Religion and Nonreligion in Same-Sex Marriage Debates

Nonreligion in a Complex Future

Edited by
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Emerging Imaginaries

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1.1 Introduction

As societies become more diverse in myriad ways and experience monumental shifts in their composition, the ways in which they are legally regulated are also changing. In this pluralistic context one of the main functions of contemporary law is not only to recognize and navigate this diversity with the aim of ensuring democratic coexistence in complex societies but also to delimit and even reconstruct the legal recognition of diversity.

In this context, questions about who makes up a family, the role of biology in defining sex, and the origins of human life are sources of deep social, moral, and legal controversies. In the last decades, the feminist and LGBTQI+[1] movements have generated alternative paradigms aiming to destabilize and denaturalize a heteronormative matrix of intelligibility. As part of this process, identifications and practices that in the past remained on the margins of legality, or were perhaps even criminalized, have begun to be protected by law. For example, having an abortion, identifying with a gender other than the one assigned at birth, or forming same-sex couples have been recognized in many countries as lawful behaviors. However, the recognition process and the recognitions themselves have generated strong social controversies that frequently continue even after the law is reformed.

During these controversies, religion is narrated, constructed, and emphasized in different ways and from alternative standpoints. Furthermore, the question of what should remain outside of religious boundaries is also disputed, narrated, constructed and constrained. This book explores the narratives and discursive formations that emerge and intertwine in debates over same-sex marriage (SSM).

1 The use of this term makes reference to Lesbian, Gay, Bisexual, Transgender, Queer and Intersex individuals and is used as a non-exhaustive list. The "+" sign indicates the open nature of the acronym, which allows for the possible inclusion of any other identity configuration that dissents from hetero/cis/normality. In addition, each chapter uses different terms that are significant to their context.

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This controversy puts into operation imaginaries and ways of attributing value and meaning that reveal and reconstruct the articulation between what is referred to as religious and what is understood as nonreligious in this new social form of conjugality. Specifically, in a context of moral and religious diversification resulting from, among other things, the decentering of Christianity, we analyze the narratives, the use of legal and religious languages, and the meanings constructed in the debate over marriage as a legal institution. The Christian heritage that has shaped law and a particular articulation of a moral order is put under scrutiny in ways it has not previously been and, importantly, through now plausible alternative imaginaries.

How is the withdrawal and the decentering of Christianity narrated in debates about the regulation of marriage? What imaginaries emerge and are constructed in relation to sexuality or the family when the Christian foundation of marriage is put under scrutiny? How is nonreligion entangled with these imaginaries? To answer these questions, we turn to debates in the legal arena to map the different materialities (legal and theological terms, forms of classification, moral statements, and images) inscribed in these narratives to understand how their articulations give rise to different configurations of alternative imaginaries, some of which are very clearly linked to nonreligion. We examine the shifting framework within which claims to 'rightness' are expressed.

Although the concept of nonreligion has frequently been conceptualized to explain changes in the way people "exit" religions, or as "religion's other" (Cragun, 2024) we are interested in analyzing the assemblage of religion and law as normative constructions, as languages that are articulated, mutating and mixing during legal controversies thus creating circumstantial discursive constructions of the nonreligious. We are less concerned with the historical aspect of the separation between the secular and the religious (as was common in debates related to the theory of secularization) or with the identity dimension (increased number of agnostics/atheists) and more interested in the contemporary production of the nonreligious as part of the process of decentering of Christianity in the arenas of law (both courts and legislative bodies).

To do this we build on research on religion as well as the burgeoning literature on nonreligion and the large literature on sexuality, particularly on the recognition of same-sex marriage. We aim to contribute to the development of a new approach to nonreligion: one that captures the normative discourses and imaginaries that are neither strictly religious nor legal, but emerge from the intersections, borrowings, overlaps, and reinterpretations of religious and non-religious repertoires in public debates. To achieve this goal, we focus on same-sex marriage debates in seven countries (Argentina, Australia, Brazil, Canada, Denmark, Norway, and the United States) as an analytical window to capture discursive constructions

on the religious and its borders. Rather than prioritizing the description of values or worldviews of nonreligious individuals, groups, or societies (as often seen in existing literature), our position is that nonreligion be understood as a product of discursive disputes. We are interested in the operations of demarcation and the zones of transition between the religious and the nonreligious. In this sense, one of the novelties of this book is the use of legal controversies as a lens to observe the work of religious and nonreligious narratives and the materialities they produce. We examine forms of naming and categorizations of moral utterances that designate different zones of transition between the religious and non-religious imaginations.

