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Natural Law, Equality, and Same-Sex Marriage

PERRY DANE†

INTRODUCTION

In 1811, Sir William Scott, the distinguished English judge later styled Lord Stowell, sitting in an English court with civil matrimonial jurisdiction,¹ heard the dispute

† Professor of Law, Rutgers School of Law—Camden. I am grateful to participants at the First Annual Law and Religion Roundtable held at the Brooklyn Law School as well as a Faculty Workshop at Rutgers School of Law—Camden for their probing and helpful questions about an earlier draft of this paper. I am also grateful to participants at the Conference on “The Family: Searching for Fairest Love” at the Notre Dame Center for Ethics and Culture and to the student members of the Liberal Party of the Yale Political Union—two very different audiences—for their equally valuable reactions to earlier presentations of the basic ideas in this paper and to colleagues at the New York University Law School Institutes on the Park, especially Douglas Husak, who asked important questions during my presentation on the overall project of which this paper is a part. Finally, I am especially indebted to Jerry Vildostegui for his incisive and deeply thoughtful comments on the paper and its various arguments and to Phillip Cary for honing in on some crucial ambiguities in my argument.

1. The court was the Court of Consistory, an ecclesiastical tribunal. By 1811, however, the Court of Consistory was an integral part of the English system of justice. See R.B. OUTHWAITE, *THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500-1860*, at 1-4 (2006); see also, e.g., EDWARD FISCHER, *THE ENGLISH CONSTITUTION* 276-81 (Richard Jenery Shee trans., 2d ed. 1863); Van Vechten Veeder, *A Century of English Judicature, III: The Ecclesiastical and Admiralty Courts*, 13 GREEN BAG 131 (1901). It was staffed by lay judges, see FISCHER, *supra*, at 279; OUTHWAITE, *supra*, at 65, and its decisions were included in the standard case reports, reflecting the Church of England’s unique status as the “Church by law established.” See M.H. Ogilvie, *What is a Church by Law Established?*, 28 Osgoode Hall L.J. 179, 195-208 (1990); Charlotte Smith, *The Church of England: Some Historical Reflections on a Constitutional Conundrum*, 56 N. IR. L.Q. 394 (2005). See generally Norman Doe, *The Notion of a National Church: A Juridical Framework*, 149 L. & JUST. CHRISTIAN L. REV. 77 (2002). With respect to many of the questions it addressed, the Court of Consistory stood out, not so much for being ecclesiastical, but for being one of the few islands of civil law thinking in the sea of English common law. Indeed, it shared judges, advocates, and space in the fabled Doctors Commons with the admiralty courts, the other principal “civilian” outpost in English law. See generally DANIEL R. COQUILLETTE, *THE CIVILIAN WRITERS OF DOCTORS’ COMMONS, LONDON: THREE CENTURIES OF JURISTIC*

between Johanna Gordon and John William Henry Dalrymple.² Dalrymple was a young aristocrat living in England but of Scottish ancestry.³ While stationed with His Majesty's Dragoon Guards in Edinburgh, Dalrymple had an ongoing sexual relationship with Gordon, assuring her in passionate letters that they were married, though without a ceremony or other public acknowledgment, but also begging her to keep the bond secret.⁴ Later, though, after moving back to England, he denied the marriage and married someone else.⁵ Gordon sued to enforce her rights as his wife.⁶

Lord Stowell held in *Dalrymple v. Dalrymple* that Scots law applied, and that, unlike English law,⁷ it recognized the

INNOVATION IN COMPARATIVE, COMMERCIAL AND INTERNATIONAL LAW (1988); Veeder, *supra*, at 134. Lord Stowell himself was university-trained in the civil law and was also an academic historian, having held the prestigious Camden Professorship of Ancient History at Oxford. In addition to sitting on the Consistory Court, he sat on the High Court of Admiralty, where he gained more fame developing many of the formative doctrines of both private admiralty law and public international law. *See generally* HENRY J. BOURGUIGNON, SIR WILLIAM SCOTT, LORD STOWELL: JUDGE OF THE HIGH COURT OF ADMIRALTY, 1798-1828, at 38-41 (1987).

2. *Dalrymple v. Dalrymple*, (1811) 161 Eng. Rep. 665 (K.B.) 666; 2 Hag. Con. 54, 54-55.

3. *Id.* at 666, 2 Hag. Con. at 55. In 1821, on the death of his cousin John Dalrymple, John William Henry became the Seventh Earl of Stair. BURKE'S PEERAGE, BARONETAGE AND KNIGHTAGE 3712 (Charles Mosley ed., 107th ed. 2003). He died childless, having never remarried after the events described here, and the line passed to a distant cousin. The current (and fourteenth) Earl of Stair, John David James Dalrymple, *id.* at 3715, was in 2008 elected by the United Kingdom's hereditary peers to sit in the House of Lords. *Earl of Stair*, PARLIAMENT.UK, <http://www.parliament.uk/biographies/lords/earl-of-stair/3137> (last visited Feb. 21, 2014).

4. *Dalrymple*, (1811) 161 Eng. Rep. at 666; 2 Hag. Con. at 54-55.

5. *Id.* at 667, 2 Hag. Con. at 58.

6. *Id.*

7. English law tightened the requirements for marriage in 1753. *See* Marriage Act, 1753, 26 Geo. 2, c. 33 (also known as Lord Hardwicke's Act and The Clandestine Marriages Act). The exact state of the law in England before Lord Hardwicke's Act remains a matter of some dispute. *See* JOHN GILLIS, FOR BETTER, FOR WORSE: BRITISH MARRIAGES, 1600 TO THE PRESENT 136, 139-42 (1985); R.B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500-1850, at 1-17, 19-20 (1995); Rebecca Probert, *Control over Marriage in England and Wales, 1753-1823*:

validity of non-ceremonial (often called common-law⁸) marriages.⁹ He decided in favor of Gordon on the basis of the factual evidence presented and ordered Dalrymple to “receive her home” as his wife and “treat her with conjugal affection.”¹⁰

The most famous passage in Lord Stowell’s opinion in *Dalrymple*, however, went well beyond the issue at hand to summarize, with unusual power and elegance, a traditional view of marriage itself and its several dimensions:

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, “principium urbis et quasi seminarium rei publicae” (Cic. De Off. 1 17) 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.¹¹

In writing these words, Lord Stowell did not have in mind the contemporary debate over same-sex marriage. The case was

The Clandestine Marriages Act of 1753 in Context, 27 LAW & HIST. REV. 413, 413-18 (2009).

8. The term “common law marriage” is always confusing and parochial and in contemporary parlance particularly misleading since its popular meaning—cohabitation without a valid marriage—is so at odds with its legal meaning—valid marriage without a ceremony. It is especially a misnomer in this particular case, since neither Scots law nor, for that matter, English ecclesiastical law (including its law of marriage) was a common law system.

9. *Dalrymple*, 161 Eng. Rep. at 667, 675, 683; 2 Hag. Con. at 59, 82-83, 106. As Lord Stowell emphasized, this principle was actually consistent with the long-held doctrine of canon law recognizing the validity of marriages entered into only by the consent of the parties. See also Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1146-48 (2009) (discussing history of non-ceremonial marriage in canon and secular law, and outlining later developments) [hereinafter *Holy Secular Institution*].

10. *Dalrymple*, 161 Eng. Rep. at 693; 2 Hag. Con. at 137.

11. *Id.* at 669, 2 Hag. Con. at 63.

a conventional nineteenth-century dispute.¹² Still, Lord Stowell's reference to "two individuals of different sexes" was not casual or insignificant. He and the tradition he embodied thought of marriage as an institution grounded in "natural law" precisely because of its connection to the procreative potential of heterosexual sex. Marriage as the core of family and family was the first building block of society. This is even clearer from Lord Stowell's Latin quotation from Cicero's *De Officiis* ("On [Moral] Duties"), which he extracted from a passage that argues that:

[S]ince the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the *foundation of civil government [principium urbis]*, [and] the *nursery, as it were, of the state [quasi seminarium rei publicae]*.¹³

Less clear, though, is whether Lord Stowell's account logically excluded the possibility of same-sex marriage. Indeed, one might even imagine, if only in a fit of fanciful anachronizing, that Lord Stowell, with his nuanced appreciation of the complex character of marriage, might be willing to say that "it is a great mistake to suppose that because [marriage] is the one [which is to say, heterosexual] it may not likewise be the other [which is to say, homosexual.]"¹⁴

In the current debate over civil same-sex marriage, proponents have tended—for strategic, ideological, and

12. That is not to suggest that the legal and cultural questions surrounding non-ceremonial marriage are easy or uninteresting, see Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000); Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541 (2006), only that *Dalrymple* neither raised nor addressed any questions dramatically out of its own time and place.

13. CICERO, *DE OFFICIIS* 57, bk. 1, § 17.54 (T.E. Page et al. eds., Walter Miller trans., Loeb Classical Library 1928) (n.d.) (emphasis added).

14. I do not want to give the impression that Lord Stowell was what we would call a progressive thinker. As a member of the House of Lords, for example, he opposed ecclesiastical reforms affecting the Church of England and "spoke at length and with special fervor in opposing Catholic emancipation in Ireland." BOURGUIGNON, *supra* note 1, at 51.

intellectual reasons—to advance a “thin” conception of civil marriage at odds, in at least three ways, with Lord Stowell’s textured vision of three closely-connected but distinct layers. First, they have sharply distinguished between the “secular” and the “religious” aspects of marriage.¹⁵ Second, they have emphasized the purely positive or enacted character of civil marriage and have resisted portraying it as an institution grounded in a more substantial normative narrative such as natural law.¹⁶ Third, they have described the substance of marriage itself in thin terms, in particular arguing against any strong link between marriage and heterosexual sex and procreation.¹⁷

In an earlier article titled *A Holy Secular Institution*, I examined the first of these three moves. I suggested that the claim that civil marriage is, in the words of the Supreme Judicial Court of Massachusetts, a “wholly secular institution” has several possible understandings.¹⁸ I then argued that, on any of these understandings, the claim is dubious. The “secular” and “religious” meanings and institutions of marriage are so intermeshed in our history and legal and religious imagination, that trying to wall off

15. See *Holy Secular Institution*, *supra* note 9, at 1125-26, 1126 n.4 (citing sources).

16. See, e.g., John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1199-1200 (1999); William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 307, 309-10, 312-13 (1998); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOW. L.J. 173, 177-78 (1992); see also, e.g., Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DePaul L. Rev. 51, 57-58 (1998).

17. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 901-02 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961-62 (Mass. 2003); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 96-98 (1996); Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 13-15 (2010); Erwin Chemerinsky, *Essay, Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1706-07 (2010); Culhane, *supra* note 16, at 1195-96; Edward Stein, *The “Accidental Procreation” Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 409-14 (2009).

18. *Holy Secular Institution*, *supra* note 9, at 1128-31.

“civil marriage” from religious considerations is neither possible nor desirable.”¹⁹

My *Holy Secular Institution* article was not a brief against same-sex marriage, however. The intermeshing of the secular and religious dimensions of marriage does have consequences. But those consequences cut both ways. The article’s goal was to “illuminate the playing field, not to score points for one side or the other.”²⁰

In this Article, I want to grapple with and connect the other two respects in which many proponents of same-sex marriage have thought it necessary to flatten marriage itself. I suggest that both these moves are unnecessary to a defense of same-sex marriage *and* potentially counterproductive. Again, my goal is primarily analytic. I still believe that legal scholarship needs to be sharply distinguished from brief-writing.²¹ Nevertheless, I do support the drive for same-sex marriage, and this Article states that commitment more directly than my earlier work. So it might be worth saying at the start that, from the proponents’ point of view, getting the argument “right” should be important not only as a matter of intellectual integrity, but for several other reasons as well.

To begin with, arguments for same-sex marriage should acknowledge the reasons that same-sex marriage is worth fighting for.²² Simply put, to strip marriage of its deeper content and resonance simply for the sake of defining it as an institution so formless that it could then effortlessly accommodate same-sex couples is not only ironic but poignant.

19. *Id.* at 1123.

20. *Id.* at 1186.

21. *Id.* at 1130 n.14.

22. This is particularly important because many of the purely instrumental benefits of marriage can be obtained by other means, ranging from private contracts to parallel institutions such as civil unions. For efforts to make sense of the residuum of difference between marriage and civil unions, see, for example, Perry Dane, *The Intersecting Worlds of Religious and Secular Marriage*, in 4 *LAW AND RELIGION: CURRENT LEGAL ISSUES* 385, 388 (Richard O’Dair & Andrew Lewis eds., 2001) [hereinafter Dane, *Intersecting Worlds*]; Misha Isaak, Comment, “What’s in a Name?: Civil Unions and the Constitutional Significance of ‘Marriage,’” 10 *U. PA. J. CONST. L.* 607, 610-21 (2008).

To be sure, some theorists affirmatively seek to deconstruct marriage. They find the very idea of marriage inherently oppressive or essentialist or sexually constricting. Indeed, some gay activists and “queer” theorists have been cool to same-sex marriage precisely because they believe it perpetuates a bankrupt institution.²³ These might all be respectable positions. But most gay couples who want to get married, I suspect, are more conventional in their motivations and their attitude to marriage. Many aspire to experience marriage in all its “traditional” depth. They formalize their bond ceremonially and often religiously. They have and raise children and create families. In all ways but one, they are often as committed to the existing paradigm of marriage as the most vehement opponents of same-sex marriage.

In addition to disserving many same-sex couples who want to get married, the effort to hollow out the institution also disserves many of the opponents of same-sex marriage. The struggle for same-sex marriage, after some fits and starts, has lately picked up perhaps unstoppable momentum. As of this writing, seventeen states and the District of Columbia have legalized same-sex marriage by legislation or judicial decision.²⁴ And in June 2013, the United States Supreme Court, while punting on whether the Constitution created a right to same-sex marriage as such,²⁵ struck down

23. They also argue that same-sex marriage will simply replicate within the gay community an invidious moral and economic division, which already afflicts the straight world, between the married elite and the lesser unattached. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 58-59 (2008); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 84-91 (1999).

24. See CNN Library, *Same Sex Marriage Fast Facts*, CNN (Jan. 21, 2014, 3:57 PM), <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/>. Only one state at present recognizes “civil unions” that offer the legal incidents and benefits of marriage without the status itself. *Id.*; cf. Dane, *Intersecting Worlds*, *supra* note 22, at 386-94 (discussing the possible meaning of civil unions as an alternative to marriage); *infra* note 173 and accompanying text (discussing civil unions as a possible marker of the “difference between the paradigmatic heterosexual case of marriage and its extension to same-sex couples”).

25. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660, 2668 (2013) (ordering Court of Appeals for the Ninth Circuit to vacate for lack of appellate standing its decision in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) and affirming trial court

Section 3 of the federal Defense of Marriage Act, which had purported to deprive same-sex couples married under state law of the incidents of marriage under federal law.²⁶ In the end though, arguments for same-sex marriage will only win the day properly and conclusively if they honestly engage with the instinct that opposes them.

More specifically, the same-sex marriage movement has so far drawn on two slogans: “freedom to marry”²⁷ and “marriage equality.”²⁸ Both slogans are incomplete and even question-begging.²⁹ Moreover, for all the movement’s successes, a measurable minority of Americans, while generally willing to accommodate gay rights and gay equality, remain unconvinced that same-sex *marriage* is necessarily part of that package of rights and equality.³⁰ As a

decision striking down state constitutional amendment banning same-sex marriage).

26. See *United States v. Windsor*, 133 S. Ct. 2675, 2683-84, 2696 (2013); *cf. infra* note 178 (distinguishing the issues raised in *Windsor* from the more general debate over same-sex marriage); *infra* note 186 (discussing recent federal District Courts relying on *Windsor* to strike down state bans on same-sex marriage).

27. Evan Wolfson, one of the important activists throughout the whole struggle for same-sex marriage (and one of my college suitemates) wrote his Harvard Law School thesis on gay “freedom to marry” in 1983. A formal National Freedom to Marry Coalition came together in 1993 in the wake of the Hawaii Supreme Court decision in *Baehr v. Lewis*, 852 P.2d 44 (Haw. 1993). See Evan Wolfson, *The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 169, 170 (Robert Wintemute & Mads Andenæs eds., 2001); see also, e.g., Evan Wolfson, *The Freedom to Marry: Our Struggle for the Map of the Country*, 16 QUINNIPIAC L. REV. 209 (1996). Evan is still the president of Freedom to Marry, Inc.

28. Though the *idea* of equal treatment was always part of the movement for same-sex marriage, the *slogan* of “marriage equality” has only in more recent years seemed to gain prominence and even often displace “freedom to marry” for rhetorical pride of place. This is apparent, for example, in the Human Rights Campaign’s marriage equality logo, the names of many state same-sex marriage advocacy groups such as Marriage Equality California, and the titles given to legislation such as the Marriage Equality Act in New York, N.Y. DOM. REL. LAW §§ 10-a-10-b (McKinney 2011).

29. See Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1377-80 (2010).

30. In one typical poll a few years ago, 47% of the respondents thought it should be “legal . . . for gay and lesbians couples to get married” but 66 percent thought

purely tactical matter, perhaps another approach might be added to the mix. More fundamentally, norms of civil discourse and interpersonal respect should look askance at arguments—such as “freedom to marry” and “marriage equality”—that treat the class of Americans generally friendly to gay rights and gay equality but skeptical of same-sex marriage as bigots.³¹ However current public sentiment

they should “be allowed to form legally recognized civil unions, giving them the legal rights of married couples in areas such as health insurance, inheritance and pension coverage.” *Washington Post—ABC News Poll*, THE WASHINGTON POST (Feb. 4-8, 2010), http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html. The latest polling shows that somewhat more than half of Americans now support same-sex marriage. See Robert P. Jones, Daniel Cox & Juhem Navarro-Rivera, *A Shifting Landscape: A Decade of Change in American Attitudes About Same-Sex Marriage and LGBT Issues*, PUB. RELIGION RES. INST. 1, 8 (Feb. 26, 2014), http://publicreligion.org/site/wp-content/uploads/2014/02/2014.LGBT_REPORT.pdf (reporting 53% overall support for same-sex marriage and providing geographical, religious, age, and other breakdowns). Even that unprecedentedly high support for full-scale same-sex marriage, though, is less than the percentage several years ago who supported either marriage or rights equivalent to marriage, suggesting that a fair number of Americans still support most essential aspects of gay equality short of marriage itself.

31. Such claims that the views of same-sex marriage opponents amount to nothing more than bigotry have been particularly apparent recently, precisely when support for same-sex marriage in some circles has turned into a rhetorical truism. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013):

In the absence of a rational basis, what remains of proponents’ case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate. See . . . *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984) (“[T]he Constitution cannot control [private biases] but neither can it tolerate them.”).

See also, e.g., *Bostic v. Rainey*, 2014 U.S. Dist. LEXIS 19110 (E.D. Va. Feb. 13, 2014) (linking the opposition to same-sex marriage by Virginia legislators and votes to “unlawful prejudice.”); José Gabilondo, *Marriage Equality a Step to End Bigotry Toward Gays*, MIAMI HERALD (July 12, 2013), <http://www.miamiherald.com/2013/07/12/3497598/marriage-equality-a-step-to->

is trending, the debate about same-sex marriage is genuinely difficult, and arguments in favor of same-sex marriage should both acknowledge that difficulty and understand it.

Accepting that the call for same-sex marriage cannot adequately rest on slogans such as “freedom” or “equality” can also be understood as an invitation to articulate more nuanced, and possibly more contingent, justifications, arguments that—without condemning the entire history of marriage to this point—grapple more powerfully with the specific conditions of the present age that would lead many same-sex couples to seek marriage as both a legal relationship and a cultural marker of their bond. Later in this paper, I suggest one direction that exploration might take, but the more important point is that the project to develop more specific justifications, whatever exact shape it takes, can itself empower all the parties to the debate.

Even if I am misreading the sentiments of both sides of the debate, however, proponents of same-sex marriage should be wary, on both principled and strategic grounds, of trying to broaden marriage only by first flattening it, particularly if alternative arguments are available. First, the move grants too much to opponents of same-sex marriage. It implies that if the details of the “traditional” heterosexual conception of marriage remain sound, the move to extend marriage to same-sex couples is unsound. But, as I demonstrate in this Article, the two can coexist.

end.html (after the Supreme Court’s decision in *Windsor*, “it just became harder to act like a bigot without being called out as one”).

Importantly, not all supporters of same-sex marriage accuse the opposition of bigotry. Some who have been involved in the struggle the longest actively dispute the assumption. See, e.g., Andrew Sullivan, *A Time-Line of Marriage Equality*, THE DISH (June 3, 2013), <http://dish.andrewsullivan.com/2013/06/03/a-time-line-of-marriage-equality/> (“My one complaint is the use of the term “bigots” to describe anyone opposed to marriage equality. Some are; many aren’t. And the use of the word does nothing to help engage opponents of equality—and merely reeks of the Maddow-like smugness that encourages the foes of equality to dig in.”). Cf. Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 29, 40-42 (2014) (arguing that if the Supreme Court strikes down laws banning same-sex marriage, it should not “obfuscat[e]” the matter by relying on a finding of illicit animus).

Second, hollowing out the substantive undergirding of marriage invites the “line-drawing problem” that I have described as the “knottiest and stubbornest difficulty that confronts the argument for same-sex marriage.”³² Briefly, if the possibility of marriage is extended to same-sex couples, why not also extend it to all manner of other human associations—close relatives,³³ non-intimate friends, plural groups, and so on? This sort of litany is a staple of arguments against same-sex marriage, and it requires the sort of careful and precise response that only a robust account of marriage can sustain.

