits if they remarry.

[92] *Cf.* Myron S. Geller, Robert E. Fine, & David J. Fine, *The Halakhah of Same-Sex Relations in a New Context*, http://www.rabbinicalassembly.org/teshuvot/docs/20052010/geller_fine_fine_dissent.pdf, at 22 (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.")

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 religious domain 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 to marry religiously are conceptually and practically distinct.[93] 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 whether such ceremonies should constitute "kiddushin."[94] For mainline, mainstream, Protestants, however, the two issues are much more difficult to separate.[95] Thus, the United Church of Christ declared its support for civil marriage for same-sex couples as part of the same process by which it began to devise liturgical forms for such marriages.[96] And, conversely, the Presbyterian Church USA 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.[97] 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 since, from the religious point of view, even a merely civil marriage *is* a marriage.[98]

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[93] *See* Elliot N. Dorff, Daniel S. Nevins & Avram I. Reisner, *Homosexuality, Human Dignity, & Halakhah: A Combined Responsum for the Committee on Jewish Law and Standards*, http://www.rabbinicalassembly.org/docs/Dorff_Nevins_Reisner_Final.pdf, at

[94] *See* General Assembly of the Union of American Hebrew Congregations, Resolution on "Civil Marriage for Gay and Lesbian Jewish Couples," http://urj.org/Articles/index.cfm?id=7214 (October 29-November 2, 1997) (resolution 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 continuing study by 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." Xxxx

[95] In fact, same-sex unions in states that do not recognize the civil institution of same-sex marriage are typically lableled "commitment ceremonies" or the like rather than, say, "religious marriages."

[96] xxxx

[97] xxxx

[98] xxxx

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.[99] A 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." 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.[100] Again, I do not meant 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

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[99] Indeed, it might even leave them open to sanctions under civil law. *See* Shaha v. Bowers, 114 F.3d 1097 (11th Cir. 1997). 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); Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, *supra* note ____, at 401.

[100] 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." http://achurch4me.org/joomla/index.php?option=com_content&view=category&layout=blog&id=39&Itemid=74

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." http://www.milwaukeeclergy.com/commitment.htm

To be sure, more and more gay unions, even in non-same-sex-marriage States, are termed marriages. Again, though, the point here is just the modest observation that a fundamental 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.

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 "traditional" marriages in that State.

2.

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.[101] 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. 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 appraise the claim that civil marriage in the American legal imagination is a "*wholly* secular institution." That claim would be wrong 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. In a state that recognizes common-law marriage, such a religious ceremony would in itself likely be taken as evidence of an intent to be civilly married.[102] The situation is admittedly more complicated with the abolition of common-law marriages in many states. Some states do, indeed, refuse

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[101] The account here is consciously limited to the United States. The civil 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 Nimmi, ed., 2005). Other countries, influenced by the French securalist 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 71 (1997).

[102] *See supra* pp. ____.

to recognize a marriage without a marriage license or other civilly mandated formalities. But other states treat the ceremony, along with an intent to be married, and not the license, as civilly dispositive.[103] Thus, for example, in one particularly evocative New York case,[104]

> 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 symbolically gave her to the plaintiff, vows were made and rings and flower garland were exchanged. The ceremony lasted approximately two hours.[105]

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 cliche 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

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[103] 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 marriage with a good faith belief that they have been lawfully joined in marriage." JOHN DE WITT GREGORY, PETER N. SWISHER, & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW 38 (3d ed. 2005). In particular, many (though not all) states will treat as valid marriages solemnized in a religious ceremony even in the absence of a a wedding license. *See, e.g.,* Carabetta v. Carabetta, 438 A.2d 109 (Conn. 1980) (couple who exchanged marital vows before a Catholic priest were legally married even though they had not obtained a marriage license.); *In Re* Estate of Wright, 613 S.W.2d 850 (Ark. 1981) (lack of marriage license does not invalidate marriage when parties are married "in a ceremonial wedding performed by a minister"); Browning v. Browning, 168 A.2d 506 (Md. 1961); State v. Denton, 983 P.2d 693 (Wash. Ct. App. 1999). *See also, e.g.*, Cal. Evid. Code § 663 ("A ceremonial marriage is presumed to be valid.").

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

[104] Persad v. Balram,724 N.Y.S.2d 560 (N.Y. Sup. Ct. 2001).

[105] *Id.*, at 562.

> Legislature. Essentially, the Domestic Relations 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.[106]

The larger point, of course, is that in the court's view, and the legislature's, there is, in fact, only one duck.[107]

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,[108] whether or not the law

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[106] *Id.*, at 562-63.