Our interest in this topic stems from our shared project Nonreligion in a Complex Future (NCF), which is a Canadian based research project (https://nonreligionproject.ca). International and comparative, with co-investigators, collaborators, advisors and partners in our research sites in Canada, Australia, the Nordic countries (Sweden, Norway, Denmark, Finland), the United States, the United Kingdom, and in Latin America (Brazil and Argentina). Our primary focus is on empirically studying the relationship between increasingly complex diversities, created by the growth of populations and institutions that declare themselves non-religious, and to build an evidence base from which to identify models for living well together in complex, diverse, and inclusive societies. One of the things we are curious about is what some describe as the positive content of nonreligion in the different countries. Focused on the core question of how we can live well together in diverse societies, the NCF project explores the shifting terrain of religion/nonreligion and its impact. We are interested in changing moral frames, but without assuming that losing (or a diminished) Christianity makes us immoral. Rather, it is the emerging frameworks, including an ethos of equality, that intrigue us.

1.2 The decentering of Christianity

The countries included in this study are characterized by a historical process of decentering of Christianity. They have all had a hegemonic Christian past through colonization, whether Catholic, Protestant or both, and different patterns of relationship between churches and the state (established national churches, legal separation, or more ambiguous articulations). Although different in intensity, each country has experienced a reduction of social and political influence of the majoritarian religions.

The process of Christian decentering encompasses multiple facets that are present in varying forms in the countries included in this research. First, decentering implies a decrease in the historically dominant patterns of Christian iden-

tification as well as changing modes of construction and representation of such identification. In some cases, this shift has been one of religious expression: from Catholicism to Protestantism, for example, or to an increase in spiritual rather than religious identification. This shift does not necessarily imply the complete disempowerment of Christianity, but rather its decline as a hegemonic influence on a variety of issues such as a particular sexual morality or the meaning of life and death, for example.

In other cases, decentering is connected to dechristianization. The percentage of Christian practitioners has decreased, global immigration flows have created increased religious diversity within countries and the number of people who identify as non-religious has increased significantly. Decentering implies a decrease in the percentage of people who define themselves as believers and a rise of those who claim to be "non-religious" or "having other religions" in many of our cases studies, although with some particularities and different intensities in each country's context. This "new diversity" (Beaman, 2017) includes a heterogeneous group of individuals such as agnostics, atheists, humanists, or people without religion who are generally included under the term "nonreligious". Understanding and protecting religious diversity also implies accounting for those sectors that position themselves outside religious institutions. In other words, those who are 'indifferent' to church related practices may claim that their practices also deserve protection. It is widely accepted that freedom of religion includes freedom of religion or belief and freedom from religion. This is especially relevant given the increasing number of people who identify as 'nones'.

Here a brief overview of some of the demographic changes might be helpful to give the reader a sense of context for the countries included in our study. For example, in 2008, 11.3 % of the population in Argentina identified as nonreligious and 76.5 % as Catholics. By 2019, the percentage of people who identified as nonreligious shifted to 18.9 %, while Catholics represented 62.9 % of the population (Mallimaci et al, 2020). Australia has also experienced a dramatic shift, with 30.1 % of the population identifying as nonreligious in 2016, a number that increased to 38.9 % in 2021 (Australian Bureau of Statistics, 2021). Brazil, on the other hand, initially showed a modest increase in its nonreligious population throughout the past decades, although the most recent data shows a significant increase in the nonreligious population. In 2000 the nonreligious only represented 7.3 % of the population in Brazil, with an increase to 8.4 % by 2010 (Instituto Brasileiro de Geografia e Estatística, 2010). By 2021, however, the World Values Survey found that 22.5 % of Brazilians identified as nonreligious when asked "Independently of whether you go to church or not, would you say you are?" (Haerpfer et al., 2022).