Again, extending marriage to same-sex couples might well inspire a healthy broader discussion about both the boundaries of marriage and whether civil marriage should exist at all. I suggest here, however, that expanding the institution of marriage to include same-sex couples does not *require* resolving those deeper arguments about the character of marriage and its place in human relations, and that those arguments can and should proceed at their own pace even in the wake of such an expansion.

This paper proceeds in four steps. Part I outlines a certain type of natural law account of marriage as a bond “between two individuals of different sexes.” My aim in this first section is not to argue definitively in favor of that natural law account, though I do find it attractive and even compelling on several grounds, but rather to posit it, *arguendo* in the lawyer’s lingo, so I can move on to the rest of the paper. I will, though, try to explicate some of the implications of the argument.

The next two parts of the paper then explore why assuming even this strong proposition about the character of marriage does not exclude the possibility of strong arguments for same-sex marriage. Part II argues an essentially negative point: although positing that heterosexual marriage is an institution of natural law might have important normative consequences, it does not, consistent with the natural law

32. *Holy Secular Institution*, *supra* note 9, at 1179-80.

33. The problem is not whether recognizing same-sex marriage will lead down the slippery slope to legitimizing incest. Rather, the question is why a hollowed-out account of marriage should continue to connect marriage to potential sex in the first place.

tradition broadly understood, necessarily exclude same-sex marriage.

Part III looks at how such an argument to extend marriage to same-sex couples might be constructed. Its aim is to move beyond conventional equality arguments that draw their force from so thoroughly hollowing out the conception of marriage that it then becomes “irrational” to deny it to same-sex couples. Instead, I give an account of another form of argument, which I call “analogy of dignity,” that, although rarely noted as such, has often been used to extend legal rights or institutions beyond their paradigmatic cases. I then suggest, briefly, how the argument from “analogy of dignity” might work in the same-sex marriage context, and what its implications might be, including the consequences of my argument for the various legal debates surrounding same-sex marriage.

Part IV concludes by asking the fraught *human* question lurking throughout the paper—whether my alternative argument for same-sex marriage grounded in “analogy of dignity” actually does justice to the dignity of its own aspirations. I argue that it does, and more.

Before plunging in, a few words about methodology, terminology, and how the parts of the article connect to each other. Parts I and II discuss “natural law.” Some natural law accounts tie arguments about marriage to views about the morality of homosexual conduct. Mine do not. Period. Even so, I have mixed feelings about framing my own analysis in natural law terms. I am skeptical of certain aspects of natural law thinking writ large.³⁴ But I do think it important, at least (but not only) for the sake of argument, to make the most highly charged case possible for the normative coherence of heterosexual marriage. Natural law discourse, whatever its larger role, helps provide that language. And it is helpful, in Part II, to draw on that same natural law tradition to explain why the arguments in Part I need not be the last word. In sum, it is useful and enlightening to think through the implications of natural law analysis at least in

34. See generally Perry Dane, *The Natural Law Challenge to Choice of Law*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 142 (Donald Earl Childress III ed., 2010) [hereinafter Dane, *Natural Law Challenge to Choice of Law*].

part to force a more complete account of both the limits and the surprising force of positive law.³⁵ Moreover, only by framing the issue in terms of natural law can we then try to make sense of both the power and the limits of positive law.

Nevertheless, I do not want to get bogged down in larger jurisprudential debates. Thus, I also argue in Part I that marriage can be understood as a “paradigmatically” heterosexual institution. Even by itself, this is an important claim, though weaker than to say that heterosexual marriage is an institution grounded in natural law. In that same spirit, the argument in Part II, stripped of its natural law particulars, can just be read to say that identifying a paradigm case does not in itself exclude the possibility of other cases beyond the paradigm.

The term “paradigm” has its own difficulties and ambiguities.³⁶ With respect to marriage, it might refer to linguistic understandings of the word.³⁷ Or it might refer to sociological consensus about the proper scope of marriage. Or it might take on a more directly normative sense. My sense of “paradigm” draws on both the linguistic and sociological but is most directly normative. Thus, to say that marriage is paradigmatically heterosexual, in my sense, is to say that the normative undergirding of marriage—the reason that marriage exists in the first place—assumes the heterosexual case.

Part III of the Article—which discusses “analogy of dignity” and its implications for the same-sex marriage debate—takes up the invitation extended in Part II. But Part III can also stand alone as a demonstration of how to extend an institution or legal rule such as marriage without

35. As James Bernard Murphy emphasizes in his important study *THE PHILOSOPHY OF POSITIVE LAW: FOUNDATIONS OF JURISPRUDENCE* (2005), the discourses of natural law and positive law, rather than necessarily opposing each other, have historically evolved in tandem, suggesting a deeply symbiotic relationship between the two.

36. I thank Doug Husak for helping me think through this ambiguity.

37. For a compelling philosophical critique of arguments against same-sex marriage that rely on current linguistic usage, see Adèle Mercier, *Meaning and Necessity: Can Semantics Stop Same-Sex Marriage?*, 8 *ESSAYS PHIL.* Iss. 1, Article 14 (2007), <http://commons.pacificu.edu/eip/vol8/iss1/14>.

rejecting the normative force or coherence of its paradigmatic core. Part III and Part IV make fewer specific references to the natural law tradition, although its spirit remains just below the surface, and I do come full circle at the very end of the Article with a brief reflection on how resort to “analogy of dignity” might have a place in the natural law dialectic itself more broadly conceived.³⁸

I. MARRIAGE AS A NATURAL INSTITUTION

As noted, many proponents of same-sex marriage, and many contemporary writers about marriage more generally, reject or discount the character of marriage as a “natural” institution. They speak of it as entirely a creature of positive law, like a licensing or registration statute.³⁹ To be sure, some of this allergy to natural law views of marriage is understandable. As noted, some natural law accounts relate arguments about the nature of marriage to views about the morality of homosexual conduct. More generally, same-sex marriage opponents in the “new natural law” tradition have argued that such unions are excluded by the very definition of marriage, understood as a natural law constraint dictated by right reason and a proper appreciation of the common good.⁴⁰

The natural law argument here is different and more modest, though I suggest more faithful to the broad sweep of natural law discourse over the centuries among both philosophers and lawyers. As already emphasized, my argument says nothing about the morality of homosexual sex.

38. See *infra* notes 215-218 and accompanying text.

39. See generally Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005).

40. See, e.g., John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1064-65 (1994); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 304 (1995); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2499 (1997). For a recent important effort to reframe these arguments for a broader audience, see SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE?: MAN AND WOMAN: A DEFENSE* (2012). See also Gerald V. Bradley, *Three Liberal—but Mistaken—Arguments for Same-Sex Marriage*, 50 S. TEX. L. REV. 45 (2008).

More generally, my excursus into natural law does not claim even to attempt any sort of comprehensive account of “the basic forms of human flourishing” or the standards of “practical thinking” of the sort emphasized by the “new natural law” thinkers.⁴¹

A.

That said, I want to describe here, in brief and broad terms, an idea of heterosexual marriage as an institution of natural law, or at least as an institution that runs much deeper than the fiats of particular state licensing regimes. My aim is not to prove the force of that idea, although I sympathize with it and will have some things to say about why I do. In any event, I do not claim—in fact, I deny—that this account of the “natural” dimension of the marriage necessarily exhausts the potential social, linguistic, or legal meaning of marriage writ large. I explain how the two might diverge in Part II of this Article.

The natural law tradition comes in many flavors. As just noted, I do not try to rely here on any single, completely theorized, system.⁴² I have elsewhere suggested, though, that

41. For relevant examples of the “new natural law” tradition, see, for example, JOHN M. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23 (2d ed. 2011). *See also*, e.g., GERMAIN GRISEZ & RUSSELL SHAW, *BEYOND THE NEW MORALITY: THE RESPONSIBILITIES OF FREEDOM* (3d ed. 1988); Robert P. George, *Natural Law and Human Nature*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 31 (Robert P. George ed., 1992); Germain Grisez, Joseph Boyle & John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *AM. J. JURIS.* 99 (1987).

Work in this tradition, however, does not in any way exhaust even contemporary natural law discourse. For critiques of the “new natural law” and alternative accounts, see, for example, RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987); RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* (2003); Alasdair MacIntyre, *Theories of Natural law in the Culture of Advanced Modernity*, in *COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW* 91 (Edward B. McLean ed., 2000); Ralph McInerny, *The Principles of Natural Law*, 25 *AM. J. JURIS.* 1 (1980). My own three-pronged approach to natural law, *see infra* notes 44-52 and accompanying text, resonates with these critiques of the “new natural law,” not so much in its eclecticism as in its determination that natural thinking must take into account not only abstract first principles but “knowledge of the world,” McInerny, *supra*, at 11.

42. *See supra* note 41 and accompanying text.

natural law traditions, broadly speaking, tend to combine some sort of “normative realism, the view that normative statements can be true” with “a sort of connection—a hinge or hook—between the normative truths of moral realism, or some of them, and the social phenomenon of law, or some of it.”⁴³

More to the point, perhaps, natural law claims of the sort that Lord Stowell probably had in mind gain whatever force they have from several converging lines of thought.⁴⁴ One of these is simply reflection or meditation on the characteristics and essential needs of human beings and human societies. Another is a sort of rough empiricism, an anthropological search for universal features of human organization that might suggest a relevant consensus.⁴⁵ The third is partly a

43. Dane, *Natural Law Challenge to Choice of Law*, *supra* note 34, at 143.

44. The overlap of these various forms of argument, even at the cost of a certain rigor, is a very old and arguably inevitable feature of the broad Western natural law tradition. Brian Tierney, discussing both fourteenth-century and seventeenth-century debates about natural rights to property, points out the common if often criticized temptation to appeal:

[T]o a primeval state of nature as a starting point for arguments about the right ordering of society. This kind of argument was made possible by the ambiguities inherent in our word “nature. . . .” “Natural” can refer to a primeval state of affairs before the institution of any human laws or customs or conventions; or the word can refer to the intrinsic, permanent characteristics of human beings as self-aware, moral, rational creatures. . . . The attempt to derive natural rights and natural law from human reason may be a worthwhile enterprise; an appeal to simple primitivism seems at first sight merely naive. And yet this latter approach appears to satisfy some deep instinctive tendency of the human mind.

BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS, STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625*, at 133-34 (1997) [hereinafter TIERNEY, *THE IDEA OF NATURAL RIGHTS*].

45. *Cf.* Clyde Kluckhohn, *Universal Values and Anthropological Relativism*, in *MODERN EDUCATION AND HUMAN VALUES: PITTCAIRN-CRABBE FOUNDATION LECTURE SERIES 4*, at 87, 105 (1952) (“[T]he mere existence of universals after so many millennia of culture history and in such diverse environments suggests that they correspond to something extremely deep in man’s nature and/or are necessary conditions to social life.”).

For a classic defense of this approach, coming out of the Scottish Enlightenment, see SIR JAMES MACKINTOSH, *A DISCOURSE ON THE STUDY OF THE LAW OF NATURE AND NATIONS* 35-36 (1835):

reflection of the first two but can also be conceptualized on its own: a counterfactual examination of what rights and institutions might exist even in the absence of formal legal rules or even organized societies. This is the familiar idea of a “state of nature” found in a range of natural law accounts. The existence of a “state of nature” need not, of course, be an actual historical claim.⁴⁶ Even as a thought experiment, it need not even be located in the past at all; it is just as interesting to ask, in the manner of apocalyptic fiction, which basic features of proto-juridical human organization would “naturally” start to constitute themselves if all present systems of government and positive law just disappeared. In this sense, the point of the counterfactual “state of nature” is not to exclude social relations, or put all persons behind a veil of ignorance, but simply to imagine how a minimum normative world might begin to be built.

Keeping all that in mind, the argument for heterosexual marriage as an institution of natural law is almost embarrassingly straightforward. Strains of it also resemble,

History . . . is now a vast museum, in which specimens of every variety of human nature may be studied. From these great accessions to knowledge, lawgivers and statesmen, but, above all, moralists and political philosophers, may reap the most important instruction. They may plainly discover in all the useful and beautiful variety of governments and institutions, and under all the fantastic multitude of usages and rites which have prevailed among men, the same fundamental, comprehensive truths, the sacred master principles which are the guardians of human society, recognised and revered (with few and slight exceptions) by every nation upon earth, and uniformly taught (with still fewer exceptions) by a succession of wise men from the first dawn of speculation to the present moment.

One need not share Mackintosh’s optimism about the existence of “sacred master principles” to see at least some utility in testing moral and political intuitions against the actual experience of humankind. See, e.g., Michael Freeman, *Anthropology and the Democratisation of Human Rights*, INT’L J. HUM. RTS., Oct. 9, 2002, at 37, 42; Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56, 65-66 (1988).

46. See Richard Ashcraft, *Locke’s State of Nature: Historical Fact or Moral Fiction?*, 62 AM. POL. SCI. REV. 898, 900 n.14 (1968) (“Locke believed it possible to use the state of nature as a ‘truth-concept,’ not only because it referred to actual human history, but also because, properly stated, it set forth the logical and moral conditions of human existence. And, because it described the ‘nature of things,’ it was true.”).

though in a different register whose implications I will draw out below, arguments already heard in the same-sex marriage debate.

As a reflection on human nature, the argument goes like this: heterosexual sex has the unique feature of potentially and even unintentionally leading to procreation. It is therefore uniquely appropriate—even necessary—to have a vehicle through which such potentially procreative heterosexual sex can be legitimized, recognized, and embedded in a set of personally and socially recognized rights, obligations, and bonds of love and loyalty between the members of the couple and between both of them and their offspring. Along the same lines, it seems appropriate for marriage to be not only a form of understanding between two people (even if “no third person existed in the world”) but also a bond between that couple and their children, and a basic building block of society—in Cicero’s terms, “the nursery . . . of the state.”⁴⁷ It also makes sense to plant in both lone individuals and in the collective understanding at least some preference for sexual relations between men and women to be channeled into that set-apart status of marriage, even if the tone and severity of that preference might take any of several forms.⁴⁸ Finally, it bears emphasis that this conception of marriage does not see it as *merely* the engine for reproduction. Heterosexual men and women, given their sexual “natures,” will be attracted to each other and love each other with all the depth that romantics and poets and lovers themselves can imagine. They will also love their children. Marriage, however, structures and frames those feelings and relations, even as it places constraints on them and attaches them more self-consciously to interpersonal moral constraints and assumptions, a social context, and a web of interconnected institutional assumptions. Marriage, in its natural dimension, is thus a set of ideas—like promise or property or liberty—about the matrix of rights, obligations,

47. See CICERO, *supra* note 13 and accompanying text.

48. Thus, even in contemporary American culture, in which premarital sex is widely accepted, broad swaths of the population still think of it as pre-marital sex, which is to say as either a time-bound period of experimentation and play before settling down or even as a form of rehearsal for marriage itself. See MARK REGNERUS & JEREMY UECKER, *PREMARITAL SEX IN AMERICA* 70-71 (2011).

and expectations that shape the normative narrative of ordinary life.

This reflective argument is then buttressed by two other converging lines of inquiry. First, marriage as the socially recognized vehicle for heterosexual bonding and for potentially reproducing the generations does, in some form, turn out to be about as close to a cultural universal as human society gets, in a small select company with “law, government, religion, conceptions of self, . . . family, and kinship.”⁴⁹ It is, even with all its complex and fascinating variations, part of the common normative and institutional template for our species.⁵⁰

49. ABRAHAM ROSMAN, PAULA G. RUBEL & MAXINE K. WEISGRAU, *THE TAPESTRY OF CULTURE: AN INTRODUCTION TO CULTURAL ANTHROPOLOGY* 13 (9th ed. 2009); see also Steven W. Gangestad, Martie G. Haselton & David M. Buss, *Evolutionary Foundations of Cultural Variation: Evoked Culture and Mate Preferences*, 17 *PSYCHOL. INQUIRY* 75, 75 (2006) (“[A]lthough marriage arrangements vary widely across human societies, long-term, culturally recognized, and sanctioned pair bonds occur in all human groups.”). To be sure, social scientists have identified a few apparent exceptions to the universality of some form of an institution of marriage. See, e.g., CAI HUA, *A SOCIETY WITHOUT FATHERS OR HUSBANDS: THE NA OF CHINA* (Asti Hustvedt trans., 2001) (discussing the Na of China). It is unnecessary for my limited purposes here to venture into the extensive debate over the precise meaning and significance of such examples.

50. Sociologists have identified some examples of apparent same-sex marriage in the diversity of human cultures. For discussions of marriages between women in some traditional African cultures, see, for example, Judith Shapiro, *Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex*, in *SAME-SEX CULTURES AND SEXUALITIES: AN ANTHROPOLOGICAL READER* 138, 150-52 (Jennifer Robertson ed., 2005); Saskia Wieringa, *Women Marriages and Other Same-Sex Practices: Historical Reflections on African Women’s Same-Sex Relations*, in *TOMMY BOYS, LESBIAN MEN AND ANCESTRAL WIVES: FEMALE SAME-SEX PRACTICES IN AFRICA* 281 (Ruth Morgan & Saskia Wieringa eds., 2006); Regina Smith Oboler, *Is the Female Husband a Man? Woman/Woman Marriage Among the Nandi of Kenya*, 19 *ETHNOLOGY* 69 (1980). For discussions of same-sex marriages in some Native American cultures, see, for example, WALTER L. WILLIAMS, *THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* (1986); Charles Callender & Lee M. Kochems, *The North American Berdache*, 24 *CURRENT ANTHROPOLOGY* 443 (1983); see also WILL ROSCOE, *CHANGING ONES: THE THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA* (1998).

The debate over the precise character and function of these sorts of marriages and the various forms they take in different cultures is unending and complex and beyond the scope of this Article. Suffice it to say that such marriages typically involve some complicating factor, whether it is complex gender-identity (as in the

Second, it is also easy to see how a society in an imagined “state of nature,” whether primordial or post-apocalyptic, would soon appreciate the need for something along the lines of an institution of marriage, which is to say socially-recognized pair bonds woven into the emerging (if still tenuous) fabric of social organization, channeling (whether strictly or not) potentially procreative sex and accompanied by (even only informally) enforceable obligations of exclusivity, mutual support, care for offspring, and stability over time.⁵¹

Native American case) or complex family structures (as in some of the African cases where a woman already married to a man might in turn marry a woman for various procreative or economic reasons), or even in some contexts the lack of any expectation of sexual relations. That is to say, while one need not doubt the reality and importance of such same-sex marriages, they were not in any culture simply assimilated unproblematically into a larger undifferentiated category of “marriage” that includes both same-sex and opposite-sex bonds. They thus lend little support to a contemporary notion of “marriage equality” as such, though they might in a loose way be some precedent for the idea promoted in this Article, *see infra* notes 162-79 and accompanying text, of understanding same-sex marriage as a “horizontal extension” of the traditional institution of heterosexual marriage.

Much the same could be said about John Boswell’s classic study of Western medieval rituals formalizing deep bonds among men. *See generally* JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994). Even putting aside the debate between Boswell and many of his critics as to whether these rituals were about homosexual bonds or something else—friendship or alliance relations, for example—the fact remains that the rituals that Boswell identified at best functioned as metaphoric extensions rather than simply straightforward examples of the institution of marriage.

51. I am thinking here, for example, of the classic novel *The Day of the Triffids* by John Wyndham, in which factions in a post-apocalyptic society experiment with various vehicles for organizing the perpetuation of the race, some of them quite horrific, with something very much like non-ceremonial marriage apparently winning the day as both the most humane and the most stable solution. JOHN WYNDHAM, *THE DAY OF THE TRIFFIDS* 185 (1951) (“So I’m to be a farmer’s wife. Anyway, I like being married to you, Bill—even if it isn’t a very proper, authentic kind of marriage.”). To be sure, the characters in the novel are influenced by the norms of the old pre-apocalyptic order; this is not a state of nature behind a “veil of ignorance.” But, as I suggested earlier in text, that actually makes the story more useful, not less, since it explores precisely which of the characters’ old habits would be discarded and which would find themselves reemerging once the coercive power of the state and the stabilizing influence of an ordered society were devastatingly removed.

The subtle transition from a post-apocalyptic “state of nature” to the reconstruction of explicit institutional forms takes more direct center stage in George R. Stewart’s 1949 novel *Earth Abides*. Almost a third of the way through the story, Ish and Em, two survivors of the fall of civilization from a worldwide plague, join together:

For a wild moment he had an idea that they might say some kind of marriage vows. Quakers could marry themselves. Why couldn’t others? . . . And then he sensed that the mere babbling of words was in itself much more dishonest even than a straightforward feeling for the knee under the table.

GEORGE R. STEWART, *EARTH ABIDES* 113 (1949). A generation later, though:

The Year 16 . . . was remarkable because the first marriage actually took place. Those married were Mary, who was Ish’s and Em’s oldest daughter, and Ralph, who had been born to Molly just before the Great Disaster. They were younger than would have been thought suitable or even decent for marriage in the Old Days, but in this also standards had changed.

. . . .

Maurine and Molly and Jean were all for “a real wedding,” as they said. They hunted up a Löhengrin record for the wind-up phonograph, and were making a wedding costume in white with a veil, and everything to go with it. But to Ish, all this seemed a horrible parody of things that had once been; Em, in her quiet way, supported him. Since Mary was their daughter, they controlled the wedding. In the end, they had no ceremony at all, except that Ralph and Mary stood before Ezra, and he told them that now they were being married and that they would assume a new responsibility to the community that they must try to fulfill as well. Mary bore a child before the year was out, and so for that reason, it was called the Year of the Grandchild.

Id. at 155-56. Cicero and Lord Stowell would have understood this story completely. They might have argued, though, as I would, that a “ceremony” *did* actually take place.