[107] *Cf. supra* note ____ (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 (2d Dist. 1988) (although couple went through a private, secret, time-specified, "Muta" 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.)

[108] *See, e.g,* Alaska Stat. § 25.05.361 ("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 ("If a marriage is solemnized without procuring a license, the parties married, and all persons aiding them, are guilty of a simple misdemeanor."); Mich. CLS § 551.106 ("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.Y. CLS Dom Rel § 17 ("If any clergyman or other person authorized by the laws of this state to perform marriage ceremonies shall solemnize or presume to solemnize any marriage between any parties without a license being presented to him or them as herein provided or with knowledge that either party is legally incompetent to contract matrimony as is provided for in this article he shall be guilty of a misdemeanor...."); N.Y. CLS Penal Law § 255.00 ("A person is guilty of unlawfully solemnizing a marriage when 1. Knowing that he is not authorized by the laws of this state to do so, he performs a marriage ceremony or presumes to solemnize a marriage...."); N.C. Gen. Stat. § 51-6 ("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

recognizes the marriage as valid. Put another way, in most states, it is not completely clear, at least in principle, that the civil law would

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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 ("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."); Rev. Code Wash. (ARCW) § 26.04.240 (punishing "Any 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....").

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 (Kansas 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 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." 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 in accordance with which the legislature has declared marriage should be contracted." *Id.*, at 285. One of the concurring judges, though 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 (N.Y. Justice Ct. 2004) They were charged with the crime of solemnizing marriages without licenses being presented to them. 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. 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. Indeed, the defendants explicitly acknowledged "that the state has an interest in regulating marriage." *Id.,* at 900. Moreover, while the local prosecutor commented to the press that "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*, The New York Times, March 16, 2004, at p. 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.")

necessarily allow a couple to marry "only in the eyes of God."[109] 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.[110]

Again, though, one particularly evocative case tells the story: A couple in Washington State – Peter and Corrine Dickson – was divorced. Peter Dickson's religious views, however, did not recognize divorce, and he continued to refer to Corrine Dickson as his wife. This, and other behavior, became the basis for an injunction: Peter could no longer refer to Corrine as his wife or represent that she was his wife. As modified by the state appellate court, the injunction

> does 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.[111]

The profound kernel of this case, of course, is the court's assumption that civil marriage is what linguists and social theorists refer to as the "unmarked form."[112] While the *Goodridge* court, for its own strategic

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[109] *But cf.*, *e.g.,* Commonwealth v. White, 14 Pa. D. & C.3d 434 (1978) (holding, 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.)

[110] *See* State v. Green, 99 P.3d 820 (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 (N.C. 1980).

[111] Dickson v. Dickson, 529 P.2d 476 (Wash. App. Ct. 1974).

[112] *See* EDWIN L. BATTISTELLA, THE LOGIC OF MARKEDNESS (1996); Robert LAWRENCE TRASK & PETER STOCKWELL, LANGUAGE AND LINGUISTICS: THE KEY CONCEPTS 163 (2007). For examples of the use of the concept in the race, gender, and sexual prference literature, see, *e.g.,* 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 (Sonia Maasik & Jack Solomon, eds., 1997); DAVID HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 43-44 (1995).

The dissent in *Dickson* would have in effect reversed the marked and unmarked

reasons, was careful always 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.

### A.

Civil marriage in the United States is a secular institution. But it is not a "wholly secular institution." What follows from this conclusion, however, is much less clear.

At the very least, it should be evident 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 in any event of more recent and unreliable vintage than might be supposed, and that henceforth it would ask both men and women to play the role. 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 the state, or a 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 Moslems continued to use the seven-day calendar for religious purposes, they would come to think of it as aberrational, exotic, and sectarian. This might not be a bad thing, religiously speaking.[113] But, good or bad, it would have a profound effect on religious life and the religious world-view. 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 Establishment Clause. Again, it bears emphasis that the stakes in all these cases are both immediately practical and more broadly cultural.

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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.

[113] *See* STANLEY HAUERWAS AND WILLIAM H. WILLIMON, RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY (1989) (xxxx).

Religious believers have a stake in the same-sex marriage debate in the same sense. That stake is partly practical. Some believers, for example, might 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 is also more broadly cultural.

B.

As I insisted at the beginning of this paper, however, having a stake is not the same as having a veto. 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.