Canada too has experienced some rather dramatic increases in its nonreligious population. In 1971, 88 % of the population identified as Christian (47 % Catholic and 41 % Protestant), with only 4 % of the population identifying as nonreligious. By 2011, 23.9 % of the population stated they had no religion, 67.3 % considered themselves Christians and 8.8 % belonged to other religions. And by 2021, 34.6 % of the population said they had no religion, 53.3 % were Christians and 12.1 % belonged to other religions (Statistics Canada, 2021). In their research on the decline of Christianity, Clarke and Macdonald (2017) predict that this increase will continue. It is also worth noting that the 2021 Statistics Canada data showed a dramatic decline in those who identify as Catholic, moving from 38.7 % in 2011 to 29.9 % in 2021.

Even the 'religious' United States is showing a significant increase in those who identify as nonreligious. The 2023 National Public Opinion Survey (NPORS) showed that 28 % of Americans self-describe as nonreligious (Pew Research Center, 2024). Pew Research Center also noted that "Since 2007, the percentage of adults who say they are atheist, agnostic or "nothing in particular" in the Center's surveys has grown from 16 % to 29 %. During this time, the share of U.S. adults who identify as Christian has fallen from 78 % to 63 %" (Pew Research Center, 2022: 20).

Finally, based on the European Values Survey carried out between 2017–2021, the nonreligious population amongst the Nordic Countries was as follows: 39.5 % for Denmark, 46.3 % for Finland, 48.1 % for Iceland, 61.9 % for Norway and 70.2 % for Sweden (European Values Study, 2021).

Demographic shifts are only one component of this massive social change. Concomitantly with the shift to personal nonreligion identification is a transformation in social institutions such as health, education and law itself. It is also evidenced in human understanding of their place in the world in relation to nonhuman animals and what Bruno Latour (2018) describes as our fellow terrestrials. These changes are inevitable as the hold of Christianity loosens. The shift is the result of a long process that is not yet fully understood. A number of scholars have situated this shift in the domain of secularization (Smith and Cragun, 2024; Blankholm, 2022; Kasselstrand et al 2023, Baker and Smith, 2015) In their international study of secular indicators (belief, behavior and belonging), including decreased church attendance, church weddings, baptisms, Kasselstrand et al. acknowledge that the shape and form of religion is changing, but that that does not explain the nature and extent of the religious and social change. Perhaps most importantly for our purposes, they argue that religion is not 'natural' and that "secular life contains its own values, contours, characteristics and rhythms." (2023: 166).

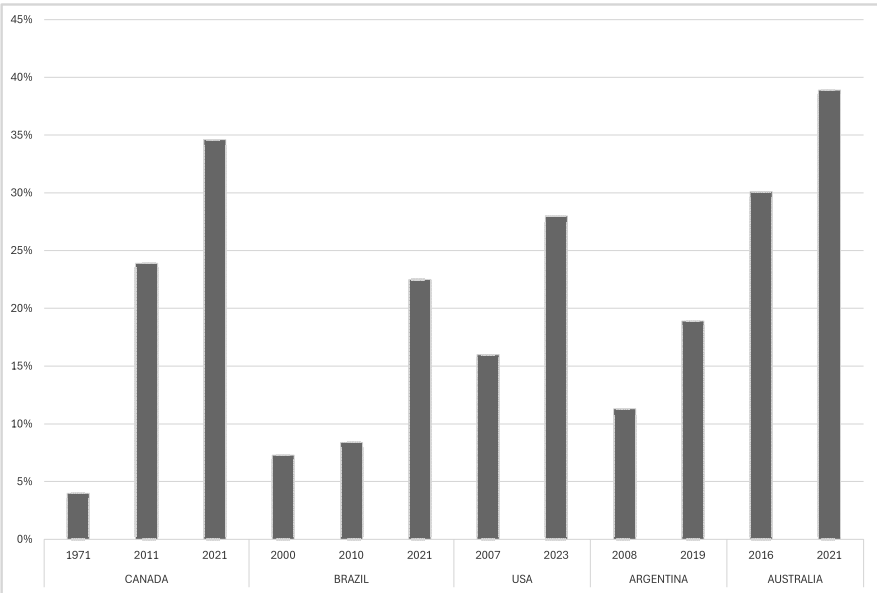

Figure 1.1. Evolution of the percentage of people that self-identify as non religious by country. Source: Own calculations based on Mallimaci et al (2020), Australian Bureau of Statistics (2021), Instituto Brasileiro de Geografia e Estatística (2010), Haerpfer et al. (2022), Statistics Canada (2021), Pew Research Center (2022).