The science fiction movie *Logan’s Run*, which does posit at least a translucent veil of ignorance, also poignantly suggests the bottom-up power of marriage. In the movie, humanity has retreated to a computer-controlled environment in which persons are incubated in machines and killed on their thirtieth birthdays; they therefore know nothing about either procreation or aging. The two protagonists, Logan and Jessica, escape and eventually meet an “old man” who tries to explain the words they have seen on tombstones in a cemetery: “Beloved Husband,” “Beloved Son,” “Beloved Wife.” “My father was the husband and my mother was the wife. ‘Beloved’ is a word they used—to stay together. . . . So people stayed together for that feeling of love. They would live and raise children together and be remembered.” Logan and Jessica, with the “old man’s” blessing, then bring the institution of marriage back to life for themselves as she whispers “Beloved husband” and he kisses her, saying “Beloved wife.” David Zelag Goodman, *Logan’s Run* (1976) Movie Script (Apr. 30, 1975), http://sfy.ru/?script=logans_run.

The post-apocalyptic thought experiment emphasizes that marriage can have an important interpersonal and collective reality even apart from the collection of more mundane legal incidents—tax benefits and the like—that attend it in advanced industrial society. It also illustrates why this view of marriage has nothing to do with a devaluation of homosexual sex. One can imagine that a society struggling to reorganize itself from the ground up would value and respect the same-sex attractions of some of its members and their love for each other without seeing the need to attach to gay sexual relations an expectation that they will be channeled into a particular socially embedded form of expression, or that they will be stable and exclusive or involve bonds of mutual support as well as affection, or that their pair bonds will be the nucleus of the larger units through which humanity projects reproduces, or—in sum—that the proto-society will make available to gay persons a proto-institution such as “natural” marriage built around those expectations.⁵²

B.

The argument here is more or less the one that Lord Stowell and Cicero had in mind when they discussed the “natural” character of marriage. In its broadest outlines, it was also once a commonplace in Western philosophical and

To be sure, science fiction authors have also created a host of less conventional forms of marriage or alternatives to marriage. Some of these, however, can be understood as efforts to unpack and reconfigure the immanent logic of the institution.

52. I am not suggesting, as both some conservatives, see, for example, Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 1016-24 (2007), and some queer theorists, MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in *MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITICS* 175 (Russ Castronovo & Dan Nelson eds., 2002); Carl Wittman, *A Gay Manifesto*, GAYHOMELAND.ORG (1970), http://library.gayhomeland.org/0006/EN/A_Gay_Manifesto.htm, have, that gay culture distinctively embraces changeable or non-exclusive relations. To the contrary, my point simply goes to whether a society building itself from scratch would find a need to provide a proto-institutional framework for such expectations.

legal thought. John Locke, for example, whose views on the right of married couples to specify the terms of their contract and even to terminate it were well ahead of their time, still conceptualized marriage as a “a voluntary compact between man and woman.”⁵³ Moses Mendelssohn, as part of his argument for the centrality of “natural liberty,”⁵⁴ held that marriage is “nothing other than an agreement between two persons of different sexes to bring children into the world; and upon this agreement rests the entire system of their mutual duties and rights.”⁵⁵

53. God having made Man such a creature, that in his own Judgment, it was not good for him to be alone, put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into *society*, as well as fitted him with understanding and language to continue and enjoy it. The first society was between Man and Wife, which gave beginning to that between Parents and Children; to which, in time, that between Master and Servant came to be added: And though all these might . . . make up but one family, wherein the Master or Mistress of it had some sort of Rule proper to a family. . . .

Conjugal Society is made by a voluntary Compact between Man and Woman; and tho' it consist chiefly in such a Communion and Right in one another's Bodies as is necessary to its chief End, Procreation; yet it draws with it mutual Support and Assistance, and a Communion of Interests too, as necessary not only to unite their Care and Affection, but also necessary to their common Off-spring, who have a right to be nourished, and maintained by them, till they are able to provide for themselves.

JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 336-37 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

54. MOSES MENDELSSOHN, *JERUSALEM* 52 (Allan Arkush trans., Univ. Press of New England 1983) (1783).

55. *Id.* at 50. His argument, more completely, was that:

Whoever helps to beget a being capable of felicity is obligated, by the laws of nature, to promote its felicity, as long as it is not yet able to provide for its own advancement. . . . [And] by the act itself, the parents have agreed to assist each other in this respect, that is, to discharge together their duty of conscience. In a word: the parents, through the very act of cohabitation, have entered into a state of matrimony. They have made a tacit contract to render capable of felicity, that is, to *educate*, the being, destined for felicity, for whose coming into the world they are jointly responsible.

All the duties and rights of the state of matrimony flow quite naturally from this principle. . . . The duty to educate follows from the agreement to beget children; and the obligation to set up a common household follows from the common duty of education. Marriage, therefore, is, in

But this notion of marriage as “natural” is not merely academic or antiquarian. Simply by virtue of being a “natural law” argument, it helps suggest why people care about marriage so deeply. It provides a coherent vantage point from which to mediate between marriage’s character as a cultural universal and the often radically different instantiations of marriage in different times and places. It makes it easier to understand the special place that marriage and even the right to marry have in our moral and constitutional discourse. It renders intelligible, for example, Justice Douglas’s famous peroration in *Griswold v. Connecticut*, that “We deal here with a right of privacy older than the Bill of Rights.”⁵⁶ And it helps make sense of the argument of some opponents of same-sex marriage—an argument I ultimately reject in this Article⁵⁷—that extending marriage to same-sex couples is not merely mistaken as a matter of policy or morals but actually intrudes the government into a question beyond its legitimate jurisdiction.⁵⁸

Jurisprudence and jurisdiction aside, this sort of natural account of marriage also helps make sense of the specific characteristics of marriage as an institution. Human life generates a variety of distinct forms of organization and interaction, but no other looks quite like marriage because no other arises out of the same complex of facts and needs as marriage. Friendship, for example, can be just as deep as sexual love, but it does not require—indeed, is sometimes defined by the lack of—formal expectations and obligations.⁵⁹ Close biological kinship includes various firm obligations, but excludes the very element that helps define marriage—sex. The list goes on.

reality, nothing other than an agreement between two persons of different sexes to bring children into the world; and upon this agreement rests the entire system of their mutual duties and rights.

Id.

56. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

57. See *infra* note 172 and accompanying text.

58. See *infra* note 172 and accompanying text (citing sources).

59. I discuss this point in more detail in *Holy Secular Institution*, *supra* note 9, at 1182.

Finally, the “natural” account of marriage, as Lord Stowell powerfully articulated, helps both make sense of the potential religious significance of marriage and locate that religious significance in a form of understanding that need not be exclusively religious. Indeed, religious traditions themselves recognize this point explicitly. In Catholic thought, for example, marriage is a universal, natural institution that then (only) for Christians is raised to the level of a sacrament, and (only) for Catholics becomes further subject to the Church’s own jurisdiction regarding matters of form.⁶⁰ Similarly, Jewish law considers marriage between Jews to be a distinctive juridical and spiritual institution, but also recognizes (though this has been under-theorized in classical Jewish thought) that all societies can establish forms of “natural” marriage of their own.⁶¹ Mainstream Protestant thought, meanwhile, as my earlier Article explains in much more detail, rejects the sacramental view of marriage and for that matter does not believe that there is such a thing as a distinctively “religious marriage” separate from the civil authority of the state⁶² but does treat marriage both as a natural institution in the divine order of creation and as a sacred type of the relation of Christ to his Church.⁶³

60. See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1601-1608, 1621, 1659-1661 (U.S. Catholic Conference trans., 1994); THE CODE OF CANON LAW: A TEXT AND COMMENTARY 740-44, canons 1055-1059 (James A. Coriden et al. eds., 1985); Timothy J. Buckley, *The Bond of Marriage*, in MARRIAGE IN THE CATHOLIC TRADITION 88, 88-89 (Todd A. Saltzman et al. eds., 2004); Todd A. Saltzman, *Friendship, Sacrament, and Marriage: The Distinction between Christian Marital Friendship and Non-Christian Marital Friendship*, in MARRIAGE IN THE CATHOLIC TRADITION, 115, 119-20 (Todd A. Saltzman et al. eds., 2004).

61. See Michael Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, in COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE 53, 68-69 (John Witte, Jr. & Eliza Ellison eds., 2005); David Novak, *Jewish Marriage: Nature, Covenant, and Contract*, in COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE 26, 27 (John Witte, Jr. & Eliza Ellison eds., 2005). For the various strands in early Rabbinic thinking about marriage, see generally MICHAEL L. SATLOW, *JEWISH MARRIAGE IN ANTIQUITY* (2001).

62. *Holy Secular Institution*, *supra* note 9, at 1160-62.

63. In the classic words of the Anglican BOOK OF COMMON PRAYER (1662) (with spellings modernized):

DEARLY beloved, we are gathered together here in the sight of God, and in the face of this congregation, to join together this Man and this Woman in holy Matrimony; which is an honourable estate, instituted of God in

In all these views, however, the religious dimension is intertwined with the more universal instinct that something like marriage is a fundamental building block of human life both as a primary bond for individuals and as the engine for the continuation of the human family as a whole. Or, to put it another way, marriage, at least in the Western religious traditions, is such a powerful idea that its human dimension is understood to be of a piece with central ideas about the divine-human encounter. Even those traditions that limit marriage, such as Western Catholicism with its discipline of priestly and consecrated celibacy, or eliminate it, as in the Shaker movement, or reconceive it, as in nineteenth century Mormonism's embrace of earthly polygamy as a step to a glorified family life after death, do so for the sake of the idea of marriage itself, though shifting more sharply than other traditions from the merely human to the spiritual plane. But all this depends on the conviction, which need not be religious at all, that marriage is something deep indeed.

C.

An argument of the sort I have just made understandably invites two types of objections. The first is that marriage

the time of man's innocency, signifying unto us the mystical union that is betwixt Christ and his Church; which holy estate Christ adorned and beautified with his presence, and first miracle that he wrought, in Cana of Galilee; and is commended of Saint Paul to be honourable among all men: and therefore is not by any to be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly, to satisfy men's carnal lusts and appetites, like brute beasts that have no understanding; but reverently, discreetly, advisedly, soberly, and in the fear of God; duly considering the causes for which Matrimony was ordained.

First, It was ordained for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy Name.

Secondly, It was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body.

Thirdly, It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity. Into which holy estate these two persons present come now to be joined. Therefore if any man can show any just cause, why they may not lawfully be joined together, let him now speak, or else hereafter for ever hold his peace.

cannot be fundamentally an institution grounded in the unique link between heterosexual sex and potential procreation because, after all, our traditions about marriage have historically allowed elderly and infertile heterosexual couples to get married.⁶⁴ Some opponents of same-sex marriage have responded to this objection with quasi-metaphysical arguments about male and female biological complementarity.⁶⁵ But there is a simpler response⁶⁶: as described here, the institution of marriage does not merely facilitate heterosexual bonding; it also channels (more or less strongly) psychological and cultural expectations about the form that committed heterosexual sexual relations should take.⁶⁷ If the institution is doing its job, then heterosexual couples and the society around them should take for granted that the only, or at least highest, expression of their sexual bond will take place in the context of marriage. It would therefore be unrealistic and unworkable, and weaken the psychological and cultural power of marriage, to cut off those expectations for particular couples just because they happen to discover themselves unable to have children.⁶⁸

64. See, e.g., Andrew Koppelman, *The Decline and Fall of the Argument Against Same-Sex Marriage*, 2 U. THOMAS L.J. 5, 24 (2004); cf. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) ("Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. People who cannot stir from their deathbed may marry.") (citation omitted) (footnote omitted).

65. See George & Bradley, *supra* note 40, at 301-02; see, e.g., John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1068 (1994).

66. I make much the same point in *Holy Secular Institution*, *supra* note 9, at 1177.

67. Cf. *Holy Secular Institution*, *supra* note 9, at 1177 & nn.152-53 (discussing channeling function of the institution and definition of marriage, and citing sources).

68. Cf. Teresa Stanton Collett, *Constitutional Confusion: The Case for the Minnesota Marriage Amendment*, 33 WM. MITCHELL L. REV. 1029, 1049 (2007) ("It is true that that the state recognizes marriages between elderly or infertile couples unable to conceive, or younger couples intending to avoid conception

The second general objection to the sort of argument made here is that it is myopic and essentialist. It ignores the wide variety of forms that marriage has taken and the many ways in which our understanding of marriage has changed.⁶⁹ Marriage can be monogamous or polygamous, patriarchal or egalitarian, economic or companionate, exogamous or endogamous, and so on. And, similarly, the objection goes, marriage can be rigidly heterosexual or open to other possibilities.

This objection has two related problems. First, to say that marriage has taken many different forms in various times and places does not prove that it has no essential core. In fact, the argument for that essential core is actually strengthened by the jumble of more variable and less essential features. And the fact remains that the heterosexual paradigm has been consistent across time and space.⁷⁰ Thus, it is telling that Lord Stowell and his contemporaries, in describing marriage as a contract of natural law, did not focus on patriarchy, property, or any other specific feature of marriage

through the use of contraception. But these arguments ignore the importance of the modeling to be achieved by encouraging all heterosexual couples to marry, as well as the legitimate self-imposed privacy limits a state may observe in its regulation of the matter.”).

It is a separate question, of course, whether extending the institution of marriage to non-heterosexual couples would dilute the psychological and cultural force of the institution. I return to that argument later. *See infra* notes 175-178 and accompanying text.

69. *See, e.g., Goodridge*, 798 N.E.2d at 966-67 (“As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm.”); *Hernandez v. Robles*, 855 N.E.2d 1, 26 (N.Y. 2006) (Kaye, J., dissenting) (“The claim that marriage has always had a single and unalterable meaning is a plain distortion of history. In truth, the common understanding of ‘marriage’ has changed dramatically over the centuries.”); Brief of the Professors of the History of Marriage, Families, and the Law as Amici Curiae in Support of Plaintiffs-Appellants at 30, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. A-2244-03T5), 2005 N.J. S. Ct. Briefs LEXIS 322, at *36; JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 60-64 (2004).

70. *See* DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 91-125, 154 (2007). *But cf.* David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?pagewanted=print>.

law, but only on the assumption that marriage exists “between two individuals of different sexes.”⁷¹

Second, this sort of nominalist objection, if taken to its own logical conclusion, is self-defeating. Proponents of same-sex marriage are just as essentialist as opponents;⁷² otherwise, they would allow *any* relationship whatsoever to form a marriage. That they would not is obvious whenever they take offense at opponents’ typical slippery slope arguments.⁷³ In other words, we are back to the “line-drawing problem” I emphasized earlier.⁷⁴ Defenders of same-sex

71. See *Dalrymple v. Dalrymple*, (1811) 161 Eng. Rep. 665 (K.B.) 669; 2 Hag. Con. 54, 63.

72. See, e.g., David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 29 (1997) (“The claim that there is no essence of marriage . . . is a claim about the essence of marriage. Since there is *discourse* about ‘marriage,’ anti-essentialists need to explain what is ‘really’ going on behind the appearance of ‘marriage.’ Once they do, they are talking about what is or is not essential. We are all, therefore, ‘essentialists.’ The real debate is about the nature and content of specific ‘essences,’ and the relationship of those essences to contingent social forms.”).

73. See, e.g., Isaac Davison, *Gay Marriage Rejectors ‘In Denial,’* NEW ZEALAND HERALD (Nov. 8, 2012), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10845849 (“The sponsor of a bill to legalise same-sex weddings says marriage is an evolving institution and many opponents of a law change were in denial about the fact that homosexuals had held equal rights in New Zealand for 27 years. . . . The MP dismissed as insulting the argument that passing same-sex marriage was a ‘slippery slope’ to polygamy, bigamy, bestiality and incest, which remained criminal offences.”); David Edwards, *Santorum Gets Booed After Claiming Same Sex Marriage Justifies Polygamy*, THE RAW STORY (Jan. 5, 2012), <http://www.rawstory.com/rs/2012/01/05/santorum-gets-booed-after-claiming-same-sex-marriage-justifies-polygamy/>.

74. Consider, for example, this entirely un-ironic defense of same-sex marriage against the argument that it will lead to the possibility of legally-recognized polygamy:

Our first task is to erect the boundary between same-sex marriage and polygamy. The *essential difference*—one that is *fundamental to the marriage forms, and not merely correlative*—is that marriage, same-sex or otherwise, is today predicated on romantic love. In contrast, polygamy is expressly admitted to exclude the expectation of romantic love: it is grounded on other experiences, and intended to fulfill other personal, social, and religious needs (duty, for one).

James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 557 (2002) (emphasis added); see also Maura I. Strassberg, *Distinctions of Form or*

marriage might want to draw that line in a different place than opponents, but they do want, and need, to draw the line or else their own arguments dissolve away. Why should marriage have anything to do with sex or love, whether heterosexual or homosexual? Why should it be marked off from familial bonds or simple friendship? If there is no core to the institution of marriage at all, then there is no meaning to the institution and no standard against which to evaluate the exclusion of same-sex couples from that institution.

D.

I have in this Part expanded on Lord Stowell's assumption that heterosexual marriage might be an institution in the law of nature. This is not a "proof." But I have tried to explain and at least mildly defend the plausibility of the idea. Some readers will have no interest in, or patience with, natural law discourse at all, even in the very general and minimally metaphysical form that I have presented it.⁷⁵ For them, I have suggested that it might be helpful to consider instead the thinner proposition that treating heterosexual marriage as the paradigm of the institution of marriage is normatively rational. Those readers could, if they insist, skip ahead to Part III of this Article. Other readers will accept the idea of natural law, but disagree that it says anything about heterosexual marriage. Yet others will object to any effort to ground marriage or even say anything nice about it, quite apart from the question of same-sex marriage. These are all—whether or not I agree with them—respectable views.

My main goal in both Parts II and III of this Article, however, is to address the assumption that only a thinner or more strictly positivistic description of marriage—a description that rejects either the natural basis of marriage or the idea that the paradigm of marriage is essentially heterosexual—could accommodate same-sex marriage. It is to that puzzle, of how same-sex marriage might fit into an

Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. REV. 1501, 1615 (1997).

75. As I emphasized earlier, *see supra* note 34 and accompanying text, my own commitment to natural law jurisprudence is at least lukewarm.

account of marriage as paradigmatically heterosexual, that I now want to turn.

II. ENTER POSITIVE LAW

The first question at hand is what precisely follows from the view that (heterosexual) marriage is an institution of natural law. For some ancient Roman thinkers, natural law reflected deeply-ingrained principles independent of enacted and particular laws, but its actual normative force was weak or unclear.⁷⁶ Cicero and other Stoics, however, believed that “true law is right reason in agreement with nature”⁷⁷ and the later medieval, Enlightenment, and modern versions of natural law all come closer to embracing—with considerable variety in jurisprudential details—something like the two-fold definition of natural law with which I began: a form of normative realism combined with a commitment to some sort of hinge or hook between normative reality and positive law.

Thus, to say that marriage, and specifically heterosexual marriage, is an institution of natural law would suggest, at least, that legal systems aspiring to conform themselves to something like natural law should incorporate an institution of heterosexual marriage, much the same as they should incorporate a whole range of other features of natural law and natural right, including both interpersonal rights and rights of liberty against the state. As noted above, that helps explain the place of a “right to marry” in our constitutional imagination. It might also suggest—along with other

76. TIERNEY, *THE IDEA OF NATURAL RIGHTS*, *supra* note 44, at 136-37.

77. Cicero, *De Re Publica*, in *ON THE REPUBLIC, ON THE LAWS* 211, bk. 3, § 22 (Clinton W. Keyes trans., Loeb Classical Library 1928). Stephen Buckle has argued that “Despite disagreements about the content of natural law, the standard formulations of the basic idea of natural law in medieval Europe were of a piece with the Ciceronian.” Stephen Buckle, *Natural Law*, in *A COMPANION TO ETHICS* 161, 165 (Peter Singer ed., 1993). For accounts that argue for more substantial differences between even Cicero’s version of natural law and later theories, see, for example, FRANCIS OAKLEY, *NATURAL LAW, LAWS OF NATURE, NATURAL RIGHTS: CONTINUITY AND DISCONTINUITY IN THE HISTORY OF IDEAS* 22 (2005).

considerations⁷⁸—that marriage is more than a mere licensing scheme and that the government could not simply eliminate marriage as a legally recognized status and institution without some constitutional cost.

But what does this imply about same-sex marriage? In other words, if, at least for the sake of argument, the paradigm of marriage in natural law is heterosexual, might same-sex marriage still be in “agreement with nature?”

Yes. The complication here is precisely the introduction of positive law into the picture. As I have emphasized elsewhere,⁷⁹ and as others have thought through in considerably greater detail, few theories of natural law have conceived of it as purely self-contained and self-executing. To the contrary, the relation between natural law and positive law is invariably difficult and complicated. Indeed, it is fair to say that one of the most important challenges any account of natural law must meet is to articulate a theory of positive law and the relation of the two. And not surprisingly, it is lawyers—whether the medieval canonists or eighteenth and nineteenth century common law jurists—who have often had a good deal to say about how positive law and natural law coexist and interact.

Positive law can play a role in natural law jurisprudence in several distinct ways.⁸⁰ To begin with, some theorists have argued that positive legal sanction is indispensable to giving juridical force to natural law.⁸¹ More to the point, as Thomas Aquinas most famously emphasized, positive law must at least fill in many of the particular details—some involving arbitrary choices such as which side of the road to drive on and others reflecting more substantive values contingent on

78. See my discussion in *Holy Secular Institution*, *supra* note 9, at 1188, of the possible constitutional implications of the existence of a religious dimension to marriage.