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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 must be, if nothing else, rational.[114] Moreover, while some have suggested that religious and other objections to same-sex marriage can only reflect invidious animus,[115] 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.[116]

To be honest, of course, defending the not-necessarily-invidious rationality of opposition to same-sex marriage does not, strictly speaking, even require invoking religious arguments at all. Thus, for example, the most straightforward instrumental argument for defining marriage in heterosexual terms can be grounded on the simple

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[114] *Cf.* Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in the judgment); ANTHONY KRONMAN, THE LOST LAWYER 161 (1993); JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 65 (1984); Philip Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445 (1987); Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005).

[115] *See, e.g.*, Justin D. Wilson, Note, *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 (2007); Samuel E. Marcosson, *The Lesson of the Same-sex Marriage Trial: the Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense*," 735 U. OF LOUISVILLE J. OF FAM. L. 721, 742 (1996); xxxx

[116] For a balanced account of the stakes, at least for Christians, see DON S. BROWNING, EQUALITY AND THE FAMILY: A FUNDAMENTAL, PRACTICAL THEOLOGY OF CHILDREN, MOTHERS, AND FATHERS IN MODERN SOCIETIES 219 (2007)

claim that because heterosexual sex is distinctly connected to the possibility of procreation, including unintended procreation, heterosexual 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.[117] 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[118] that procreation cannot be "rationally" central to the meaning of marriage because, after all, not all heterosexual married couples have children and not all children are born to heterosexual married couples.

The religious piece of the puzzle, however, emphasizes how this instrumental argument is profoundly intertwined with, without by any means exhausting, a much larger dignitary and symbolic frame of meaning. That frame of meaning – the traditional religious and religiously-influenced understanding of marriage – is broad, deep, and powerful. For Jews and Christians, indeed, it is bound up with the very mythos of creation and the Garden of Eden.[119] But it is also

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[117] For important general discussions of the "channeling function" of marriage and family law, see, *e.g.*, Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Linda S. McClain, *Love, Marrige, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007). *See also, e.g.*, 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, *e.g.*, 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).

[118] xxxx

[119] The basic text for both traditions, of course, is Genesis 2:21-24:

> So God Eternal caused a deep sleep to fall on the human being, who slept; and God took one of the human being's sides and closed up the flesh in its place. God made the side, which God Eternal had taken from the human being, into a woman, and brought her to the man. And the man said: "This is now bone of my bones, and flesh of my flesh; she shall be called Woman, because she was taken out of Man." Therefore a man leaves his father and his mother, and clings to his wife, and they become one flesh.

Jews incorporate this primordial romance into the "seven blessings" of the wedding ceremony:

> Grant perfect joy to these loving companions, as you did to the first man and woman in the Garden of Eden. Blessed are You, God Eternal, who grants the joy of groom and bride.

potentially fragile, and society's hesitation to tamper with it is, if nothing else, understandable.

2

So far, the analysis has focused on the "rationality" of refusing same-sex marriage. A different conclusion might be available, however, if the same-sex marriage 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 actually suggest *more* rather than less potent arguments for allowing or requiring same-sex marriage. The analysis here might have two pieces: First, as a general matter, the religious history and resonance of American civil marriage helps, as already discussed,[120] 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[121]) "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.[122] 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

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For Christians, the crucial gloss is Ephesians 5:28-32:

> So ought men to love their wives as their own bodies. He that loves his wife loves himself. For no man ever yet hated his own flesh; but nourishes and cherishes it, even as the Lord the church. For we are members of his body, of his flesh, and of his bones. For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery, but I speak concerning Christ and the church.

[120] *Supra* pp. ____.

[121] For sources debating whether the right to marry is substantive or merely comparative, see *supra* pp. _____.

[122] *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 that "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, to the description of 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).

been there in force, but emerging, vibrant, religious voices in its favor.[123]

3

At the same time, though, the religious dimension of marriage can helps explain the coherence, if not necessarily the practical or normative force, of efforts to avoid such deeper questions by fashioning alternatives to same-sex marriage such as civil unions. This is, in essence, 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.[124] 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 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

[123] *Cf.* Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, Capital 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.")

[124] Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, in LAW AND RELIGION: CURRENT LEGAL ISSUES, VOL. 4, at 385 (Richard O'Dair & Andrew Lewis, eds., 2001).

> 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 dra wing meaning from that conversation or projecting mean into it.[125]

4

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[126] or that "separate" cannot be "equal"[127] Those claims are, by themselves, little more than conclusory or circular.[128] 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

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

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[125] *Id.*, at 405.

[126] Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004); 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 OF RTS. J. 1 (2000); *David 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); Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 18, 22.

[127] *Cf.* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569, 580 (Mass. 2004); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149 (2000).

[128] For a powerful critique of invocations of "stigma" in legal and moral argument, see Matthew Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PENN. L. REV. 1363 (2000).