Christian decentering also involves the increased inability of church authorities to control the practices and opinions of those who identify as Christian.[2] In addition to the growing number of agnostics and atheists, most societies have experienced an increasing autonomization of religious identification. Many people who still identify as Protestant or Catholic do so in autonomous and/or syncretic ways. The influence of hierarchies in determining what it means to be a "believer" is being challenged. In contemporary societies religious identifications are produced with autonomy from, or even confrontation with, the formal hierarchies and doctrinal components that have often traditionally dominated the Christian religion (albeit frequently taking rather different shape in Protestantism and Catholicism). Social scientists have identified lived religion as one conceptual tool for understanding this mode of religious expression (see McGuire, 2008; Ammerman,

2 A recent Angus Reid poll in Canada showed that there is a significant difference between traditional Christian teachings and what Christians actually believe (Bennet, 2024), which is similar to a Pew Research Center (2019).

2021; Orsi, 2003). Other characterizations include religion a la carte, syncretism and dimorphism.

Second, the decentering of Christianity is also a cultural process that impacts social institutions, groups, and individuals, particularly in relation to frameworks of meaning and social norms, according to Brown (2009) a decline in discursive Christianity. This process is particularly evident in the ways sexuality, reproduction, and kinship are regulated. As the following chapters show, the countries in our study have moved from a monolithic/hegemonic Christian narrative organizing the sexual order to a wide range of religious and nonreligious positions seeking recognition and legality. The decline of Christian morality as universal has opened space for the construction, circulation, and legitimization of other narratives and imaginaries regarding the social and sexual world.

Legal systems increased the recognition of sexual diversity, particularly since the 70s, by dismantling (always partially) the Christian heritage imprinted on the law. This dismantling fragmented the construction of an intended universal morality, while reflecting the coexistence of different positions and moral values. The alleged synonymity between Christianity and religion, morality, or even nationhood, was broken, or at least called into question.

Decentering Christianity and interrupting a narrative of universal morality allowed the circulation of different and conflicting imaginaries on diverse matters as, among others, marriage, love, desire, reproduction or kinship. Part of these imaginaries are driven by social movements, such as feminism, LGBTQI+ or human rights, which question the role of Christianity in the hierarchization of the sexual order. These movements produce other forms of community and/or identity belonging which impact both religious and non-religious imaginaries and normativities. On the one hand, they pushed the limits of secularism as a doctrine for conceiving the world: that which was private, and therefore outside the secularist debate, is placed at the center of the debate. In this sense, they propose a series of moral and legal normativities that are constructed in opposition to the religious, in particular of Christian influence. On the other hand, they provoked important changes in religious beliefs and institutions that we analyze further down.

The public controversies around same-sex marriage condense these processes. Same-sex marriage is one more step forward in decentering Christian marriage regulation (one man, one woman for all eternity, biological reproduction, etc., as its usual repertoire) toward a more diverse family imaginary. The regulation of marriage and debates about marriage equality or equal access to marriage fall at a critical historical crossroads when legal and moral matrixes of pluralism define the field of debate about living well together in a diverse world. First, it is part of the process of de-Christianization which included law and, especially, family

law. The coupling and uncoupling of legal and religious norms have shaped the history of marriage in different countries. Second, same-sex marriage is the result of a process of expansion of rights connected to the struggles of social movements at the national and transnational levels. These processes are interrelated because same-sex marriage as a public controversy was possible by, and intensified, the dismantling Christianity as a universal moral norm.

The emergence of nonreligion as identity, imaginary or discourse is related in different ways to the process of decentering and, as we have said, is the purpose of this research. Our main objective is to capture how the decentering and the diversification impacts the narratives about marriage and family. The emphasis lies in examining how different perspectives are produced in those narratives and how boundaries between what is designated as the religious and the nonreligious are constructed and maintained. The next section presents the theoretical and analytical possibilities of nonreligion for understanding contemporary dynamics.