79. See Dane, *Natural Law Challenge to Choice of Law*, *supra* note 34, at 149-50.

80. Much of the discussion in this Part is drawn from my article, Dane, *Natural Law Challenge to Choice of Law*, *supra* note 34.

81. See Jürgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 104-05 (William Rehg trans., 1996); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1562 (1996).

circumstances of time and place—about which natural law is itself indifferent.⁸² This insight is particularly important in understanding the puzzle of marriage, which otherwise might seem to be an institution much too highly regulated and specifically defined by positive law to qualify as an institution of natural law. But as the Supreme Court’s jurisprudence on marriage suggests, the institution can be understood as combining a basic core understanding constituting a moral or constitutional entitlement with a panoply of varying and equally permissible regulatory details.⁸³ Or, as I put it in a different context, the institution of marriage “has two faces. . . . [It] is . . . governed by very precise, often technical, requirements and consequences [and at] the same time . . . participates in a larger legal and cultural project These two faces coexist. Neither face should be reduced to the other, or deemed irrelevant.”⁸⁴

Even more fundamentally, most theories of natural law recognize potentially substantial authority for positive law even when it trenches on questions about which natural law is not “indifferent.” To some extent, this recognition simply reflects a theory of roles: while legislators might be normatively bound to try to adhere to natural law, judges in their role as enforcers of law and individual citizens as the objects of law are, according to many natural law accounts, required in many or even all circumstances to respect whatever determination the legislature makes.⁸⁵ Thus, natural law in this view does not sit perched “above positive law like a constitution,” simply invalidating any contrary positive law.⁸⁶

82. See Brian Bix, *Natural Law Theory*, in *A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 211, 213 (Dennis Patterson ed., 2d ed. 2010).

83. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Turner v. Safley*, 482 U.S. 78, 87 (1987).

84. Dane, *Intersecting Worlds*, *supra* note 22, at 405.

85. See, e.g., Robert P. George, *Natural Law and Positive Law*, in *COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW* 151, 165-66 (Edward B. McLean ed., 2004). For a very different but complementary argument, see JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 75-76 (1999).

86. Dane, *Natural Law Challenge to Choice of Law*, *supra* note 34, at 149.

Nevertheless, the classical common law tradition emphasized that, even as natural law made way for positive law in the work of judges, it did not by any means exit the stage. To the contrary, natural law arguments could do important legal work. When the legislature has not spoken, those arguments—in the classic common law conception of a judge—can work directly on the law, at least as complicatedly filtered through the “artificial reason of the law.”⁸⁷ Even when the legislature has spoken, they can provide rules of construction. They can also create presumptions in favor of strong geographical, temporal, or conceptual limits to problematic positive law.

Lord Stowell’s decision in *Dalrymple* is itself a classic example of this delicate interplay between positive law and natural law. Recall that young Mr. Dalrymple entered into his non-ceremonial marital relationship in Scotland. This fact was crucial because, as noted earlier, an Act of Parliament had abolished non-ceremonial marriages.⁸⁸ The statute did not, however, apply to the distinct Scottish legal system, which left room for Lord Stowell’s account of natural law to have its say.⁸⁹ Meanwhile, in the United States, the natural law analysis in *Dalrymple* was sometimes put to an even more aggressive use, with some courts holding that even when States enacted licensing and solemnization regimes governing marriage, those statutes were merely “directory” rather than “mandatory,” and non-ceremonial marriages entered into by simple mutual consent could still be civilly recognized.⁹⁰ In the words of the leading nineteenth century treatise on marriage:

Marriage existed before statutes, it is of natural right, it is favored by the law. Hence, in reason, any commands which a statute may give concerning its solemnization should, if the form of words will

87. See Gerald J. Postema, *Classical Common Law Jurisprudence* (Part I), 2 OXFORD U. COMMONWEALTH L.J. 155, 175 (2002); Gerald J. Postema, *Classical Common Law Jurisprudence* (Part II), 3 OXFORD U. COMMONWEALTH L.J. 1, 7 (2003).

88. See Marriage Act, 1753, 26 Geo. 2 c. 33.

89. *Dalrymple v. Dalrymple*, (1811) 161 Eng. Rep. 665 (K.B.) 668; 2 Hag. Con. 54, 61-62.

90. See generally *Meister v. Moore*, 96 U.S. 76 (1877).

permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void what is done in disregard thereof.⁹¹

The more famous example of the interplay of natural law and positive law involved the terrible problem of slavery. According to one standard view, slavery, being contrary to natural law, could only be supported by municipal law and then only within the geographical bounds of that municipal law.⁹² For our purposes, the most interesting test of this principle involved the intersection of the question of slavery and the law of marriage after slavery was abolished: in the antebellum slave states, slaves could not generally enter into civilly-recognized marriages.⁹³ Nevertheless, of course, many slave couples did “marry” according to their own understanding and with their own rituals.⁹⁴ After the Civil War and the abolition of slavery, the question arose whether those marriages would be *retroactively* recognized.⁹⁵ (The question of timing was often important in resolving disputes regarding property, the validity of subsequent marriages, and the like). While the response in Southern legal systems was split, at least some States, either by court opinion or with

91. JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 241, § 283 (6th ed. 1881). The passage continues: “Consequently the doctrine has become established in authority, that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity.*” *Id.*

92. *See, e.g.*, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

93. *See, e.g.*, *Howard v. Howard*, 51 N.C. (6 Jones) 235, 236 (N.C. 1858) (“[T]he relation of ‘man and wife’ cannot exist among slaves. It is excluded, both on account of their incapacity to contract, and of the paramount right of ownership in them, as property.”); Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307 (2006) (“During the period of American Slavery, blacks were denied even the most basic of human rights, including the right to join together as a legally sanctioned family unit. As personalty, slaves lacked the capacity to enter into any form of marital union recognized necessarily or legally by the plantation masters, the government, or the judiciary.”) (footnotes omitted).

94. *See* JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 149-91 (rev. & enlarged ed. 1979); Thomas E. Will, *Weddings on Contested Grounds: Slave Marriage in the Antebellum South*, 62 HISTORIAN 99 (1999).

95. *See generally* Goring, *supra* note 93, at 314-15.

the help of saving statutes, did hold that the earlier “natural” marriages, although rendered invisible by the law of slavery, came back into sight, so to speak, when the oppressive force of that law was removed.⁹⁶ To be sure, this answer was controversial, and some contrary authorities made the not-unreasonable argument that, in a world of positive law, natural marriage, even under these circumstances, had to give way to other powerful principles, including the need for certain and settled expectations, the rights of other parties, and the practical difficulties of proof.⁹⁷ For my present purposes, however, the important thing is not which side made the stronger case, but that the argument was even possible.⁹⁸

Thus, even if natural law does not stand perched “above positive law like a constitution,” it does rest firmly “below it like a substrate, not as the limit to positive law, but as its foundation.”⁹⁹ Natural law and positive law in this view are mutually interstitial. The details of positive law fill in the gaps in natural law, but natural law also fills in the gaps, ambiguities, and jurisdictional details of positive law.

But there are yet more powerful ways in which natural law might, according to its own principles, recognize the force of positive law—what Jeremy Waldron has called the “dignity of legislation.”¹⁰⁰ I have elsewhere argued, for example, that even a jurisdiction committed to the view that its own laws perfectly reflect a universal natural law could still respect legal diversity and embrace a robust, multilateralist law of choice of law.¹⁰¹ Here though, I want to

96. See, e.g., *Stikes v. Swanson*, 44 Ala. 633, 635 (1870) (relying on common law), *overruled by* *Cantelan v. Doe ex dem. Hood*, 56 Ala. 519 (Ala. 1876); *State v. Harris*, 63 N.C. 1, 4 (N.C. 1868) (citing statute).

97. See, e.g., *Cantelou v. Doe ex dem. Hood*, 56 Ala. 519, 519-20 (Ala. 1876).

98. Interestingly, the Supreme Judicial Court of Massachusetts, which had in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) been the first to recognize a state constitutional right of same-sex couples to marry, subsequently refused in *Charron v. Amaral*, 889 N.E.2d 946 (Mass. 2008) to grant marital rights retroactively even to couples who might be able to demonstrate that they would have been married but for the earlier, now-voided, legal prohibition.

99. Dane, *Natural Law Challenge to Choice of Law*, *supra* note 34, at 171.

100. See WALDRON, *supra* note 85, at 156.

101. See Dane, *Natural Law Challenge to Choice of Law*, *supra* note 34.

emphasize a somewhat different point: the very existence of positive law and formal legal institutions with their powers of specification, coordination, and enforcement, can alter the normative world. It can change the assumptions against which natural law would otherwise operate. Thus, lawmakers can—over and above the prerogatives of their merely positive authority—*legitimately* invoke principles, priorities, and practical realities to produce results that are in tension with the natural law that might otherwise prevail in the absence of an actual organized legal system.

Recognition of this sort of complex interplay between natural law and positive law goes back at least to the roots of the Christian West's rediscovery and reframing of natural law thinking.¹⁰² For example:

[M]any medieval and early modern thinkers argued that there was no natural right to private property—that, to the contrary, every person had a natural right of access to the world's goods, either . . . equally or for . . . subsistence. Nevertheless . . . [they] recognized that legitimate legal systems could reconstitute this natural entitlement, and promote what we would call efficiency or wealth maximization or social coordination, by allocating specific property to specific individuals as a matter of conventional positive law.¹⁰³

Significantly though, even in this view, natural law continued to do analytic work even when its most direct vision of an unhindered natural right of access was put to the side. It helped, for example, motivate a notion of “necessity” that limited the entitlement of the positive property regime. More to the point, perhaps, the very idea of a “natural” right to property arose out of a practical legal dilemma facing medieval canonists: the question at hand—put most strongly by opponents of these new and threatening religious movements—was how Franciscans could take a vow of poverty and renounce their right to hold property, while still, in effect, claiming use rights to the goods they received in their itinerant begging. The answer was that the Franciscan vow of poverty extended only to any rights they might have

102. See generally BRIAN TIERNEY, *LIBERTY AND LAW: THE IDEA OF PERMISSIVE NATURAL LAW, 1100-1800* (2014).

103. Dane, *Natural Law Challenge to Choice of Law*, *supra* note 34, at 168-69.

in positive property but did not—indeed, could not—deprive them of their natural right to subsistence.

“Centuries later, John Locke, while not rejecting a right to subsistence, also argued that private property of at least a sort did exist as a matter of natural law.”¹⁰⁴ But “a sound reading of Locke is that legitimately constituted legal systems are not only empowered to enforce those natural rights as some libertarians believe, but also to regulate and even reallocate property for social ends.”¹⁰⁵

Thus, “[w]hatever the starting point”—whatever the precise balance between private and collective ownership in the law of nature considered in isolation—“the introduction of positive law into the picture is transformative.”¹⁰⁶

104. *Id.* at 169.

105. *Id.*

106. *Id.*

A more obscure but deeply evocative example of this sort of complex interaction between “natural law” and positive law is found in the history of the law of copyright. *See generally* Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 413 (2009); L. Ray Patterson, *Understanding the Copyright Clause*, 47 *J. COPYRIGHT SOC'Y U.S.A.* 365 (2000). The first English copyright law was the “stationers’ copyright,” a product of the system of licensing and monopoly that gave the London publishing guild—the Stationers’ Company—control over the production of books. *See Patterson, supra*, at 366. In 1709, however, Parliament created the first statutory copyright system with the Copyright Act, 1709, 8 Ann., c. 19. The Statute of Anne upended the old monopoly system in two distinct ways. First, it vested the copyright in the author, relegating the publisher to the role of assignee. *Id.* Second, it limited what had been a perpetual right to a term of “fourteen years, to commence from the day of the first publishing the same, and no longer.” *Id.* The statute, however, left an obvious gap: who owned the rights to a work *before* its first publication? In 1769, Lord Mansfield writing for the King’s Bench held that authors possessed under the common law a “natural law” right to publish and control their own work and that this right not only preceded the first publication but extended into perpetuity, thus effectively overriding the limited term specified in the Statute of Anne. *See Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) 251; 4 Burr. 2303, 2396-97. (This was actually less a victory for authors than for the old monopolist booksellers, since they could “simply demand the assignment of the [natural law] copyright as a condition for publishing the work.” *See Patterson, supra*, at 381 n.37). Only five years later, however, the House of Lords solved the puzzle in a strikingly different way. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) 839-40, 846-47; 2 Brown 129, 134-35, 144-45. It recognized the author’s “natural law” ownership of his work prior to first publication, but that any rights after that were governed solely by the Statute of

This analysis suggests that Lord Stowell might actually have overplayed his hand in *Dalrymple*. In fact, the resistance to non-ceremonial marriage which he might have found not only in English statute law but also in both Protestant Reformation thinking about the state's role in marriage and Catholic canon law in the wake of the Council of Trent, reflected a serious concern that marriage as a legal and social institution embedded in a larger matrix of both legal entitlements and collective purposes required some public acknowledgment and participation and that clandestine or purely private marriages were, at least arguably, a contradiction in terms. Lord Stowell powerfully

Anne. *Id.* The effect of this elegant analysis was that the “natural law” filled in the gap left by the statute (as to who owned rights to a work before its first publication), but that the positive law could and did extinguish that natural law right in the service of larger social ends, including “the encouragement of learning, the protection of the public domain, and public access by publication.” Patterson, *supra*, at 382. In the United States, until 1978, federal statutory copyright was triggered by publication, while state common law covered pre-publication rights. See *Werckmeister v. Am. Lithographic Co.*, 134 F. 321, 324-25 (2d Cir. 1904); *Stanley v. Columbia Broad. Sys., Inc.*, 221 P.2d 73, 77-78 (Cal. 1950); *cf. Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) (rejecting common law or natural law grounds for federal copyright and holding that copyright in federal law is entirely statutory). The Copyright Act of 1976, however, radically reshaped the law by shifting the line between federal and state rights from the moment of publication to “fix[ation] in any tangible medium of expression.” See 17 U.S.C. § 102(a) (2012); Laura A Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 842-44 (2009).

In any event, some commentators continue to argue that the “separation of authors’ rights from the narrow right of publishers to publish manuscripts is an important separation between natural and economic rights that ought to be acknowledged as creating two distinct sets of rights - property entitlements and economic privileges - in copyright jurisprudence.” Ng, *supra*, at 447-48; see also Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 558-59 (1990). And European civil law, in contrast to the Anglo-American tradition, famously recognizes authors’ “moral rights” over their work in addition to their rights under copyright law. See Jeff Berg, *Moral Rights: A Legal Historical and Anthropological Reappraisal*, 6 INTELL. PROP. J. 341 (1991); Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968). Lurking in all these debates is a more basic question: whether the story we tell about intellectual property is of a piece with, or only superficially resembles, the interplay between “natural” entitlements and positive regulation in the story of property writ large. See generally Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 CHI.-KENT L. REV. 715 (1993); Yen, *supra*.

recognized the integrity of natural law—the law that would apply even if “no third person existed in the world.” And he emphasized that the force of natural law persisted even when marriage “becomes a civil contract regulated and prescribed by law and endowed with civil consequences.” He then reasoned on the basis of natural law that the default state of Scots law, in the absence of a regulation to the contrary, was to recognize nonceremonial marriages. But he might not have sufficiently appreciated the extent to which, in a world full of “third persons” organized into effective legal systems, the relation between the natural law of marriage and its positive regulation is not merely additive, so to speak, but potentially interactive.

What does all this have to say about same-sex marriage? Only that it is perfectly possible to believe that marriage is an institution of natural law and that marriage is by “nature” heterosexual but also to see all this as the beginning of the conversation about the precise shape of marriage, not as its end. This might seem like a small conclusion. But it is actually sufficiently important, especially in light of the assumption to the contrary of both defenders and opponents of same-sex marriage that it is worth pausing at precisely this conclusion before proceeding to the next Part of this paper.

III. PARADIGMS AND EXTENSIONS: OF ANALOGY OF DIGNITY

A.

I observed at the start of this paper that proponents of same-sex marriage have felt the need to “thin” the conception of marriage in two ways: by rejecting its natural or essential character and by denying its paradigmatically heterosexual meaning. Part II addressed both points together. Emphasizing the dynamic, interactive, and mutually interstitial relation between natural law and positive law, it reached the admittedly negative but still important conclusion that accepting a “naturally” heterosexual account of marriage does not exclude normative arguments for same-sex marriage in actual societies with developed systems of positive law. This Part sketches the form that such normative arguments might take. In one sense, the argument here

follows from Parts I and II. But it can also be read apart from them and their excursion into natural law discourse simply by focusing directly, without the equipment of natural law discourse, on the claim that the historical, purposive, and analytical paradigm of marriage has been and remains heterosexual.

It is easy to see how many of the prevalent arguments for same-sex marriage necessarily reject the paradigmatically heterosexual character of marriage. For example, the effort to rest same-sex marriage on a more general “right to marry” only follows unproblematically if we deny from the outset that marriage is paradigmatically heterosexual. More to the point, the arguments over “marriage equality” typically depend on a specific two-step maneuver that has characterized much of our means-end constitutional equal protection discourse since at least Joseph Tussman and Jacobus tenBroek’s classic formulation of the subject in 1949.¹⁰⁷ The first step (analytically, not necessarily in exposition) is to define the essential character of marriage. The second step is to ask whether, given that definition, it is “irrational” or invidious for the law to exclude same-sex couples from the possibility of marriage. This form of argument, however, only supports a right to same-sex marriage if the ends, purposes, or meaning of “marriage” are stripped of much of their once taken-for-granted substantive thickness, and in particular stripped of any defining reference to reproductive sexual bonding or the uniquely procreative potential of heterosexual sex.¹⁰⁸ The argument for “marriage equality” thus depends on rejecting the idea that the paradigm of marriage is heterosexual and that this paradigm reasonably reflects the normative origins and underpinnings of the institution.

The question then is whether there is any way to extend marriage to same-sex couples without rejecting the heterosexual paradigm of marriage. In fact, there is. We do often extend existing rights or institutions to new cases by engaging in the sort of two-step maneuver I just described: abstracting away from the existing particular and then

107. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

108. See *supra* note 17.

applying that abstraction to a new set of particulars. Indeed, legal and moral reasoning more generally often moves vertically, so to speak, ascending from existing cases to an abstract height and then descending to the new case.

But not always.¹⁰⁹ Sometimes, legal and moral reasoning moves horizontally, asking only whether a new case or application can be justified at the boundaries of the old. The vertical maneuver is necessarily acidic—destructive of the paradigm undergirding the existing case. The horizontal maneuver, by contrast is, as a logical form, agnostic and open-ended, though it can end up challenging existing assumptions and inviting new questions.

What I am calling “horizontal” extensions of existing legal and moral paradigms show up in many contexts.¹¹⁰ I

109. My argument here bears at least a distant family resemblance to that in LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 115-22 (2005). Specifically, Weinreb finds unsatisfactory the view that analogical reasoning in legal argument necessarily requires finding a “rule” that covers both an existing case and its analogically-derived extension. *Id.* Weinreb argues, to the contrary, that analogies can proceed directly from the existing case to the extension without the need for a general “analogy-warranting rule.” *Id.*; see also Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746-47 (1993) (emphasizing that analogical reasoning “focuses on particulars . . . develops from concrete controversies . . . [and] operates without a comprehensive theory that accounts for the particular outcomes it yields”).

110. Recall in this connection the discussion of copyright law at *supra* note 106. Another example, from private law, is the doctrine of “quasi-contract.” According to the seminal nineteenth century case, quasi-contracts or contracts implied in law are found “whenever . . . the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy.” *Hertzog v. Hertzog*, 29 Pa. 465, 467 (Pa. 1857). As one typical contemporary case puts it:

Even if there is no express contract, a plaintiff may sometimes recover under the theory of unjust enrichment, which is also called quantum meruit, contract implied-in-law, constructive contract, or quasi contract. These theories are legal fictions invented by the common law courts in order to permit recovery where in fact there is no true contract, but where, to avoid unjust enrichment, the courts permit recovery of the value of the services rendered just as if there had been a true contract.

Kelly v. Levandoski, 825 N.E.2d 850, 860 (Ind. Ct. App. 2005) (internal quotations omitted).

Whatever the precise formulation, the affinity to what I am calling “horizontal” extension of a paradigm is obvious. As I emphasize in the discussion below of what

I call “analogy of dignity,” however, such “horizontal” extensions are rarely straightforward.

Thus, at one extreme, many commentators would prefer to eliminate the terminology of quasi-contracts or contracts implied in law and instead just rest the obligations involved on notions of unjust enrichment or restitution. *See, e.g.*, PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 19-22 (1989); *cf.* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 195 (3d ed. 1971) (arguing that in early English cases, “[t]his type of remedy was given the name quasi-contract, a misleading anglicisation of the Roman obligation *quasi ex contractu*”). Others are slightly more understanding but still ultimately dismissive. *See, e.g.*, Stephen A. Smith, *Justifying the Law of Unjust Enrichment*, 79 TEX. L. REV. 2177, 2182 (2001) (“The terminology of ‘quasi-contract’ and ‘implied contract’ that was once used to describe actions in unjust enrichment can be explained in part as an attempt to give a justification for the duty to return. Although the fiction of ‘quasi-contract’ has now rightly been abandoned, we should not be surprised that it was used, and for so long. It offered a plausible *normative* explanation of the defendant’s apparent duty to benefit the plaintiff.”). Yet others tolerate the label, as long as it is understood as a mere legal fiction. *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 640-43, 646-49 (4th ed. 2010).