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,[129] 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

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 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.[130]

C.

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 possibly context before reducing it to the limited doctrinal

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[129] Perry Dane, *Nature, Equality, and Same-Sex Marriage* (in progress).

[130] *Cf.* Arnaud Villlani, *Figures of Duality: Hölderlin and Greek Tragedy*, in THE SOLID LETTER: READINGS OF FRIEDRICH HÖLDERLIN 175, 184 (Aris Fioretos &David S. Ferris, eds. 2000) (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 indissoluble 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 princple: yin and yang, the two opposites interlock and cut into each other impurely and asymmetrically.")

categories afforded by the First Amendment.[131] But it should be addressed now, at least briefly.

It will help to be precise here. If I am right about the "religious meaning" of civil marriage, does that render either civil marriage 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 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.

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.[132] It also emphasizes the irreducible difference between the 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 present state. The line of reasoning I have in mind, which I can only outline here, would draw in part from Justice Brennan's observation that "There 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."[133] Justice Brennan had in mind prison and military chaplaincies, but the institution of heterosexually-defined civil marriage is, if in an exponentially more complicated way, also a government resource that helps make religious life possible under conditions in which few substitutes might be available.

The more direct and consequential part of the argument, however, would go something like this: 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

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[131] *See* Perry Dane, *The Public, the Private, and The Sacred: Variations on a Theme of* Nomos and Narrative, 8 CARDOZO STUDIES IN LAW AND LITERATURE 15 (1996); Perry Dane, *Constitutional Law and Religion* in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 113 (Dennis Patterson, ed., 1996).

[132] *Supra* pp. _____.

[133] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 296 (1963) (Brennan, J., concurring).

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 expression 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 clause of the First Amendment are prone.[134] 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.

D

Nothing in the argument here is meant to endorse, in any direct or simple way at least, a less strict or more "accommodationist," view of the Establishment Clause.[135] 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.[136] Moreover, strict separationism, as a

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[134] *Cf.* 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 (Nicholas Jay Demerath III, Peter Dobkin Hall, Terry Schmitt, & Rhys H. Williams., eds., 1998); 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.").

[135] *See generally* 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); Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, in LAW AND RELIGION 63 (Rex J. Ahdar ed., 2000); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986); Oaks, *Separation, Accommodation, and the Future of Church and State*, 35 DE PAUL L. REV. 1 (1985). *See also* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

[136] *See* Dane, *Separation Anxiety, supra* note ____.

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.[137] And the official display of distinctively religious symbols should be suspect because it tends to co-opt those symbols to profane use.[138] And government aid to religious institutions should be restricted because it threatens, in several ways, the integrity of a distinctively religious conscience.[139]

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,[140] and the relationship might just be too difficult to disentangle without harming the very values that underlie the Establishment Clause itself.[141] 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.[142] Similarly, some commentators have argued that

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[137] *See* Engel v. Vitale, 370 U.S. 421, 432 (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)*); *see also* Marsh v. Chambers, 463 U.S. 783, 804, 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).

[138] *See* Lynch v. Donnelly, 465 U.S. 668, 711-12 (1984) (Brennan, J., dissenting).

[139] *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 (2002); 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. & POLITICS 479 (2002). This financial piece of the separationist impulse was particularly central to the thought of the framing generation. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*; FELDMAN, *supra* note ____.

[140] Not directly on point, but resonant nevertheless, is Justice Douglass's famous peroration in Griswold v. Connecticut, 381 U.S. 479, 486 (1965): "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 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."

[141] 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 (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 (2004).

[142] Perry Dane, "Christmas," unpublished paper available at http://ssrn.com/abstract=947613

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.[143] This solution, however, assumes that churches could just take over the marriage 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.[144] And that in turn suggests yet one more reason why the constitutionally-protected "fundamental right to marry" might indeed require not mere 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[145], any more than it could retreat from establishing family law or property law or contract law.[146]

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.[147] 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.[148]

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[143] *See, e.g.,* 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. Zelinksky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006); Daniel A. Crane, *Abolishing Civil Marriage: a "Judeo-christian" Argument for Privatizing Marriage,* 27 CARDOZO L. REV. 1221 (2006); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1993); *see also* Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

[144] 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.

[145] *See supra* pp. _______.

[146] For some of the relevant discussions, see, *e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000); Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195 (1999).

[147] *Cf.* Alice Domurat Dreger, *The Limits of Individuality: Ritual and Sacrifice in the Lives and Medical Treatment of Conjoined Twins*, 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.

[148] *Cf.* Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, Capital U. L. Rev. 221 (2002).