1.3 Nonreligion

1.3.1 Nonreligion as an academic agenda

This book is in dialogue with the study of nonreligion as a still nascent research area. In recent years, there has been a notable increase in academic focus on nonreligion, highlighting its centrality as a phenomenon and, at the same time, recognizing the complexity of its characterization. The increased number of people moving away from religious identification and affiliation has made nonreligion a "master concept" (Lee, 2012) encompassing a variety of social and political processes and changes. While there have always been people "outside" religion, there is something different in this process, both in its intensity and impact, that has required new analysis and interpretations.

One of the main challenges in this area of research is defining what the term nonreligion refers to and the scope of the phenomenon. How does it complement studies on the religious, and what does it add to studies on the secular? Is it indicative of a change in beliefs, or is nonreligion part of a more complex structural phenomenon? Although these questions remain open, three issues are worth mentioning. First, scholars are interested in shifting the focus from a negative conception of the phenomenon to a more substantive one, moving toward an understanding of the characteristics of nonreligious identities, social institutions, and social processes. This shift includes an understanding of values, ethics and morality that have long been understood to be the sole domain of religion. In

other words, understanding that non religion involves "… a set of social and cultural forms and experiences that are alternative to religion…" (Lee, 2012: 13)

Particularly helpful to us is the idea that nonreligion needs to be considered as a relational concept (Quack, 2014). It is in relation to religion that the term acquires its analytical relevance; as Lee affirms, nonreligion can be seen as "any phenomenon – position, perspective, or practice – understood in relation to religion but not itself considered to be religious" (Lee, 2015: 32). This shift of focus moves away from opposing religion and nonreligion towards examining the discourses and practices that constitute a certain phenomenon as religion-related or not (Cotter, 2020). This relational perspective allows us to understand religion and nonreligion as mutually constituted categories rather than fixed or inherently separate domains.

Our main interest lies not so much in defining nonreligion but in understanding the (dis)articulations between what is seen as religion and what is placed outside of it. The massive weight of Christianity as a paradigm of what religion is or should be, significantly shapes this process in the countries we study. We pay particular attention to the dynamic frontiers between the religious and the nonreligious positions, and how these borders are instituted and dissolved by social actors. But more than this, the transition we are in the midst of also means that there is a move to a conceptualization of nonreligion that involves more than 'religion's other' (Smith & Cragun, 2019) in which the normative is not tethered to religion. Presently, it is difficult to conceptualize it as it is not possible to disentangle nonreligion from religion.

We focus on the zones of transition that offer a nuanced understanding of the relationship between religious and nonreligious discourses. Zones of transition include, for example, the use of arguments based on scientific evidence by social actors who identify as religious or so-called secular actors using theological or religious arguments (Vaggione, 2005). Zones of transition also incorporate those social actors for whom there is a continuity between religious and nonreligious arguments, thus blurring any boundary between these two conceptual touchstones. They also include those arguments which purport to lay claim to universal laws based on a transcendent authority, such as natural laws that are divinely attributed to justify the purpose of marriage. Christian's universalizing impetus (Boyarin and Boyarin, 1993) colonizes the social and legal field. Dichotomous characterization of these positions or arguments is untenable and validates our caution about an essentialized use of religious and nonreligious and terms like 'the secular'. As we move from the poles of 'religious' and 'nonreligious', what we are referring to as 'between the binary' in the broader Nonreligion in a Complex Future Project, we reach a better understanding of the complex territory we have entered.

Secondly, while the phenomenon of nonreligion has traditionally been characterized by attempts to understand the ways in which people stop believing, practicing or belonging (deidentification or deconversion), there are also approaches that extend the analysis to social and cultural dimensions. Terms like "worldviews" or "representations" are used as indicators that there is something beyond mere identities to be understood. Cragun et al have developed the concept of lifestances, referring to beliefs, relationships and behaviors linked to a person's perceptions of life and existence (Beaman, Ezzy, Cragun, forthcoming). Though identities are crucial in researching nonreligion, it is also relevant to think beyond them to capture other levels of the phenomenon. In this sense, the processes of lawmaking and juridification are key arenas where representations of nonreligion take shape. As Årsheim et al affirm "the process of 'legal framing', in which people come to think about themselves and key aspects of their identity in legal terms and categories" can be connected to a study of the nonreligion (2022: 8). Our focus lies not so much on categorizing individuals or institutions as religious or nonreligious but rather on understanding how social actors describe, define, criticize, name, or produce the religious and the nonreligious when they dispute the legal regulation of same-sex marriage.