At the other extreme, though, some commentators argue that notions such as quasi-contract challenge the very basis of the idea that contract law itself is grounded in will or consent. As Clare Dalton has put it:

The current mainstream treatment of quasi-contracts and implied contracts illustrates doctrine’s techniques of separation and conflation. The prevailing position, represented by the *Second Restatement*, but also by cases and commentary from the 1850’s to the present, is that quasi-contracts are not contracts at all, but constitute instead an exceptional imposition of obligation by the state in order to prevent unjust enrichment. An artificially sharp line of demarcation is therefore presented as separating quasi-contracts from implied-in-fact contracts, and public from private. But this position obscures the fact that the finding of contractual implication is guided in the so-called “private” sphere by the same considerations that dictate the imposition of quasi-contract. Any inquiry into a party’s intent must confront the problem of knowledge—our ultimate inability to gain access to the subjective intent underlying any particular agreement.

Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1011 (1985). And Patrick Atiyah famously argued that quasi-contracts were historically not a matter of what I am calling “horizontal” extension of a paradigm at all, but were rather ripped out of the body of a more capacious account of contract law when judges began to articulate a more determinedly consent-based theory of contract in the nineteenth century. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 184 (1979) (“the conceptual distinctions between contract and quasi-contract . . . did not really exist” in Lord Mansfield’s time); *see also, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 170-71 (1979); James Oldham, *Reinterpretations of 18th-Century English Contract*

want to focus, however, on one subset of that larger phenomenon, which I call “analogy of dignity,” in which the case for extending a paradigm rests at least in part on some claim about the status or worth of the person or entity for whose benefit the paradigm rule or institution is being extended. Arguments for analogy of dignity thus have something to do with notions of equal worth, but they differ substantially from the usual means-end rhetoric typically identified with constitutional “equal protection” doctrine.¹¹¹

Arguments for what I call “analogy of dignity” vary in their details and their consequences. But they all share certain basic characteristics.

First, these arguments do not reject the sheer coherence or sufficiency of limiting a given right or institution to its paradigm case. They do not claim that doing so would simply be irrational. Instead, they rely on distinct normative (or

Theory: The View from Lord Mansfield's Trial Notes, 76 GEO. L.J. 1949, 1968-69 (1988) (“Just as the promise was, for Mansfield, a moral statement, so also was the return of unjust enrichment a moral necessity. In this sense, contract and quasi-contract were congenial parts of an overall philosophy of moral transactional behavior that required the honoring of legitimately created expectations and the return of benefits unjustly acquired.”). *But see* J.H. Baker, *Reviews*, 43 MOD. L. REV. 467, 467-69 (1980) (reviewing P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979)).

I have discussed all this at such length here only to hammer home the point that the sort of conceptual and normative ambiguities, fluidities, and challenges we find in the debate over same-sex marriage, or for that matter any of the other examples of what I am calling “analogy of dignity,” are in a deep sense not all that extraordinary.

111. I am indebted here to the compelling demonstration in Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315, 343 (1998) that not all equal protection cases fall into the standard conception of “wrongful discrimination as ill-fit between proxy and target,” although my alternative form of argument is not the same as hers and might not even be an equal protection argument in the constitutional sense.

For other critiques of the adequacy of the standard Tussman and tenBroek model, see, for example, Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 368-70 (2003); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 994-95 (2009). For a more general discussion of the principles underlying legally-protected equality, see Denise Réaume, *Dignity, Equality, and Comparison*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* (Deborah Hellman & Sophia Moreau eds., 2014).

normative plus prudential) arguments for extending the right or institution to the new case even in the face of the coherence of the paradigm case.

Second, even if the right or institution *is* extended to the new case, the paradigm case remains the template for the right or institution. That is to say, the way the right or institution is understood, even in the new case, draws heavily on the assumptions behind the paradigm case.

Third, the force of the argument from analogy will, depending on the context, either end up being so taken for granted as to render any distinction between the paradigm case and its extension almost invisible, or it will continue to be noticed and even marked by either substantive differences or just terminological distinctions between the paradigm case and its extension.

Fourth, in any event, applying the original template to the new case is rarely entirely straightforward. Stubborn factual differences between the paradigm case and the new case can complicate matters and raise difficult puzzles. The seams can show. How much they show, though, can vary tremendously from one context to another.

Fifth, the very ground of the argument from analogy of dignity can remain deeply contested even among those who accept its results. Some participants in the debate might well reject the coherence of the paradigm or refuse to treat it as an appropriate template. Others might argue that the very act of extending the right or institution to the new case will inevitably, for good or ill, transform the right or institution and its understanding. But—importantly—the extension of the right or institution can occur even in the face of these disputes, and the disputes can continue even after the extension has occurred.

Sixth, the new dispensation will not necessarily be stable. As with other arguments from analogy, it will leave itself open to the claim that the circle should be drawn wider still. But it will also be able, at least in many cases, to resist those arguments precisely by keeping in mind both the original paradigm and the precise reasons for moving beyond it.

B.

The best way to explain what I have in mind is by example. I want to briefly suggest three areas in which arguments from what I call analogy of dignity have been made. Each of these topics would merit a law review article to itself. But my point here is simply to suggest, with the broadest brush strokes, how such arguments can proceed. These three sets of instances are intentionally quite different from each other, especially in where they sit on the spectrum of possibilities in the six characteristics I have just outlined. Together, though, they should get across the form of argument I want to describe.

1.

Consider, first, the system of American federalism. Much of American federalism, particularly its various guarantees of state prerogatives¹¹² and its assumptions about the differences between States and other subnational units such as cities,¹¹³ is based on the image of the States as a group of sovereigns that, in banding together, gave up some but not all of their sovereignty.¹¹⁴ But of the fifty States of the Union,

112. See, e.g., *Printz v. United States*, 521 U.S. 898, 918-19 (1997).

113. See, e.g., *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978).

114. This general narrative is powerfully present, in the negative, even in contexts such as the federal foreign affairs power in which it is denied; the story there is that, unlike internal sovereignty, which passed from the British Crown to the States and was then delegated in part to the federal government, external sovereignty passed directly from the Crown to the federal government at the moment of independence. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936) (With respect to internal affairs, "the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . [But] since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers, but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by, and were entirely under the control of, the Crown. By the Declaration of Independence, 'the Representatives of the United States of America' declared the United (not the several) Colonies to be free and independent states, and, as such, to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and

only the original thirteen and Texas,¹¹⁵ and arguably a few others,¹¹⁶ were actually independent and in any sense “sovereign” before joining the Union. The others were carved out of territories; in those cases, if any actual delegation occurred, it was from the federal government to the new States and not the other way around. Nevertheless, all the States are assimilated into the original paradigm. By virtue of the “equal footing” doctrine¹¹⁷ and deeper, usually implicit, principles, they are treated *as if* they reserved sovereign powers that they, in fact, never had.

1. The assimilation of all the States into a paradigm that, strictly speaking, only applies to about a quarter of them, was not inevitable, and a different regime would not

to do all other Acts and Things which Independent States may of right do.’ As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”) (citations omitted).

115. See Earl M. Maltz, *The Constitution and the Annexation of Texas*, 23 CONST. COMMENT. 381, 384-87 (2006).

116. Vermont, for example, is often cited as, like Texas, a State that entered the Union as an existing independent country. The case is debatable, however, because, though in its own view independent before its entry into the Union in 1791, Vermont was, by some lights, nevertheless already within the territorial boundaries of the United States. *Id.* at 393. Hawaii was undoubtedly an independent country before its last monarch was overthrown, but it was a territory for many years before gaining statehood. California claimed independence from Mexico, but then became a territorial possession of the United States before entering the Union.

117. See, e.g., *Coyle v. Smith*, 221 U.S. 559, 571-79 (1911) (notwithstanding contrary condition in statute admitting Alabama to the Union, Congress could not prevent Oklahoma from moving its state capital); *Pollard v. Hagan*, 44 U.S. 212, 221-23 (1845) (notwithstanding contrary language in the statute admitting Alabama to the Union, the balance of federal and state control over navigable waters must be the same in Alabama as in the original States).

Recent cases, particularly *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down the Voting Rights Act’s “pre-clearance” requirement for certain States and portions of States), threaten to transform this limited “equal footing” doctrine into a broader principle of “equal sovereignty among the states.” For strong critiques of that move, see, for example, Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013); Vivek Kanwar, *A Fugitive from the Camp of the Conquerors: The Revival of the Equal Sovereignty Doctrine in Shelby County v. Holder*, J. RACE GENDER & ETHNICITY (forthcoming 2014).

have been irrational. Many federal systems—Spain, the United Kingdom, and Russia are among the often-cited examples—are “asymmetric,” in that different subnational units possess different degrees of autonomy and privilege, depending on historical circumstances and other considerations.¹¹⁸ Indeed, the Supreme Court has frankly acknowledged the artificiality of its own narrative of federalism, explaining in one Eleventh Amendment case, for example, that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States).”¹¹⁹ This is not to suggest that the equal footing doctrine is wrong, but only that it is contingent, a consequence of distinct normative decisions rather than anything in the logic of statehood or federalism.

2. Implicit in that same, normatively defensible but conceptually contingent, equal footing doctrine is that the template for all the “new” States remains the narrative of the original thirteen, pre-existing the Constitution and banding

118. See generally RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* (3d ed. 2008); Peter Perenthaler, *Asymmetric Federalism as a Comprehensive Framework of Regional Autonomy*, in *HANDBOOK OF FEDERAL COUNTRIES 2002*, at 472 (Ann L. Griffiths ed., Forum of Federations 2002 ed. 2002).

119. *Alden v. Maine*, 527 U.S. 706, 713 (1999); see also, e.g., *Reynolds v. Sims*, 377 U.S. 533, 574 (1964), in which the Court, in rejecting the argument that unequal apportionments of state legislative districts were permissible by analogy to the grossly unequal character of the United States Senate, wrote that the “system of representation in the Two Houses of Federal Congress” arose from:

unique historical circumstances . . . based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together “to form a more perfect Union.” But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments.

Id.

together to surrender some but not all of their sovereignty to a newly empowered federal government.

3. Moreover, the imaginative power of the equal footing doctrine is so strong that the line between the original States and the rest is virtually invisible, except in certain token respects such as the design of the national flag, which acknowledges the paradigm (in its thirteen stripes) even as it proclaims its extension (in fifty stars).

4. Nevertheless, the seams show. Consider, for example, the vast expanses of federal land in many of the Western States—a consequence of their prior status as territories and a crucial feature of the way federalism actually operates in those States.¹²⁰

5. Moreover, the whole project of expanding the United States by simple analogy to the original union of thirteen States has been, and continues to be in different respects, contested. Much of what is today taken for granted was not always so. The ability of the nation to acquire new territory, as through the Louisiana Purchase, was at one time, for example, a matter of live, vigorous debate.¹²¹ So was the power of Congress to create new States in whatever territories were acquired after the ratification of the Constitution.¹²² So was the precise extent to which the Constitution applied in the territories or in various categories of territories.¹²³

120. See R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* (1993); Bartholomew H. Sparrow, *Empires External and Internal: Territories, Government Lands, and Federalism in the United States*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898*, at 231, 238 (Sanford Levinson & Bartholomew Sparrow eds., 2005) (“The result of these various regimes obtaining among U.S. government agencies over the lands under their management is that state boundaries—at least as marked on maps and as typically conceived—are misleading and, in many instances, practically a fiction.”).

121. See Gary Lawson & Guy Seidman, *The First “Incorporation” Debate*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898*, *supra* note 120, at 19, 32-36.

122. See Maltz, *supra* note 115, at 384-85.

123. See generally Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005); Christina Duffy

Today, although many of those earlier debates seem settled, the consequences of the growth of the federal system through assimilation into the original paradigm of thirteen States remain controversial. Constitutional theorists debate, for example, whether the language of sovereignty really works in thinking about the purposes and character of American federalism.¹²⁴ And particular elements of the constitutional design mean something very different than they did when the country only had thirteen States.¹²⁵ For example, the population ratio of the largest to the smallest of the original thirteen States was approximately eleven to one; the same ratio today is closer to seventy to one, rendering the anti-democratic consequences of the compromise that created a Senate with equal representation for each State that much more severe.¹²⁶

6. And other questions and debates remain, injecting an element of instability into our otherwise almost invisible system of analogy of dignity. In some respects, after all, the United States *does* have a system of asymmetric federalism, in that some subnational units—the District of Columbia, American Indian tribal governments, and our continuing territorial possessions and associated commonwealths—are treated very differently from the fifty states.¹²⁷ And precisely because our constitutional ideology only reluctantly

Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009).

124. For one useful review and provocative argument, see Heather K. Gerken, *The Supreme Court 2009 Term: Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010). The same concern has obviously figured in popular commentary. See, e.g., James Poulos, *Disunited and Without States: Americans No Longer Take States Seriously as Political Units. And that Means Federalism is Probably Doomed*, THE DAILY BEAST, (Jan. 4, 2014), <http://www.thedailybeast.com/articles/2014/01/04/disunited-and-without-states.html>.

125. See, e.g., Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1 (2011).

126. For biting criticisms of these and other mismatches between the original constitutional design and contemporary realities, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 50-51 (2006).

127. See G. Alan Tarr, *Symmetry and Asymmetry in American Federalism*, in *THE FEDERAL IDEA: ESSAYS IN HONOUR OF RONALD L. WATTS* 169, 169 (Thomas J. Courchene et al. eds., 2011).

acknowledges the differences between the original thirteen and the rest of the States, it becomes especially vulnerable to the argument that it invidiously disadvantages those subnational units that remain outside the circle. But the country survives this discrepancy, and the resulting instability turns out to be slight.

2.

Another context in which explicit or implicit arguments for analogy of dignity have powerful consequences is in our treatment of religion. American law and policy exhibit a powerful, if often only intermittent, impulse to avoid treating religious groups and traditions differently based on theological differences among them, even when it might be perfectly sensible to do so. The impulse, in other words, is to extend religious rights and privileges beyond their paradigm cases, even when the logic of the paradigms themselves might not demand it. I have elsewhere discussed how this impulse plays itself out profoundly in the American law of charities, which is inclined (rightly, in my view) to treat all religious groups the same, even in the face of what might be defensible distinctions among them, and even at some cost to the coherence of the law of charities itself.¹²⁸ For present purposes, though, I want to consider three narrower but particularly acute instances of this important normative impulse at work.

The first is quite trivial, but so deeply emblematic and even absurd (in the comedic sense) that it merits some discussion: New York City famously restricts parking on certain sides of certain streets on certain days to allow street cleaning vehicles to pass through unimpeded. As a result, New Yorkers who park on city streets have grown accustomed to getting up early on certain days to move their cars to other parking spots across the street or around the block. Many years ago, the City began suspending those regulations on certain Jewish holidays when observant Jews

128. See Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 *CARDOZO STUD. L. & LITERATURE* 15, 29-32 (1996).

could not, for religious reasons, operate their vehicles.¹²⁹ Over time, though, the list of days on which the regulations are suspended has grown to include the major holy days of a panoply of faiths, even though most believers of most of those faiths have no religious reasons not to drive on those days.¹³⁰ In a deep sense, many religious communities in New York City have come to see the suspension of alternate-side parking on their holy days, not as an accommodation of their specific religious needs, but as a sort of coming of age within the city's pluralistic mosaic.¹³¹

129. Originally, alternate side of the street restrictions were only suspended on certain civil holidays (including Christmas) and on Good Friday, presumably for the benefit of the sanitation workers. At least by 1960, however, the suspension also applied on Rosh Hashanah and Yom Kippur, the Jewish High Holy Days. *Wiley Clarifies No-Parking Rules: 11 Legal, Three Religious Holidays Listed on Which Bans Will Be Eased*, N.Y. TIMES, Feb. 28, 1960, at 49. In 1968, Mayor John Lindsay tried to cut back on suspensions, limiting them to civil holidays and Christmas, but soon relented after a storm of protests, immediately restoring Rosh Hashanah and Yom Kippur to the list and directing a review of whether other religious holidays, including Good Friday and Passover, should be included. *Mayor Eases His Stand on Parking for Holy Days*, N.Y. TIMES, June 5, 1968, at 49. In 1970, the New York City Council legislated on the matter for the first time, suspending alternate side of the street parking on "Christmas, Yom Kippur, Rosh ha-Shanah, Good Friday, the first two and last two days of Succoth, Shabuoth, the first two and last' two days of Passover and all state and national holidays." *City Parking Bill Signed*, N.Y. TIMES, July 30, 1970, at 50. Note that, except for Christmas and Good Friday, discussed *supra*, each of the Jewish holidays on the list is a day on which many observant Jews cannot drive or engage in other activities that Jewish law defines as "work."

130. First, the City Transportation Department expanded the list to include a raft of other Christian holidays, including Eastern Orthodox Good Friday, Ascension Day, the Feast of the Assumption, All Saints Day, and the Feast of the Immaculate Conception. *See City's Parking Rules for Holidays in 1986*, N.Y. TIMES, Jan. 1, 1986. Then the City brought other religious traditions on board. By 2014, the suspension calendar also included, for example, Christian holy days including Ash Wednesday and Orthodox Holy Thursday, Muslim holy days including Idul-Fitr and Idul Adha, and the Hindu holy day of Diwali. *See* NEW YORK CITY DEPARTMENT OF TRANSPORTATION, *Alternate Side Parking*, NYC.GOV, <http://www.nyc.gov/html/dot/html/motorist/alternate-side-parking.shtml#cal>.

131. *See* Letter from Prof. John Stratton Hawley to Chair of N.Y.C. Counsel Comm. on Transp. (Sep. 17, 2005), <http://www.sree.net/stuff/diwaliparking.html#hawley> (urging inclusion of the Hindu Festival Diwali to mark the substantial Hindu presence in the City and "recognize and celebrate the cultural and religious plurality of our citizenry.").

A similar if less obvious story can be told about the virtually absolute testimonial privilege that protects clergy from disclosing certain communications with “penitents” who disclose information to them in confidence.¹³² The clergy privilege was not known, or was at least controversial, in the common law.¹³³ It is, however, now a part of the law in all fifty states¹³⁴ as well as federal common law in cases involving federal questions.¹³⁵ The first cases recognizing the privilege sought to protect Catholic priests, as an accommodation to their very specific sacramental understanding of the seal of confession.¹³⁶ Indeed, some early authority explicitly held

132. See generally JOHN C. BUSH & WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW* (3d ed. 1989).

133. See *id.* at 111; Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Post Colonial Jurisprudence*, 80 *IND. L.J.* 1037, 1045 (2005); Chad Horner, Note, *Beyond the Confines of the Confessional: the Priest-Penitent Privilege in a Diverse Society*, 45 *DRAKE L. REV.* 697, 701 (1997). *But cf.* BUSH & TIEMANN, *supra* note 132, at 47-54, 99 (discussing pre-Reformation common law antecedents to the privilege).

134. See R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 *WM. & MARY L. REV.* 1627, 1639 (2003). The nature of the privilege does, however, vary in some important ways from one jurisdiction to another. State laws differ, for example, on whether the cleric or the confider, or both or neither, can waive the privilege. See *id.* at 1650-53; Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 *MINN. L. REV.* 723, 755-59 (1987). More to the point of the discussion here, state statutes differ as to the precise religious or communicative context in which the privilege can be invoked. See *infra* note 139 and accompanying text.

135. See *In re Grand Jury Investigation*, 918 F.2d 374, 376-77 (3d Cir. 1990); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 506.03.

136. For an early history of the privilege in the United States, see Walsh, *supra* note 133; Walter J. Walsh, *The First Free Exercise Case*, 73 *GEO. WASH. L. REV.* 1 (2004). The case Walsh discusses is *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813), in 1 *W. L.J.* 109 (1843), reprinted in *Privileged Communications to Clergymen*, 1 *CATH. LAW.* 199, 199-209 (1955). *Phillips*, as a case under the Free Exercise Clause, was explicitly grounded in the distinct sacramental status of the confession in Catholic belief in practice. The question, as posed by the court, was:

[W]hether a Roman catholic priest shall be compelled to disclose what he has received in confession—in violation of his conscience, of his clerical engagements, and of the canons of his church, and with a certainty of being stripped of his sacred functions, and cut off from religious

that the privilege only applied to Catholic priests.¹³⁷ Soon, though, legislatures extended the privilege to all clergy,¹³⁸ often even if their own theological understandings or religious principles did not require it.¹³⁹ The privilege according to some statutory formulations even applies, ironically enough, in contexts in which a clergyperson might, according to her own religious understanding, be *required* to disclose certain “confidential” communications.¹⁴⁰

communion and social intercourse with the denomination to which he belongs.

Id. at 200.

137. Thus, in *People v. Smith*, 2 NY City H Rptr 77, 80 (N.Y. Ct. Oyer & Terminer Richmond County 1817), reprinted in 1 AMERICAN STATE TRIALS VOL. 1 779, 783-84 (John D. Lawson ed., 1914), excerpted in *Privileged Communication to Clergymen*, *supra* note 136, at 209-11, the court, rejecting a claim of privilege with respect to communications to a Protestant minister, distinguished “between auricular confessions made to a priest in the course of discipline, according to the canons of the church, and those made to a minister of the gospel in confidence, merely as a friend or adviser.”

138. Most famously, the New York Legislature enacted a statutory privilege, the model for that in other States, requiring that “No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.” 2 N.Y. REV. STAT., pt. 3, ch. 7, tit. 3, § 72 (1828) (emphasis added). The current version of the privilege in New York reads: “Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [sic] disclose a confession or confidence made to him in his professional character as spiritual advisor.” N.Y. C.P.L.R. 4505 (CONSOL. 2003).

139. “The more modern approach, which has become the majority position, is to discard any requirement of confession or penitential communication as a precondition to the application of the privilege, and to protect any confidential communication with a clergy member whenever the parishioner is ‘seeking spiritual counsel and advice.’” Cassidy, *supra* note 134, at 1647 (quoting VA. CODE ANN. § 8.01-400 (2007)). Some states (adopt/take/etc...) a stricter position based on language similar to that in the original 1828 New York statute, see *supra* note 138, which privileges “only confessions made in the course of discipline enjoined by the rules” of the cleric’s specific religious tradition. *Id.* at 1645-46 (emphasis omitted). Yet other states define the privilege more expansively to include any communications made to a cleric in his or her “professional capacity.” See *id.* at 1649.

140. For discussion of some of the potential tensions between religious duties to disclose and secular testimonial privileges and other norms of confidentiality, see, for example, *People v. Bragg*, 824 N.W.2d 170, 173-77 (Mich. Ct. App. 2012)

A final instance of the remarkable American impulse to extend paradigm cases of religious rights and privileges beyond their original logic is known to very few but clergy and their accountants and tax advisors. The problem is this: according to general tax principles, employees who live in employer-provided housing as a requirement of their employment and for the convenience of their employers are entitled to exclude the value of their housing from their gross income.¹⁴¹ Classic examples include lighthouse keepers, resident building managers, and the President of the United States. This rule would apply uncontroversially to most Catholic priests and other clergy who live in rectories and the like.¹⁴² But other clergy, whose religions' ecclesiastical or theological principles do not require clergy to live above the store, so to speak, would not have that tax benefit. For decades, however, the tax code has contained a special provision, often called the parsonage exemption, whose essential function is to extend to all clergy the same tax treatment as priests living in rectories.¹⁴³ While the

(excluding testimony of pastor to whom defendant, who had sexually assaulted a nine-year old, had confessed, even though pastor had sought out the conversation with the defendant and believed that sharing the confession with the family and authorities was consistent with Baptist doctrine and was “the right thing to do”); Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 472-74 (2011); Alan Mayor Sokobin, *Rabbinic Confidentiality: American Law and Jewish Law*, 38 U. TOL. L. REV. 1179 (2007); Andrew Chow, *Mich. Court Mulls Church Confession Issue*, FINDLAW (Feb. 13, 2012 5:04 AM), http://blogs.findlaw.com/law_and_life/2012/02/mich-court-mulls-church-confession-issue.html.

141. There shall be excluded from gross income of an employee the value of any . . . lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if . . . the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

I.R.C. § 119(a) (2012).

142. I am eliding here the question of the precise nature of the “employment” or other legal relationship between priests and the Church, a question that remains in certain other contexts a matter of real debate. See Perry Dane, “*Omalous*” *Autonomy*, 2004 BYU L. REV. 1715, 1715-16, 1734-35 (2004) [hereinafter Dane, “*Omalous*” *Autonomy*].

143. In the case of a minister of the gospel, gross income does not include—
 (1) the rental value of a home furnished to him as part of his compensation; or

parsonage exemption seems at first glance like a gratuitous and extraordinary financial windfall for clergy,¹⁴⁴ its underlying purpose—to mitigate what would otherwise be the tax code’s differential treatment of various religious traditions based solely on different ecclesiastical structures—locates it comfortably within the larger impulse to extend paradigm cases of religious rights or privileges across the religious spectrum.

Having gone through in some detail how the federalism example fits into my description of “analogy of dignity,” I don’t feel the same need to do so here. A few points, though, are worth emphasizing.

First, the instances I’ve described cannot be explained by any simple application of principles such as religious liberty or religious equality. To be sure, some of the paradigm cases—particularly suspending of alternate-side parking regulations during Jewish holy days and protecting the seal of sacramental confession—do raise important religious liberty concerns. But the extended cases are non-paradigmatic precisely because they are much less obvious.¹⁴⁵

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

I.R.C. § 107 (2012).

144. See *infra* note 148 and accompanying text.

145. Of the three instances just discussed, the general clergy privilege probably comes closest to being defensible on general religious liberty principles. Some religious traditions, even if they do not attach sacramental significance or absolute inviolability to the secrecy of certain clergy-congregant communications, might nevertheless have strong religious reasons for treating them as confidential. But this is not a universal religious belief, and yet the law of clergy privilege makes little effort to sort among cases on such theological grounds. The clergy privilege might also be defended as an application of principles of religious institutional autonomy, which often operate across all religious traditions irrespective of specific theological differences. See Dane, “*Omalous*” *Autonomy*, *supra* note 142, at 1734 (“The right to institutional autonomy does not depend, as the right to religion-based exemptions does, on asserting a specific conflict between a secular legal norm and a sincerely held religious belief. To the contrary, the right to autonomy, correctly understood, attaches to a religious institution regardless of its motives and beliefs.”). But this argument also only goes so far: the clergy privilege, in some cases, as when it is invoked by a communicant to

Similarly, religious equality principles most obviously require that like cases be treated alike, not that unlike cases be treated alike. Nevertheless, American church-state tradition seems particularly sensitive—not always or consistently, but often enough to be noticeable—to the appearance of religious equality, even when a “neutral law of general applicability”¹⁴⁶ might justify different treatment.¹⁴⁷

Second, with respect to the impulse toward uniformity of treatment across religious differences, much more so than with respect to uniformity of the legal status of the states, the seams, complications, and counter-arguments are often clearly visible. As I write this, for example, the parsonage exemption, which I for one would gladly defend as an expression of at least a complicated version of religious equality, is undergoing its most serious constitutional attack yet for enshrining a gross *inequality* between clergy and all other taxpayers.¹⁴⁸ In a sense, this is an intractable problem—either the law treats priests and rabbis the same, as under current law, or it treats rabbis and their next-door neighbors the same, as the opponents of the parsonage exemption insist it should. Such dilemmas are, however, only more or less visibly, built into the logic of all arguments for “analogy of dignity.”

prevent disclosures that a clergyperson might actually want, or feel duty-bound, to make, arguably impedes rather than promotes religious institutional autonomy.

146. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

147. This is, it seems to me, a peculiarly American impulse. Many other legal systems feel no similar compunction. See Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, *supra* note 128, at 40-41.

148. See *Freedom from Religion Found., Inc. v. Lew*, No. 11-cv-626-bbc, 2013 U.S. Dist. LEXIS 166076, *2-3, *62 (W.D. Wis. Nov. 21, 2013) (holding that the parsonage exemption violates the Establishment Clause because it “provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise,” but staying injunction until the conclusion of appeals). For my argument that the decision “is quite wrong . . . [and] misunderstands an important piece of our church-state dispensation,” see Perry Dane, *The Parsonage Exemption and Constitutional Glare*, CENTER FOR L. & RELIGION F., (Nov. 27, 2013), <http://clrforum.org/2013/11/27/parsonage-exemption/>.

3.

Finally, and most evocatively for my purposes here, consider the institution of familial adoption. Recall Cicero's thought that if "the first bond of union is that between husband and wife[,] the next [is] that between parents and children; then we find one home, with everything in common."¹⁴⁹ The bonds—of affection, rights, obligations, and traditionally mutual economic relations—between parents and children are at least as primordial and central as the bonds of marriage. Moreover, the paradigmatic form of the parent-child relation is, for a variety of reasons, including the obvious evolutionary one, paradigmatically biological.¹⁵⁰

Nevertheless, throughout human history, for a variety of reasons, not all children have been raised by their biological parents.¹⁵¹ Many societies have accommodated this fact only informally,¹⁵² or on an ad hoc basis, or by resort to legal categories other than adoption.¹⁵³ The common law, for

149. See *supra* note 13 and accompanying text.

150. For helpful philosophical discussions, see, for example, NORVIN RICHARDS, *THE ETHICS OF PARENTHOOD* 8-26 (2010); Don S. Browning, *Adoption and the Moral Significance of Kin Altruism*, in *THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES* 52 (Timothy P. Jackson ed., 2005); Edgar Page, *Parental Rights*, *J. APPLIED PHIL.* 187, 198-200 (1984). For one of many accounts that treat biology as important but not necessarily dispositive, see, for example, MICHAEL W. AUSTIN, *CONCEPTIONS OF PARENTHOOD: ETHICS AND THE FAMILY* (2007). To be sure, any straightforward biological account of at least presumptive parenthood has been challenged, not only by adoption, which is my focus here, but by the new reproductive technologies. That topic, however, is far beyond the scope of this Article, as is the possibly different role played by mothers and fathers in the biological paradigm (particularly in such aberrant cases as rape).

151. See generally Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 *DUKE L.J.* 1077 (2003); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 *VAND. L. REV.* 743 (1956); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 *J. FAM. L.* 443 (1971).

152. For an important account of informal adoption in the American nation as reflected in literary sources, see CAROL J. SINGLEY, *ADOPTING AMERICA: CHILDHOOD, KINSHIP, AND NATIONAL IDENTITY IN LITERATURE* (2011).

153. For a detailed discussion of the Jewish legal category of "A Person Who Raises Another's Child," see Michael J. Broyde, *Adoption, Personal Status, and Jewish Law*, in *THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL,*

example, had no formal provision for legal adoption.¹⁵⁴ Nevertheless, around the 1850s, American states began to enact adoption statutes that, to lesser or greater degrees, established a legal status modeled on biological parenthood but designed to recognize families that were not made up of biological parents and their biological children.¹⁵⁵

Again, I do not need to go through the entire litany to explain how this development is a clear example of what I have called “analogy of dignity.” I should, though, again make several distinct points.

First, while adoption law was based from the start on the paradigmatic case of biological parenthood, the degree of identity between the two has varied over time and place. For example, the American law of adoption did not at first treat adopted children as equal to biological children with respect, for example, to inheritance from persons (grandparents, uncles, half-siblings, etc.) other than their adoptive parents.¹⁵⁶

Second, the extension of the biological paradigm to adoption has rarely been unproblematic. For example, the

THEOLOGICAL, AND LEGAL PERSPECTIVES, *supra* note 150, at 128 [hereinafter Broyde, *Adoption, Personal Status, and Jewish Law*].

154. See *Tillinghast v. Chin Mon ex rel Chin Yuen*, 25 F.2d 262, 266 (1st Cir. 1928) (Anderson, J., dissenting) (“The Egyptians, Hebrews, Greeks, Babylonians, Romans, and Spanish, all practiced adoption; while at common law, adoption was unknown.”).

155. See Presser, *supra* note 151, at 461-79. For an updated discussion of the complex cultural and religious forces at work in both the early and more recent legal history of adoption, see Stephen B. Presser, *Law, Christianity, and Adoption*, in *THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES*, *supra* note 150, at 219.

156. See, e.g., *Keegan v. Geraghty*, 101 Ill. 26 (Ill. 1881); *Hockaday v. Lynn*, 98 S.W. 585 (Mo. 1906), *Batcheller-Durkee v. Batcheller*, 97 A. 378 (R.I. 1916). This older view has now generally been repudiated by both legislation and case law. See, e.g., IND. CODE ANN. § 29-1-2-8 (LexisNexis 2013) (“For all purposes of intestate succession, including succession by, through, or from a person, both lineal and collateral, an adopted child shall be treated as a natural child of the child’s adopting parents, and the child shall cease to be treated as a child of the natural parents and of any previous adopting parents.”); *Elliott v. Hiddleston*, 303 N.W.2d 140, 144 (Iowa 1981) (overruling the “stranger to the adoption” doctrine and citing similar cases in other states).

deep insistence at one time on secrecy in adoption¹⁵⁷ and the complete excision of the biological parent from any possible relation with her child were motivated, at least in part, by a determined effort to fashion adopted families in the exact image of biological families.¹⁵⁸ But that effort was probably doomed to be overturned.¹⁵⁹

Third, the imaginative construct of adoption law remains profoundly challenged from two ends. On the one hand, a whole movement centered on the rights of adoptive children has championed the continued relevance—and legal protection—of biological ties alongside adoptive ones.¹⁶⁰ On the other hand, some theorists have pointed to adoption laws as a datum in their arguments against biological and genetic “essentialism” in our more general understanding of the parent-child relation.¹⁶¹ Yet the important point remains that

157. See Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 370-71 (2001). See generally E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (2000).

158. See ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* 122 (2008) (“Until the late 1960s, matching was the dominant paradigm in adoption; it promised to deliver naturalness and authenticity. . . . Exacting specifications aspired to create families that appeared to be authorized by nature rather than by society.”); Cahn, *supra* note 151, at 1148-49.

159. See HERMAN, *supra* note 158, at 227-28; cf. CARP, *supra* note 157, at 196-222 (relating rise of open adoption movement to breakdown of traditional assumptions about adoption, including ethnic matching).

160. See BETTY JEAN LIFTON, *LOST AND FOUND: THE ADOPTION EXPERIENCE* (1979); Naomi Cahn & Jana Singer, *Adoption, Identity and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 172-75 (1999). For an important theological effort to uphold the centrality of biologically-grounded “kin altruism” while also emphasizing the “importance and dignity of adoption” as a solution to family breakdown, see Browning, *supra* note 150, at 62-64.

161. See, e.g., Charlotte Witt, *Adoption, Biological Essentialism, and Feminist Theory*, in *FAMILIES BY LAW: AN ADOPTION READER* 280 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004); Charlotte Witt, *Family Resemblances: Adoption, Personal Identity, and Genetic Essentialism*, in *ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS* 135 (Sally Haslanger & Charlotte Witt eds., 2005); cf. John Lawrence Hill, *What Does It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991) (arguing for priority of those who first intend to have a child over claims of biologic parents or gestational carriers). But see, e.g., Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001) (arguing that

these debates did not need to be resolved as a prerequisite to enacting adoption laws, and current laws of adoption continue operating, with disputes about their details but not their basic desirability, even as such debates continue to swirl around them.

C.

In light of my discussion of the law of adoption, the basic outline of an “analogy of dignity” argument for same-sex marriage should now be obvious.¹⁶² Assume, as suggested here, that the paradigm of marriage is heterosexual. Nevertheless, not all persons are heterosexual, nor is all love and mutual support. And committed, loving homosexual couples deserve a place in the symbolic and institutional

traditional notions of biologically-based parental status, alienable only voluntarily or on proof of unfitness, best accord with fundamental constitutional principles and best protect those families most vulnerable for economic and other reasons to undue state intervention).

It is possible, of course, to criticize some of the “biologic bias” in the law without radically critiquing the relevance of biology as such. See, e.g., ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* (Beacon Press 1999) (1993); Elizabeth Bartholet, *What’s Wrong with Adoption Law?*, 4 INT’L J. CHILD. RTS. 263 (1996). See generally WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY (Linda C. McClain & Daniel Cere eds., 2013); Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6 (1980).

Jewish tradition, though not recognizing adoption as such, treats the raising of another’s child as “special, sacred, a manifestation of holiness, and covenantal. It is such precisely because it is [a relationship grounded in] choice . . . and thus different from (and not to be confused with) natural parenthood, which lacks these basic covenantal components.” Broyde, *Adoption, Personal Status, and Jewish Law*, *supra* note 153, at 141.

For similar though theologically more foundational grounds, the idea of adoption has historically been a central religious metaphor in Christian thought, with complicated cultural implications for the biological paradigm in ordinary family life. See, e.g., MARTIN LUTHER, GALATIANS 193 (Alister McGrath & J.I. Packer eds., Crossway Books 1998) (1575) (“The apostle is saying, in effect, ‘If you believe and are baptized into Christ—if you believe that he is that promised Seed of Abraham who bought the blessing to all the Gentiles—then you are the children of Abraham, not by nature, but by adoption.’”).

162. The argument here further develops my earlier more tentative suggestions in *Holy Secular Institution*, *supra* note 9, at 1182-86.

architecture of contemporary society¹⁶³ along with all the other forms of association out of which our larger community and culture are built.¹⁶⁴

Had our moral and political tradition always valorized gay and lesbian love and long-term, equal, same-sex relationships, law and culture would probably long ago have lent some structure to those relationships, and there is good reason to suppose, in light of the earlier arguments in this Article, that such a structure would have been distinct from marriage. But it is pointless to try to confect that imaginary structure out of the counterfactual ether. Perhaps the best contemporary society can do is to adapt an existing structure to a new purpose.

Under different circumstances, deep and lasting homosexual love might well have been valorized, not as same-sex marriage, but as sexualized (and perhaps formalized) friendship.¹⁶⁵ Indeed, classic homosexual culture and literature have often conceived of gay love as a form of sexualized friendship.¹⁶⁶ And the historical practice and

163. I leave to one side the continuing vigorous debate among historians and theorists about whether the very idea of gay or homosexual identity (as opposed to same-sex sexual behavior) is a largely modern social construction that can only be applied anachronistically to past societies, even ones in which same-sex sex was accepted or celebrated. Compare John Boswell, *Revolutions, Universals, and Sexual Categories*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 17, 35 (Martin Duberman et al. eds., 1989), with DAVID M. HALPERIN, HOW TO DO THE HISTORY OF HOMOSEXUALITY 48-81 (2004). See generally WILLIAM B. TURNER, A GENEALOGY OF QUEER THEORY (2000); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993).

164. I have elsewhere similarly referred to the “symbolic economy—the scaffolding of values—of law and society.” *Holy Secular Institution*, *supra* note 9, at 1182.

165. Consider in this connection Alan Bray’s poignant and powerful article, *A Traditional Rite for Blessing Friendship*, in LOVE, SEX, INTIMACY, AND FRIENDSHIP BETWEEN MEN, 1550-1800, at 87, 89 (Katherine O’Donnell & Michael O’Rourke eds., 2003), which discusses heraldic devices and joint burials that were employed from at least the fourteenth to the nineteenth centuries to honor deep friendships and “sworn brothers.” As with the rituals discussed in John Boswell’s well-known book, see *supra* note 50, it is rarely apparent whether the relationships marked in this way were sexual. See Bray, *supra*.

166. See, e.g., George E. Haggerty, *Male Love and Friendship in the Eighteenth Century*, in LOVE, SEX, INTIMACY, AND FRIENDSHIP BETWEEN MEN, 1550-1800,

theory of friendship, while resting on the possibility of a pure form of companionship without the distractions of sex or kinship or family, has also at times flirted with the erotic at its edges. Consider, for example, the endless and sometimes historically tin-eared debates over whether this or that great historical friendship marked by passionate declarations of love did or did not remain Platonic. Of course, lasting and deep gay relationships do not precisely fit classical accounts of pure friendship. But they do not fit classical accounts of marriage either, and all I am suggesting is that, until not that long ago, the former analogy might have been more compelling than the latter.¹⁶⁷

In today's actual world, however, the model of friendship—even extended and reshaped—will not fit the bill, for several reasons. To begin with, while one of the strengths of friendship has been its freedom from legal rights and obligations, and therefore legal entanglements, that is also its weakness, particularly in a culture in which so much of everyday life—from tax status to hospital visitations—turns on a network of thick legal rules. Some of the legal rights and obligations that same-sex pairs might need could

supra note 165, at 70, 72; Rictor Norton, *The Homosexual Pastoral Tradition in English Renaissance Literature*, RICTORNORTON.CO.UK (June 20, 2008), <http://rictornorton.co.uk/pastor00.htm>.

In a different twist on old themes, some contemporary Christians have chosen to affirm the reality and dignity of gay sexual identity while still accepting traditional Christian norms forbidding same-sex sex. This leads them to embrace a practice of celibacy grounded in the nurturing of deep “spiritual” friendship. For a helpful clearinghouse and group blog of voices articulating these views, see SPIRITUAL FRIENDSHIP, <http://spiritualfriendship.org> (last updated Jan. 18, 2014). For an earlier proposal along similar lines, see Oliver O’Donovan, *Homosexuality in the Church: Can There Be a Fruitful Theological Debate?*, in *THEOLOGY AND SEXUALITY; CLASSIC AND CONTEMPORARY READINGS* 373, 380-81 (Eugene F. Rogers, Jr. ed., 2002).

I should add, lest I be misunderstood, that my own theological and moral perspective is not sympathetic to this approach for a variety of reasons.

167. Of course, these two institutions—marriage and friendship—overlap, not only in their substantive and emotional content, but also in the repertoire of symbols with which they are expressed. Thus, I have already discussed the debate (arising out of genuine ambiguity) as to whether the medieval rites discussed by John Boswell are best considered “marriage” ceremonies or “friendship” ceremonies. See BOSWELL, *supra* note 50. Similarly, Alan Bray points out the use of symbolic forms often associated with marriage in the “friendship” rites that are the focus of his article cited *supra* note 165.

be constructed ad hoc, but not enough. Marriage, though, has had attached to it a range of automatic legal privileges and rights and duties that would clearly make sense for other types of pair bonds. Positivity matters. The very fact that law has embraced marriage is transformative, giving civil marriage a range of meanings and practical incidents that render it a different creature than the natural marriage, or the paradigm of heterosexual marriage, that might exist even without civil law. And, in the modern age, with its new conceptions of government and regulation, positivity matters even more. All this confounds what might in other times and places have been a perfectly sensible philosophical and practical conclusion.

Specific legal rules are only one part of the reason, however, that intense friendship can no longer serve, at least alone, as an adequate template for committed same-sex relationships. More important are broader changes in the valence of friendship and its relation to marriage. Friendship does not carry the symbolic and emotional weight that it used to. Philosophers, theologians, and poets could at one time declare that genuine friendship was a defining human bond,¹⁶⁸ perhaps even a deeper and nobler relationship than marriage.¹⁶⁹ That no longer rings true. In addition, to the extent that friendship continues to be valued in the

168. See, e.g., ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 935, 1058-93, bk. 8-9, §§ 1155a-1172a (Richard McKeon ed. & trans., 1941); CICERO, *De Amicitia*, in ON OLD AGE—ON FRIENDSHIP—ON DIVINATION 108 (W.A. Falconer trans., Loeb Classical Library 1923).