In this sense, we move away from viewing nonreligion solely as identity or identification and instead seek to capture it through the analysis of imaginaries, that is, through narratives of the world, of its past and future, that the actors mobilize when they talk about family and marriage. As described by Beaman and Stacey, "The power of the term imaginary, in our view, is in its ability to traverse distinctions between religious and nonreligious ways of understanding the world while avoiding thinking of either as unified systems." (2021: 4). This approach seeks to unpack the nonreligious as a discursive construction in relation to what is imagined as religious and what is not; a discursive approach to nonreligion that, in Cotter's terms, "blurs the boundary between 'religion' and 'non-religion' and demonstrates that they are dynamic subject positions" (Cotter, 2020).

Thirdly, we consider that nonreligion as an analytical category opens fresh alternatives to understand the complexity of the contemporary world that overcome the focus on the secular/secularism/secularization. Different studies and approaches unraveled the need to rethink secularism/secularization as a *lingua franca* outside of the religious, particularly when considering the legal arena (Beaman, 2021; Montero et al., 2023; Biroli et al., 2020; Zwilling & Årsheim, 2022; Jakobsen & Pellegrini, 2003; Scott, 2017, among others). In this way, the secular (not only the religious) also becomes the object of critical reflection and has shown its limitations as a normative and analytical theory of separation and neutrality of the state (Asad, 2003).

Using nonreligion as an analytical category allows us to inquire (from) outside the corset of secularism as an analytical and normative theory of the relationship between state and religion and to move away from the religious/secular binarism. The conceptual and ideological battles associated with the notions of the secular, secularization, and secularism have resulted in our avoidance of the equation of the nonreligious with the secular. This does not mean ignoring the important and critical debates surrounding the concept, but rather that due to/through these debates the nonreligious emerges as a category for analysis that allows to overcome some of the limits of secularism. To move away from the secular, to disarm it, as a category of analysis does not imply ignoring it but perhaps rethinking it as an analytical category. Or, in Lee's (2015: 14) terms "distinguishing the non-religious from the secular gives rise to a more refined and more meaningful understanding of the latter…".

In sum, we aim to develop an alternative approach that does not equate nonreligion with secularism and emphasizes its discursive normative dimension that emerges from the clash/borrowing/overlapping/twisting of the law and religion languages when same-sex marriage is at stake. We take up the studies which critically turn to secularity as a central dimension for understanding contemporary societies (Klein and Wohlrab-Sahr, 2021), but we do so from the perspective of emphasizing the nonreligious as an analytical category that allows us to avoid the many limitations of the secular as an object of analysis. This enables us to grasp the configurations of a new imaginary (nonreligious and non-secularistic) about fundamental social relationships such as family and marriage.

1.3.2 A diversified social world: modes of nonreligiosity and sexualities

Religious beliefs and practices have multiple and complex articulations with gender, sexual moralities and identities. It should not be surprising, therefore, that gender and sexuality are key dimensions of the study of nonreligion in contemporary society. Structural changes – such as the diversification of sexual and reproductive worldviews and shifts in gender relations – have transformed religious positions and discourses, thereby reshaping the boundaries and understandings of what is considered religious and nonreligious. Issues such as abortion, kinship or sexual and gender diversity have had a determining impact on the field of beliefs and, thus, also appear systematically in studies on the nonreligious.

Gender and sexuality are central to the study of nonreligion. Three key areas of research emerge in examining the intersections between nonreligious studies and debates on gender and sexuality. These lines of inquiry shed light on the complex relationships within highly diverse societies, where religion, gender, and sex-

uality serve as crucial identity markers and political fault lines. While not intended as an exhaustive literature review, we present selected examples to provide context for the discussions explored in this book.

a. Scholars of nonreligion have paid attention to the intricate relationship between nonreligion and sexuality, emphasizing the impact of sexual and reproductive decisions and experiences on religious disidentification. One interest in this type of analysis is to understand why some people move away from religion and the role that sexual and reproductive life has on this decision. Cragun and Smith (2024) consider "value misalignment" as a key factor in the analysis of religious exit. They argue that the tension or conflict between an individual's moral stance on sexuality and the official position of their religious denomination serves as a driving or push factor for disaffiliation and the transition to nonreligion (p.69).