Some in the Christian tradition have put a distinctively religious spin on their understanding of friendship. See, e.g., AELRED OF RIEVAULX, *Spiritual Friendship* (Marsha L. Dutton ed., Lawrence C. Braceland trans., Liturgical Press 2010) (1616). And just as human marriage in the Christian view was understood as a type for Christ's mystical marriage with his Church, human friendship was understood as a type for the intimate relationship of the three persons of the Trinity. See James McEvoy, *Ultimate Goods: Happiness, Friendship, and Bliss*, in THE CAMBRIDGE COMPANION TO MEDIEVAL PHILOSOPHY 254, 273 (2003) ("[T]he friendship of the three divine persons is the exemplar for all nonpossessive, self-giving *amicitia*, wherefore friendship is the natural virtue that draws closest to supernatural charity."). For a contemporary study along these lines, see PAUL D. O'CALLAGHAN, *THE FEAST OF FRIENDSHIP* (2007).

169. See, e.g., MICHEL DE MONTAIGNE, *On Affectionate Relationships*, in THE COMPLETE ESSAYS 205, 209-10 (M.A. Screech ed. & trans., 1991).

contemporary imagination, part of the reason is that it has been imported into marriage itself. Historians and sociologists emphasize the idea of “companionate marriage” as a new dimension of the institution.¹⁷⁰ Many married couples now expect, as they might not have in the past, to be each other’s “best friends.”¹⁷¹ This is largely due to the egalitarian revolution in marriage, though one can imagine one without the other. The companionate model of marriage does not *itself* destroy the heterosexual paradigm of marriage—in some sense, it flows directly out of it—and is not in itself an argument for same-sex marriage. But it does indicate that if the best model for committed same-sex relationships is something like symbolically elevated, emotionally profound, sexualized friendship, some of that conceptual space has already been taken—by marriage.

Finally, in light of advances in reproductive technologies, as well as a series of significant sociological developments, homosexual couples now routinely act as legal parents and not only as pair bonds. Various legal tools short of marriage, including the law of adoption, can accommodate some of these developments, but not all.

In sum, in the legal system and society in which we live, the institution of marriage has in some sense done its job too well. Despite the severe challenges it has faced, marriage has come to hold a distinct and unparalleled place in our dignitary imagination, and it carries with it a set of important legal rights and obligations. None of this ineluctably *requires* that the institution of marriage be extended to same-sex couples. Nevertheless, just as the law recognizes, for both moral and prudential reasons, the justice of extending the statuses of parent and child to persons with no biological relation, it might think it reasonable or necessary to allow conferring the status of spouse to persons who are not of the opposite sex. In other words, a humane society, in the name of respecting both the dignity of its

170. See generally PAUL R. AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* (2007).

171. See Sylvia Weishauss & Dorothy Field, *A Half Century of Marriage: Continuity or Change?*, 50 J. MARRIAGE & FAM. 763 (1988). For a skeptical take on this modern ideal, see ARNOLD A. LAZARUS, *MARITAL MYTHS REVISITED: A FRESH LOOK AT TWO DOZEN MISTAKEN BELIEFS ABOUT MARRIAGE* 9-12 (2001).

members and the utility of its institutions, will at least consider the possibility of same-sex marriage.

1. Note, again, that this form of argument for same-sex marriage does not deny the paradigmatic character of heterosexual marriage, nor even denies the rationality or coherence of limiting marriage to heterosexual couples. It does not erase the paradigm, or hollow it out, or abstract away from it, but rather proposes extending it to a different context. It is a contingent argument, rooted in our time and place. It is an argument for empathy, dignity, and decency, not for logic or acidic equality.

In particular, consider in this connection one of the more interesting and even arresting arguments against extending marriage to same-sex couples: that such a move is frighteningly statist, even tyrannical, in its implications. As R.R. Reno puts it,

Redefinition of marriage to allow same-sex unions undermines the proper separation of cultural and governmental power that is so important for a liberal regime. Marriage . . . is more primitive and ancient than anything resembling organized government. . . . Government has always treated marriage like murder—a moral fact recognized rather than a policy formulated, a given truth framed in law rather than something to be fed into the machinery of political debate. . . .

[G]ay marriage won't just happen if government "gets out of the way." It requires creating a new possibility that will not come to pass if traditional institutions and moral traditions are left alone. . . .

Tyranny isn't just a situation in which the government is telling you what to do at every moment. It's also a society in which government says that, if necessary, it can. . . . If legislatures and courts can redefine marriage, what can't it intervene to reshape and re-purpose?¹⁷²

172. R.R. Reno, *Gay Marriage and Conservatism*, FIRST THINGS (Apr. 8, 2013), <http://www.firstthings.com/onthesquare/2013/04/gay-marriage-and-conservatism/rr-reno>. For similar arguments, see, for example, Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. L. REV. 1245, 1264 (1998) ("Marriage exists independent of the state. It is created through the consensual act of self-giving by a man and a woman."); *Between Man and Woman: Questions and Answers About Marriage and Same-Sex Unions*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,

But same-sex marriage need not, if I am right, “redefine marriage” in Reno’s strong sense. It *can* leave “traditional” marriage intact, while also responding to a distinct set of moral imperatives that are themselves ancient, powerful, and persuasive.

2. Framing the argument as I have helps explain why same-sex marriage mimics the precise form of heterosexual marriage—including its rules and assumptions about exclusivity, fidelity, hurdles to dissolution, and the like.

3. It also helps explain, however, the impulse in some quarters to mark somehow the difference between the paradigmatic heterosexual case of marriage and its extension to same-sex couples. The idea of “civil unions” can be understood, at least in part, as such an effort.¹⁷³

4. Even jurisdictions that have embraced same-sex marriages find themselves puzzled about how completely to assimilate them into the rules surrounding heterosexual marriages. An obvious example: the law typically creates a presumption (rebuttable or not, to varying degrees in different states) that the husband in a heterosexual marriage is the parent of any child born to the mother during the marriage. But does it make sense to apply the same presumption to homosexual married couples?¹⁷⁴

and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions.cfm (“Marriage is a basic human and social institution. Though it is regulated by civil laws and church laws, it did not originate from either the church or state, but from God. Therefore, neither church nor state can alter the basic meaning and structure of marriage.”) (last visited Feb. 22, 2014).

173. See Dane, *Intersecting Worlds*, *supra* note 22.

174. In the United States, the trend seems to be for jurisdictions that have recognized same-sex marriage to also extend the legal presumption of parentage to the same-sex spouses of biological parents. See *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (extending legal parenthood to same-sex spouse of biological parent); *Hunter v. Rose*, 975 N.E.2d 857 (Mass. 2012) (same); *Lewis v. Harris*, 908 A.2d 196, 216-24 (N.J. 2006) (striking down non-marital Domestic Partnership Act partly because it did not provide presumption of dual parentage to the non-biological partner of a child born to a domestic partner); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J. C.R. & C.L. 201, 247 (2009); see also Jennifer L. Rosato, *Children of Same-Sex Couples Deserve the Security Blanket of the Parentage Presumption*, 44 FAM.

5. At the same time, as with the law of adoption, same-sex marriage can become the catalyst for much deeper debates. For example, some commentators support the hollowing out of the heterosexual paradigm of marriage not merely because it facilitates an argument for same-sex marriage, but because they reject the paradigm itself and all that it connotes about the norms of sexuality and family. Other commentators, as I suggested at the start, would rather reject marriage entirely and are therefore at best grudging in their support of the campaign for same-sex marriage.

This is not the place to try to address those arguments or resolve those debates. The only point worth making, though, is that these controversies, as with similar disputes arising out of the institution of adoption, need not be resolved before same-sex marriage is considered, and they can continue, and probably will for a long time, even after same-sex marriage becomes a feature of the law.

In this connection, the worry that extending marriage to same-sex couples *might* (though it need not necessarily or logically) undermine the cultural and legal coherence of the institution and even threaten the meaning that heterosexual couples attach to it is legitimate, and same-sex marriage advocates are wrong to ridicule it.¹⁷⁵ Consider, for example,

CT. REV. 74, 80 (2006). But as one commentator has argued, when “conception occurs through sexual intercourse, the parentage presumption is inadequate unless accompanied by legislation settling *when, by whom, and on what basis* the presumption can be rebutted,” and virtually no American jurisdictions have directly addressed these complexities. Polikoff, *supra*, at 247.

Interestingly, many of the foreign countries that now recognize same-sex marriage have been more hesitant to extend the presumption of parentage along with it. See Macarena Sáez, General Report, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” Is So Different*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1, 4-7 (2011).

175. For a classic example of such ridicule, see *How Same-Sex Marriages Harmed Mine*, BASTION OF SASS (June 29, 2013), <http://bastionofsass.blogspot.com/2013/06/how-same-sex-marriages-harmed-mine.html>.

As more states allowed same-sex marriage, warnings came:

[A]bout how same-sex marriages will harm non-same-sex marriages. What awfulness would happen to my marriage? Nothing, as much as I could tell. . . . ‘Vote against the right of gays to marry!’ voters were

the argument that: “After accepting same-sex marriage, you just can’t say that there’s anything especially important, normative, crucial to the common good, or ideal for children or society about the man and the woman who make the baby sticking around and loving each other and the baby, too.”¹⁷⁶

This is, in principle, a sensible concern. In other contexts, we routinely entertain the argument that extending a legal rule or institution too far “trivializes” the rule itself and its original purposes and thus makes it more difficult to keep those purposes in mind.¹⁷⁷ Nevertheless, such “undermining”

warned. ‘Save your marriage! Save your children’s marriage! . . .’ I heard that my own marriage will loose [sic] its ‘specialness.’ I wasn’t sure what that meant, but if my marriage was special, wasn’t everyone’s in its own way? I also heard that same-sex marriage would cut into the rights given to non-same-sex married couples. Really? Did some people think that marriage is like a pizza, and as more people come to the pizza party, each of us gets a smaller and smaller piece to enjoy?! . . . Still, when the Supreme Court decisions in the Proposition 8 and DOMA cases were issued . . . concerns about the harm to ‘traditional’ marriages again arose. And I’ll keep monitoring the resulting harm to my own marriage. But I’m going to bet that the number of ultimate harmful effects will continue as it has been: none.

Id.

Rhetorically, this is powerful stuff. Analytically, it misses the point.

176. Maggie Gallagher, *Reply to Corvino*, in JOHN CORVINO & MAGGIE GALLAGER, *DEBATING SAME-SEX MARRIAGE* 207, 214 (2012).

177. See, e.g., L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* (Craig Joyce ed., 2009), *printed in* 46 *HOUS. L. REV.* 215, 285 (2009) (“The constitutional subject matter of copyright is materials for learning. . . . Part of the problem, however, is that courts have trivialized copyright by extending it to protect all manner of works, from casual doodles to ornamental aspects of useful articles, that are insignificant in light of copyright’s purpose and function. Because copyright protects such objects only as items of commerce (not as works of learning), there is a cross-fertilization effect that reduces the status of learning materials to that of mere commodities for the marketplace”) (footnote omitted); Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 *CONN. L. REV.* 1, 34-35 (2010) (arguing that the right to privacy articulated by Samuel Warren and Louis Brandeis was a “weighty right” to “personal autonomy” and “personal authenticity,” which can only be “trivialize[d]” and “cheapen[ed]” if it is broadened into a merely private and “much less defensible right not be annoyed”); Pamela M. Prah, *Federal Enforcement of ADA Falls Short, Civil Rights Commission Says in Report*, 67 *U.S.L.W.* 2199 (Oct. 13, 1998) (“Many of these cases defy credulity and are absolutely not what we intended when we passed the ADA in 1990,” Redenbaugh wrote, listing more than a dozen ADA cases that he said illustrate how the concepts behind the ADA have

is not inevitable, particularly if the sort of discourse I have suggested here were to gain some traction. That is to say, if same-sex marriage is understood as a supplement to the “traditional” account of marriage, rather than a rejection of it, then same-sex marriage need not undermine it any more than the possibility of adoption would necessarily undermine the cultural and psychological incidents of biological parenthood. If anything, there is a good case to be made that, given the current erosion of many of the behavior assumptions surrounding marriage and its relation to both sex and child-bearing, same-sex marriage might actually strengthen the institution overall rather than weaken it.¹⁷⁸

6. Finally, it is important to notice how the struggle for same-sex marriage has brought with it efforts to broaden the circle even wider. As noted earlier, those efforts seem to me to be entirely expected whenever a paradigm case is extended beyond its original boundaries. They are simply an alternative response—celebratory rather than defensive—to the line-drawing problem that has popped up several times in this Article.

Nevertheless, an argument of the sort I have outlined here is much better able to address those efforts than one grounded in an outright rejection of the heterosexual paradigm of marriage. Put simply, the point to remember is that heterosexual marriage is simply closed to many gay men and lesbians unless they are willing to engage in a lie. A decent society might therefore find a place for them in the institution of marriage even if they do not fit its paradigm. Other persons in complex relationships—such as nonsexual friends or kin who depend on each other for economic or emotional support—might deserve certain legal rights and protections. But they simply do not need *marriage* in the same way or for the same reasons as homosexual couples.

been expanded ‘in almost every way imaginable,’ trivializing the term ‘disability.’ ‘What seems to be happening is that, even with the EEOC’s rejection of half of its complaints, the courts are dealing with many cases that appear outrageous to most Americans and that damage the reputation of both the ADA and those of us with severe disabilities,’ according to Redenbaugh, who was blinded and lost most of his hands in an explosion at the age of 17.”).

178. See RAUCH, *supra* note 69, at 104-22; ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 104-14 (1996).

Nor (as some have argued) do their claims demand the abolition or legal marginalization of marriage. That is not to say that such further changes in our ideas about marriage can be dismissed out of hand on their own terms. But they are not *required* simply because society and the law have extended marriage to same-sex couples.

D.

This essay has invoked a good many legal ideas and examples. But it is a fair question what sort of *legal* difference its argument might make. This is not the place to canvass those issues in detail. But I can venture a few thoughts.

1.

The analysis here unsettles the most straightforward means-end equality argument for same-sex marriage. It suggests that even though extending marriage to same-sex couples might be right and good, that would not be because limiting marriage to heterosexual couples is irretrievably irrational, or incoherent, or necessarily invidious and bigoted. The simple legal implication, if this argument is correct, is that a constitutional right to same-sex marriage could not be grounded in the standard mores of equal protection doctrine, particularly the customary forms of rational basis review and even, for that matter, intermediate scrutiny.¹⁷⁹

179. An entirely different—and much simpler—question was posed by statutes such as Section 3 of the federal Defense of Marriage Act (DOMA), which denied the several thousand federal incidents of marriage to same-sex couples. As the Supreme Court held, DOMA did not purport to define marriage or limit who was entitled to marry; all it did was discriminate, in a sweeping and often irrational manner, against one set of couples who were undoubtedly married under state law. *See* *United States v. Windsor*, 133 S. Ct. 2675 (2013); *see also, e.g.,* *Massachusetts v. United States Dep't of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012). I should add in the interests of full disclosure that this was essentially the argument that my colleagues and I on the Jewish Social Policy Action Network advanced in an *amicus* brief I principally drafted in the First Circuit case. *See* Brief for Amicus Curiae Jewish Social Policy Action Network,

The important next question, then, is whether something like an argument from “analogy of dignity” can find a place in constitutional discourse, whether only on a State level or in federal constitutional law too. *Lawrence v. Texas*, which struck down laws criminalizing homosexual sexual conduct, might point in that direction, particularly in its insistence that the state cannot “demean the existence” of gay persons by forbidding them to engage in sexual practices central to their very identity as human beings.¹⁸⁰ The linchpin to applying that theme in *Lawrence* to the marriage question would be the observation that both laws against same-sex sex and laws against same-sex marriage try to categorically deny to gay men and lesbians who are honest to themselves any access at all to a vital human good. In the case of marriage, that denial might be rational. But that does not make it constitutional.¹⁸¹

To see the point more clearly, consider the often-made comparison to *Loving v. Virginia*,¹⁸² which struck down laws restricting interracial marriages.¹⁸³ Opponents of same-sex marriage are right that *Loving* is not directly on point in the current debate. *Loving* really was a simple equality case. The laws at issue in *Loving* did not so much define marriage as they employed the regulation of marriage to further irrational ideas of racial purity and invidious ends of racial subordination.¹⁸⁴ For that matter, even supporters of those

Massachusetts v. United States Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214), 2011 WL 5833104.

180. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). To be sure, *Lawrence* carefully precluded its direct application to the question of same-sex marriage. *Id.* at 585.

181. See Conkle, *supra* note 31, at 37-42 (arguing that restrictions on same-sex marriage should survive an honest “rational basis” inquiry but could be struck down on the basis of substantive due process and a heightened equal protection standard working together and informed by consideration of “evolving social values”).

182. 388 U.S. 1 (1967).

183. *Id.* at 11-12.

184. *See id.* at 2.

laws never claimed that Blacks and Whites could not, in some essential sense, marry—only that they should not.¹⁸⁵

Nevertheless, in one crucial sense, bans on same-sex marriage are actually *more onerous* than bans on interracial marriage. Blacks and Whites under Jim Crow could not marry persons of the other race, which was unjust and racist. But they could—without denying their fundamental identity—fall in love and marry *somebody*. It is *that* possibility that is closed off to gay men and women. *Loving* is not on point, but it does not need to be. A constitutional claim to same-sex marriage might rest, not on an analogy to *Loving*, but on a careful account of the difference between the two cases.

If truth be told, though, this would be a doctrinal stretch. It would require extending existing forms of argument beyond their inevitable reach and might even demand new forms of argument. There might indeed be no constitutional right to same-sex marriage, at least on the basis of the argument in this Article. Or if there is such a right it might be best articulated, as it has been already, at the state rather than the federal level.¹⁸⁶

185. Supporters of bans on interracial marriage did sometimes refer to such marriages as “unnatural.” But that was a much looser use of the term than in the current debate; in more censorious times, many sorts of marriages have been described as both perfectly legal and conceptually possible yet in some sense “unnatural.” See, e.g., Frederick S. Crum, *The Statistical Work of Süssmilch*, 7 PUBLICATIONS AM. STAT. ASS’N 335, 351 (1900-01) (discussing Johann Peter Süssmilch’s views of the “unnatural marriage of young girls to old men, or of young men to middle aged widows”).

186. Just before and as this article was going to press, several federal district courts, claiming to take their cue from *United States v. Windsor*, 133 S. Ct. 2675 (2013), did hold that states must extend the institution of marriage to same-sex couples. See, e.g., *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 U.S. Dist LEXIS 26236 (W.D. Tex. Feb. 26, 2014); *Bostic v. Rainey*, No. 2:13cv395, 2014 U.S. Dist LEXIS 19110 (E.D. Va. Feb. 13, 2014); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 U.S. Dist LEXIS 4374 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist LEXIS 179331 (D. Utah Dec. 20, 2013), *stay granted*, 134 S. Ct. 893 (2014). However welcome these results on emotional grounds, I remain skeptical that either *Windsor* or equal protection doctrine requires such holdings. See *supra* note 179 and accompanying text (discussing *Windsor*). Time will tell whether the Supreme Court will ride this train or bring it to a stop.

At the end of the day, however, the force of an argument for same-sex marriage grounded in something like “analogy of dignity” does not depend on whether it easily translates into constitutional doctrine, or even on whether it is an argument about “rights” at all. Not all normative arguments—even important normative arguments—need be constitutional or based on a claim of right. I will have more to say on this vital point in Part IV.

2.

In any event, the legal questions surrounding same-sex marriage extend well beyond whether or not it is constitutionally required. I have already described one complex, almost dialectical, dynamic:¹⁸⁷ If opening marriage to same-sex couples can *extend*, without *undermining*, the heterosexual paradigm of marriage, that would help explain the instinct to leave most of the legal incidents of marriage unchanged even in the midst of an arguably revolutionary change in its premises. But it would also suggest that we should not be surprised to find some visible seams in the extension, including debates about nomenclature and the interplay between law and biology.

But other sorts of questions arise out of the difference between straightforward equality and “analogy of dignity.” Here, I want to flag just one: as a series of states have in recent years enacted statutes recognizing same-sex marriage, religious freedom activists and academics have urged legislatures to include provisions protecting religious objectors to same-sex marriage.¹⁸⁸ States have responded,¹⁸⁹

187. See *supra* notes 179-86 and accompanying text.

188. See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206 (2010); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & PUB. POL'Y 274 (2010).

189. See, e.g., CONN. GEN. STAT. § 46b-35a (2013) (providing that religious organizations and religiously-affiliated nonprofits “shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of

but not nearly to the extent that proponents of such exemptions have urged.¹⁹⁰ The difficulty is this: if objectors

a marriage and such solemnization or celebration is in violation of their religious beliefs and faith”); N.Y. DOM. REL. §10-b (McKinney 2013) (preserving right of religious entities and benevolent groups to refuse “to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage” and of religious and charitable groups “to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained”); Civil Marriage Protection Act, H.B. 438, 430th Reg. Leg. Sess. §§ 2-3 (Md. 2011) (providing, among other things, that religious organizations and religiously-affiliated nonprofits “may not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for the services, accommodations, advantages, facilities, goods, or privileges is related” to either “the solemnization of a marriage or celebration of a marriage that is in violation of the entity’s religious beliefs” or “the promotion of marriage through any social or religious programs or services, in violation of the entity’s religious beliefs, unless State or federal funds are received for that specific program or service”). For helpful summaries and comparisons of some state laws on the subject, see Robin F. Wilson, *Charting the Success of Same-Sex Marriage Legislation* (Sept. 1, 2012), <http://scholarlycommons.law.wlu.edu/wlufac/132/>; Statement of William Bassett, Thomas Berg, Robert Destro, Carl Esbeck, Marie Failing, Edward Gaffney, Richard Garnett, Michael McConnell, and Robin Wilson on Religious Freedom Implications of Proposed Hawaii Marriage Equality Act of 2013, 16-17, app. A (Oct. 28, 2013), <http://mirrorofjustice.blogspot.com/files/hawaii-gaffney-et-al-testimony-full-final-28oct13-1.pdf> [hereinafter Law Professors’ Statement].

190. *See, e.g.*, Law Professors’ Statement, *supra* note 189 (testimony by a group of law professors urging expanded religious liberty protection for opponents of same-sex marriage, including for-profit “small businesses”); Letter from Thomas C. Berg, Douglas Laycock, Bruce C. Ledewitz, Christopher C. Lund & Michael Perry, to Members of the Illinois Senate (Dec. 21 2012), *available at* <http://mirrorofjustice.blogspot.com/files/illinoisbased-1.docx> (urging, among other things, the enactment of “carefully crafted language . . . fair to both sides . . . [that] would protect only individuals and very small businesses that are essentially personal extensions of the individual owner, and only when some other business is reasonably available to provide the same service”).

More recently, controversial efforts have been mounted in some states to broaden such religious liberty protections further. *See, e.g.*, H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2014) (seeking to establish a right for any “individual or religious entity” with contrary religious beliefs to refuse, among other things to provide “any services, accommodations, advantages, facilities, goods, or privileges; provide counseling, adoption, foster care and other social services; or provide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement” or to

are simply bigots in the same class as objectors to interracial marriage, then wide exemptions would seem unwarranted. But if same-sex marriage is as hard a question as I have suggested here, and if opposition to it need not be grounded in mere animus,¹⁹¹ then it begins to look the sort of issue that might merit more tolerance of diversity and conscientious objection.¹⁹²

IV. NATURE, LAW, AND THE DECENT SOCIETY

A.

The most obvious objection to an argument for same-sex marriage grounded in “analogy of dignity,” at least from other supporters of same-sex marriage, is that marriage by “analogy” awards same-sex couples a mere consolation prize, a second-hand appendage to “real” marriage that is, in a word, condescending. This is a serious claim, and it requires a serious response. The form of argument here would indeed be neither necessary nor apposite if made, say, with respect to interracial marriage. As I just discussed, that *is* a straightforward right, correctly understood to be a matter of both abstract and practical equality. For that matter, the form of argument here would also be inapposite and inappropriate if made with respect to most other questions of gay and lesbian appeals for equal rights and equal treatment. The irreducible core of the analysis here is that the question of same-sex marriage is different, and that it is different because of the normatively coherent legitimate paradigmatically heterosexual character of marriage. But that by itself does not make the argument condescending, or mean that it assigns a second-class status to same-sex marriages, any more than adopted children are second-class

“treat any marriage, domestic partnership, civil union or similar arrangement as valid”).

191. See Conkle, *supra* note 31, at 41-42 (suggesting that a “sensitive accommodation” of the right to same-sex marriage with the “competing liberties” of religious objectors would be more difficult if the courts simply characterized opponents as driven by animus).

192. See Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 112-17 (2013).

compared to biological offspring,¹⁹³ or, for that matter, than North Dakota is a second-class state compared to North Carolina.

But I want to go further. The argument from “analogy of dignity” is not merely good enough to do the job. It is distinctively worthy. It understands same-sex marriage not as an afterthought, but as the product of a polity’s profound decision to do right by all its members, paradigms be damned. More important, the argument only looks condescending if we accept a set of contestable and even pernicious assumptions in favor of abstraction over contingency, acidic equality over empathetic decency, and instrumental rationalism over a forthright exploration of values and culture.¹⁹⁴ Indeed, that we (I include myself) would even suspect the argument of being condescending only reflects a poverty in our collective moral, political, and legal vision.

The questions stirred up here are deep, and I cannot begin to do them justice in the course of this article. But there are several ways to begin to think about what I am getting at.

First, recall the two slogans that have dominated arguments for same-sex marriage, “Freedom to Marry” and

193. If anything, an important strand in the Western tradition treats adoption, or at least the idea of adoption, as possessing a higher dignity than biology. See *supra* note 161 (citing Jewish and Christian sources on the special dignity of both real and symbolic adoption).

194. See Robert F. Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMMENT. 9, 13 (1987) (“Despite its currency, rationalism is not a synonym for all methods of moral and intellectual inquiry. It is not the same as insight, creativity, wisdom, vision, instinct, or empathy.”); *id.* at 15 (“Treating social choices as a series of intellectual problems is reassuring to many in the educated classes, but it also tends to denigrate important values and to stunt moral and political discourse.”). One need not be (and I am not) a disciple of Michael Oakeshott to sympathize with his argument that the “predicament of our time is that the Rationalists have been at work so long on their project of drawing off the liquid in which our moral ideals were suspended . . . that we are left only with the dry and gritty residue which chokes us as we try to take it down.” MICHAEL OAKESHOTT, *Rationalism in Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 1, 36 (1962). For among the most prominent recent arguments that moral argument needs to be embedded in specific and textured bodies of tradition, see ALASDAIR MACINTYRE, *AFTER VIRTUE* (3d ed. 2007).

“Marriage Equality.” Freedom to Marry is as an argument for liberty. Marriage Equality is, well, an argument for equality. The obvious missing piece of the puzzle here is Fraternity.¹⁹⁵ The idea of fraternity, sometimes mysterious and often overlooked,¹⁹⁶ is simply the sense of fellow feeling in a common endeavor,¹⁹⁷ or more grandly a commitment to the “brotherhood of man.”¹⁹⁸ What I am calling “analogy of dignity” is, among other things, an expression of fraternity, a desire, born of fellow-feeling, to break down distinctions and disperse the goods of society as widely as possible.

Fraternity, in turn, is deeply related to, if distinct from, the Golden Rule, one or another version of which appears in the texts of most of the world’s religions. The Golden Rule is often equated with the norm of equality, or even

195. “Liberté, égalité, fraternité” was, of course, a classic slogan of the French Revolution and has been since the late nineteenth century the official motto of the French state. See generally JACK R. CENSER & LYNN AVERY HUNT, *LIBERTY, EQUALITY, FRATERNITY: EXPLORING THE FRENCH REVOLUTION* (2001); ROBERT DARNTON, *WHAT WAS REVOLUTIONARY ABOUT THE FRENCH REVOLUTION?* (1990). Similar sentiments appear in other canonical texts. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), Art. 1 (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”).

196. Robert Darnton describes “fraternity” as “the strangest in the trinity of revolutionary values.” DARNTON, *supra* note 195, at 17. Nevertheless, it:

swept through Paris with the force of a hurricane in 1792. We can barely imagine its power, because we inhabit a world organized according to other principles, such as tenure, take-home pay, bottom lines, and who reports to whom. We define ourselves as employers or employees, as teachers or students, as someone located somewhere in a web of intersecting roles. The Revolution at its most revolutionary tried to wipe out such distinctions.

Id. at 17. Significantly, Darnton situates this trinity of values, but particularly fraternity, at the heart of the revolutionary impulse itself, an impulse that at its worst produced terrible, unexplainable, violence, but at its best “released utopian energy” and a “sense of boundless possibility.” *Id.* at 16.

197. Ideas of fraternity, particularly in the United States, have often focused on economic solidarity. For the classic study, see generally WILSON CAREY MCWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* (1973). But there is at least a family resemblance between that theme and my argument for same-sex marriage as an expression of social solidarity.

198. DARNTON, *supra* note 195, at 17.

constitutional equal protection,¹⁹⁹ and that is not entirely wrong.²⁰⁰ But the Golden Rule in its full flower moves well beyond straightforward equality. Equality—at least the conventional understanding of equality—demands that like cases be treated alike. The Golden Rule asks each of us to put ourselves in the shoes of our fellow even in difficult, unlike, cases.²⁰¹ And that is exactly the work that “analogy of dignity” does in the argument here for same-sex marriage.

199. See, e.g., *Cruzan v. Director, Missouri Dep’t of Pub. Health*, 497 U.S. 261, 261, 287, 300, 310 (1990) (“Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”) (Scalia, J., concurring). I am indebted to Jon W. Davidson, *Winning Marriage Equality: Lessons from the Court*, 17 *YALE J. L. & FEMINISM* 297, 300 n.13 (2005) for this wonderfully evocative citation.

200. For fine discussions of some of the complex and multi-layered meanings embedded in the Golden Rule, see, for example, JEFFREY WATTLES, *THE GOLDEN RULE* 3-5 (1996); Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and Law*, 84 *NOTRE DAME L. REV.* 1529, 1529-34 (2009); Bill Puka, *The Golden Rule*, *INTERNET ENCYCLOPEDIA PHIL.*, <http://www.iep.utm.edu/goldrule/> (last visited Feb. 22, 2014); see also, e.g., R.M. HARE, *FREEDOM AND REASON* (1963) (a classic effort to synthesize “golden rule arguments” with universal prescriptivism and preference utilitarianism); Hans Reiner, *The Golden Rule and Natural Law, in DUTY AND INCLINATION THE FUNDAMENTALS OF MORALITY DISCUSSED AND REDEFINED WITH SPECIAL REGARD TO KANT AND SCHILLER*, 93 *PHAENOMENOLOGICA* 271, 277-87 (Mark Santos trans., 1983) (discussing, in the context of a natural law analysis, various meanings of the Golden Rule, including empathy, autonomy, and reciprocity).

201. See WATTLES, *supra* note 200, at 174-75 (“To act in accord with the golden rule is to treat others as comparable with oneself. Comparability, however, does not entail homogeneity; it does not involve the assumption that people think alike, feel alike, or are alike Imaginatively adopting another’s perspective helps one gain a sense of the differences between self and other; the rule operates with the assumption that differences need not block understanding.”).

Jürgen Habermas similarly distinguishes between two understandings of equality: “Equal respect for each person *in general* as a subject capable of autonomous action means equal treatment; however, equal respect for each person *as an individual* can mean . . . support for the person as a self-realizing being.” Jürgen Habermas, *Justice and Solidarity: On the Discussion Concerning Stage 6*, in *THE MORAL DOMAIN: ESSAYS IN THE ONGOING DISCUSSION BETWEEN PHILOSOPHY AND THE SOCIAL SCIENCES* 224, 242 (Thomas Wren ed., 1990). In the same essay, Habermas discusses the differences and connections between equality and solidarity, or what I might call fraternity in its social context:

[The] principle [of] solidarity is rooted in the realization that each person must take responsibility for the other because as consociates all must have an interest in the integrity of their shared life context in the same

More broadly, the argument here resonates with a range of important ideas in contemporary moral philosophy and moral psychology. Obvious examples include: (1) the family of views sharing the label of “virtue ethics” that emphasize the role of character and rightly-formed discernment, instead of or in addition to abstract rules, as the basis for moral judgment and the moral life;²⁰² (2) Carol Gilligan’s famous analysis of the “ethic of care” as a distinct, valuable perspective over against the “ethic of justice”²⁰³ (though one might also, consistent with Gilligan’s larger point, treat care as a form of justice);²⁰⁴ (3) Emmanuel Levinas’s emphasis on existential encounter with the “Other” as the basis for absolute moral duty;²⁰⁵ and (4) the specifically Christian

way. Justice conceived deontologically requires solidarity as its reverse side. It is a question not so much of two moments that supplement each other as of two aspects of the same thing. Every autonomous morality has to serve two purposes at once: it brings to bear the inviolability of socialized individuals by requiring equal treatment and thereby equal respect for the dignity of each one; and it protects intersubjective relationships of mutual recognition requiring solidarity of individual members of a community, in which they have been socialized. . . . Moral norms cannot protect one without the other: they cannot protect the equal rights and freedoms of the individual without protecting the welfare of one’s fellow man and of the community to which the individuals belong.

Id. at 244.

202. Classic landmarks in the theory of “virtue ethics” include G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958), *reprinted in* VIRTUE ETHICS 26 (Roger Crisp & Michael Slote eds., 1997); Michael Stocker, *The Schizophrenia of Modern Ethical Theories*, 73 J. PHIL. 453 (1976), *reprinted in* VIRTUE ETHICS, *supra*, at 66; ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (2002). For an important effort to apply virtue ethics to a specific set of moral problems, see Rosalind Hursthouse, *Virtue Theory and Abortion*, 20 PHIL. & PUB. AFF. 223 (1991), *reprinted in* VIRTUE ETHICS, *supra*, at 217.

203. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 174 (1982); *see also, e.g.*, Annette C. Baier, *What Do Women Want in a Moral Theory?* 19 NOÛS 53 (1985).

204. *See, e.g.*, DANIEL ENGSTER, THE HEART OF JUSTICE: CARE ETHICS AND POLITICAL THEORY 5-7 (2007).

205. *See, e.g.*, EMMANUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY 261-62 (Alphonso Lingis trans., Twentieth Printing 2007) (1961). The Danish philosopher Knud Ejler Løgstrup similarly argued that the fundamental ethical demand is to “take care of that in the other person’s life which is dependent upon us and we have in our power.” KNUD EJLER LØGSTRUP,

emphasis on *agape*—unconditional love—in the understanding of human relations²⁰⁶ and even in law.²⁰⁷ These accounts are different from each other and each is complex and controversial. But they do share a basic emphasis on contingency, contextuality, and lived experience,²⁰⁸ and it is in that general neighborhood that I want to locate the argument here from “analogy of dignity.”²⁰⁹

Fraternity. The Golden Rule. Virtue. Care. Encountering the Other. Love. This is not bad company to keep for a moral and political argument. As already suggested, my goal here

THE ETHICAL DEMAND 28 (Theodor I. Jensen trans., 1997). This demand is radical, if also unfulfillable, not only in scope but also in content, for it excludes both any reciprocal obligations and any judgments of the other person’s own decisions.

206. See ANDERS NYGREN, *AGAPE AND EROS* 41-45 (Philip S. Watson trans., 1953). See generally GENE OUTKA, *AGAPE: AN ETHICAL ANALYSIS* (1972); Benedictus PP. XVI, *Encyclical Letter Caritas in Veritate of the Supreme Pontiff Benedict XVI to the Bishops Priests and Deacons Men and Women Religious the Lay Faithful and all People of Good Will on Integral Human Development in Charity and Truth*, VATICAN.VA (June 29, 2009), http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

207. See, e.g., Jeffrie G. Murphy, *Christian Love and Criminal Punishment, in CHRISTIANITY AND LAW: AN INTRODUCTION* 219 (John Witte, Jr. & Frank S. Alexander eds., 2008); James Boyd White, *Agape and the Activity of “Reframing,”* Address at 2014 Herbert and Elinor Nootbaar Institute on Law, Religion and Ethics Conference on Love and Law (Feb. 8, 2014) (transcript available at <http://law.pepperdine.edu/nootbaar/annual-conference/loveandlaw/presentations/AGAPE%20AND%20REFRAMING%20DRAFT.pdf>).

208. It bears emphasis that the gravamen here is not merely psychological. I am not suggesting that marriage should be extended to same-sex couples because failing to do so would make the couples denied such an opportunity “feel bad.” If anything, contemporary law focuses too much on feelings. See Perry Dane, Professor of Law, Rutgers Sch. of Law, *Endorsement, Legal Reason and the Misguided Quest for Reasonableness: Address at the Third Bi-Annual Conference of the International Consortium for Law and Religious Studies in Richmond, Williamsburg, and Charlottesville, Virginia* (Aug. 24, 2013) (transcript on file with author). But ideas such as fraternity, the Golden Rule, and the like—with all their situatedness and contingency—go much deeper than psychology and feelings.

209. I am also influenced here by Martha Nussbaum’s observation that “public emotions,” including the love of country and one’s fellow citizens, can help “diverse people” overcome even deep-seated differences in political and moral ideals and “embrace a common future.” MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 393 (2013).

has not been to explicate any of these theories in any detail but only to demonstrate, through these impressionistic associations, the worth and moral rank of a non-reductionist argument for same-sex marriage.

Arguments from equality and abstract right claim to have a logical coercive power. I have no objection to such arguments in those contexts in which they are appropriate.²¹⁰ But—to come back to the claim with which I began this Part—there is also a distinct power and, yes, dignity to arguments whose compulsion is not detached and universal, but interpersonal and situational. Such arguments—particularly when other arguments fall short—require a real, unblinking acknowledgment of both humanity and specific human needs. Far from being condescending, they depend at their core on mutuality and respect. With respect to same-sex marriage specifically, the argument from analogy of dignity has the added advantage of being normatively forthright. Slogans such as “marriage equality” and “freedom to marry” might be politically potent, but they risk pushing the actual debate off center.²¹¹ The argument here, to the contrary, explicitly and unapologetically focuses on same-sex couples and their rightful place in a caring society.²¹²

210. I therefore do not suggest going as far as, say, Richard Rorty, who wanted to understand systems of political rights and obligations completely in the context of empathy, solidarity, and communication. See, e.g., RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

211. Cf. Mary Bernstein & Verta Taylor, *Introduction: Marital Discord: Understanding the Contested Place of Marriage in the Lesbian and Gay Movement*, in *THE MARRYING KIND?: DEBATING SAME-SEX MARRIAGE WITHIN THE LESBIAN AND GAY MOVEMENT* 1, 21-25 (Mary Bernstein & Verta Taylor eds., 2013) (making similar observation about same-sex marriage advocacy organizations such as “Equality California”); Amin Ghaziani, *Post-Gay Collective Identity Construction*, 58 *SOC. PROBLEMS* 99, 111-19 (2011) (describing and critiquing a “post-gay” sensibility and strategy in which LGBT student groups and civil rights organizations come to adopt names such as “Pride Alliance” and “Equality [State name]” that obscure specific references to the cause at issue).

212. Indeed, in this sense, the argument from analogy of dignity, in its situational focus and bluntness, is actually considerably *more* responsive than more conventional equality-based or rights-based claims to the worry among some gay rights and queer analysts that the entire movement for same-sex marriage could itself just be “another move toward decentering a lesbian and gay identity, with the implication that it spells the beginning of the end of the LGBT movement.” Bernstein & Taylor, *supra* note 211, at 21. Cf. Duggan, *supra* note

At the same time, arguments from analogy of dignity acknowledge the genuine difficulty of the question at hand and the legitimacy of the other side. They do not require labeling opponents as either stupid or bigoted. They allow, even encourage, the conversation to proceed.

The texture of such arguments might also help explain why the question of same-sex marriage might more properly belong in the court of politics rather than the court of the Constitution. As noted earlier, I remain agnostic on this point.²¹³ But whether or not there is a federal constitutional right to same-sex marriage is in any event not relevant to the significance or worthiness of the question or its resolution. The Constitution is important. But is not the font or even the home of all important values. It is just a mistake to imagine that all important, even fundamental, normative arguments must be constitutional arguments. To think that it must be is to engage in a fallacy that I have elsewhere called “constitutional glare.”²¹⁴

B.

This last set of comments²¹⁵ can also finally connect the arguments in Part I about the “natural law” paradigm of heterosexual marriage with the arguments in Part II about the complex relationship between natural law and positive law and in Part III about same-sex marriage as an expression of analogy of dignity. Recall R.R. Reno’s argument that extending marriage to same-sex couples “undermines the proper separation of cultural and governmental power that is so important for a liberal regime.”²¹⁶ Let’s read this argument in its strongest form, as identifying the “cultural” meaning of marriage with its “natural law” meaning. Still, as I have tried

52, at 190 (critiquing “the new homonormativity” and its attendant “rhetorical recoding,” in which, for example, “equality’ becomes narrow, formal access to a few conservatizing institutions”).

213. See *supra* notes 179-186.

214. See, e.g., Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, *supra* note 128, at 21, 26.

215. See *supra* notes 193-214 and accompanying text.

216. See *supra* note 172 and accompanying text.

to demonstrate, sufficiently sophisticated accounts of natural law can leave room for positive law—the difference that government makes—to transform the meaning of even the most fundamental “natural” institutions.²¹⁷ But that transformation should not be merely willful. As I argued in Part II, natural law (if it exists) and positive law are interactive and mutually interstitial.

The argument from analogy of dignity suggests how same-sex marriage can coexist with the heterosexual paradigm of “natural law marriage.” But the analysis in this Part has been stronger than that. By invoking values such as fraternity, the golden rule, virtue, care, and love, it suggests a dialectic within natural law itself between the institutional forms appropriate to human continuity and the responses to those institutions that might, at least in particular times and places, be appropriate to human decency. Positive law then steps in, not as a tyrannical agency of arbitrary state power, but as the contemporary community’s contribution to that dialectical conversation. In taking on the question of same-sex marriage, we should tread carefully, even to some point slowly. But tread we can, and should.

CONCLUSION

Observers have long noted that the campaign for same-sex marriage is in a deep sense counter-radical, even counter-revolutionary.²¹⁸ My argument here, in its view of marriage, is even more so (though in other respects it is radical indeed).²¹⁹ The institution of marriage is not above criticism or immune to deconstruction. But such criticism and deconstruction is not necessary to extending the possibility of marriage to same-sex couples. Same-sex marriage does not require upending the traditional paradigm of what marriage is or what it is for. Appreciating that simple point is

217. See *supra* notes 80-106 and accompanying text.

218. The classic “conservative” case for same-sex marriage was made in SULLIVAN, *supra* note 178, at 94-132; see also RAUCH, *supra* note 69, at 4-5, 79, 92-93; Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 96-103 (2008).

219. See *supra* note 211; see also notes 180-86 & 194-214 and accompanying text.

intellectually and morally important. It might also help bridge the bitter divide that threatens to remain and fester whatever the outcome of the current legal and political struggle.