Research indicates that LGBTQI individuals are more likely to exit "traditional" religions due to the tensions between their desires and religious moralities. As demonstrated by Woodell and Schwadel (2020) in the U.S. context, different approaches to operationalizing sexual diversity – whether through attraction, behavior, or identity – are linked to religious decline and disaffiliation. Growing freedom and sexual pluralism can destabilize certain types of religious identifications, especially within morally conservative denominations. While some people manage to reconcile their religious beliefs and sexual identity, others opt to either convert to more liberal religions or to exit religion in general. For instance, according to data from the General Social Survey (GSS), GLB individuals in the United States are nearly three times more likely than heterosexuals to respond to the question about belief in God in an atheistic or agnostic way (Linneman and Clendenen, 2010).

This process of abandonment of certain religions does not necessarily mean the total abandonment of religious beliefs. Woodell & Schwadel (2020) show that while sexual diversities are more likely than heterosexuals to become religious unaffiliated and to abandon religious services in emerging adulthood, they do not abandon more private religious practices like prayer.

Different studies also have found that issues such as the defense of virginity or the rejection of same-sex desires play a significant role in people's decisions to distance themselves from religion (Block, 2016; Kolysh, 2017; Starr, Waldo & Kauffman, 2019). In that regard, as sexual and reproductive practices outside of the narrow ideals of many Christianities become more common and themselves the norm, this in turn becomes a precipitating factor in disaffiliation and disidentification. Ezzy's (2023) study in Australia offers valuable insight, highlighting that the rise of nonreligion and the acceptance of sexual diversity are also evident among students at religiously affiliated schools.

The decision to leave religion can also be linked to the moral rigidity of certain religious traditions. Zuckerman (2012) argues that, in his interviews, about one-third of people cited controversy over gay rights, including the religion's condemnation of homosexuality, church activism against gays and lesbians, or lack of support for gay rights among their coreligionists, as a key factors in their apostasy.

That the tension between sexual and religious identities may lead some individuals to distance themselves from religion is proposed by other approaches. Brewster (2013), for example, suggests that people who identify as atheists might experience a sense of freedom from religious oppression, enabling them to explore and acknowledge their LGBTQ identity more openly. There is both a push and pull factor in the interconnections between sexual diversity and nonreligion (Cragun and Smith, 2024). The rigid teachings of some religious traditions ostracize, judge, exclude, causing LGBTQ+ people to disaffiliate. The push factor, on the other hand, is that nonreligious people are more gay positive, and thus as more people disaffiliate for a wide range of reasons, or are raised in nonreligious homes, there is a shift toward sexual diversity.

b. A second focus in the study of nonreligion is the investigation of whether the nonreligious population shares similar characteristics beyond their distance from religion. Researchers in this area aim to identify demographic or attitudinal variables that help differentiating religious and nonreligious individuals. Gender and sexuality play significant roles in these analyses, as it has been suggested that nonreligious people tend to be more liberal toward sexual diversity and more supportive of sexual and reproductive rights compared to their religious counterparts.

This type of research, often based on survey and census data, explores the relationship between the intensity of religious feelings (rather than religious affiliation) and attitudes toward certain sexual moral values. Agnostic, atheist, or nonreligious individuals typically exhibit more liberal positions on issues such as abortion, same-sex marriage, sex education, and gender identity, although there are variations within the nonreligious category as well. For instance, Baker and Buster (2015) found agnostics were the most accepting of homosexuality (69 %), followed by atheists (64 %), nonaffiliated believers (58 %), and culturally religious individuals (55 %). In contrast, acceptance levels were considerably lower among the actively religious (35 %). Similarly, Linneman and Clendenen (2010) discovered differences between atheists and agnostics, as atheists exhibited slightly more liberal overall political views than agnostics but were more antigay in their attitudes. This is not to deny the existence of studies that suggest that, in a context of growing acceptance of towards homosexuality (Roberts, 2019; Flores, 2020; Pushter & Kent, 2020) even the most conservative religious individuals have also broadened their acceptance of sexual pluralism (Murphy, 2015).

In Latin America, research consistently shows that individuals with lower levels of religiosity – measured through various indicators – are more likely to support sexual and reproductive rights. Aizenberg et al. (2024) conclude that unaffiliated individuals tend to be more supportive of abortion, comprehensive sexual education, and same-sex marriage compared to those with religious affiliations. In Argentina, Esquivel (2021) showed that, compared to the overall population, those who are not affiliated with any religion (atheists, agnostics and nones) show greater support for diversity, gender equality, and the importance of prioritizing care for the most vulnerable. While almost 60 % of the religiously unaffiliated believe that a woman should have the right to an abortion, only 20 % of the rest of society share this point of view. Only 11.9 % of the religiously unaffiliated consider that the only valid marriage is between a man and a woman and 85.6 % support the right of same-sex couples to adopt children.

Thus it is clear that religious identity still proves to have a significant effect on attitudes towards sexual diversity and sexual minority rights, even in countries with progressive legislation. Based on a study of political attitudes in 22 European countries, Dotti, Santi and Quaranta (2020) showed that, even in countries that are more advanced in terms of LGBTI rights, individual-level characteristics such as age, level of education and religiosity are still powerful predictors of attitudes towards homosexuality. In addition, this study suggests that adoption by same-sex couples is more supported by youth, higher educated and secular respondents mostly in contexts that are highly developed in terms of rights for LGBTI people.

While the decline of Christianity is associated with an increased acceptance of sexual and gender diversity, it is important to acknowledge, as noted by Thiessen and Wilkins-Laflamme (2020), that "…not all organized religious groups have more right-leaning teachings and values on sexuality, reproductive rights, family values, gender roles, and the roles and responsibilities of government in society. But on average more do than what can be found in general American and Canadian popular culture and society." (Thiessen & Wilkins-Laflamme, 2020: 115). It is also important to note that right-leaning groups seem to attract a disproportionate share of media attention, thus perhaps leaving the impression that Christianity and religion *en bloc* supports a narrow conceptualization of sexuality.

c. A third area of research in the study of nonreligion that intersects with gender or sexuality is social activism. This line of inquiry shifts the emphasis from understanding why some individuals become nonreligious or exploring their attitudes and opinions to examining how nonreligion is publicly represented. Despite the increasing visibility and acceptance of nonreligious perspectives in some contexts, in many countries being agnostic, humanist, or atheist can still be a marginalized position. For this reason, it became relevant to research how nonreligious standpoints are represented, and even defended, in the public arena.

The public representations of atheists or agnostics shares some affinities with feminists and LGBTQI agendas. Atheist/agnostic, feminist and LGBTQI organizations share an opposition, (through formal activism or informal networks of 'like-minded people' or simply in opinion or through disaffiliation, to what Quack et al. (2019: 5) have defined as religious normativity understood as the "…means by which religion is experienced as carrying certain social orders and normativities…". Though with differing emphases, these constituencies defend an ethical standpoint that is usually in opposition to clerical authorities. As Quack et al. (2019:5) affirm: "The respective activism counters both stigmatized nonreligious identities as well as conservative (religious) moralities, especially with respect to matters around sexuality and the beginning and end of life".

These activists and movements challenge long-standing religious and moral codes that have permeated the social order and they confront the "will to religion" understood as the "the idea that we are all religious, that we all have spiritual needs, and that those needs are available for scrutiny, examination, correction, regulation, and addressing both by ourselves and by others" (Beaman, 2013: 145). This will to religion does, of course, marginalize atheists and agnostics, but also impacts those people who build their personal decisions and practices in opposition to the religious hierarchies' defense of a universal morality.

Research on collective apostasy campaigns has also revealed the connection between atheist/agnostic and feminist positions. In Argentina, for example, in the context of the abortion debate many feminists joined the Apostasy Campaign to erode the Catholic Church's legitimacy as a public voice. These findings underscore the intersectional nature of non-religious activism and its alignment with broader social justice movements. (Rabbia & Vaggione, 2021; Martinez-Ariño, 2024).

It is crucial to note that this emphasis on nonreligious social activism does not deny the multifaceted articulations between religious positions and feminist and LGBTQI activism.[3] While religious norms often reinforce hierarchical sexual orders, there are various tensions and conflicts not only among different religious traditions but also within the same ones. Feminist and LGBTQI+ movements have also impacted the religious field, leading to modifications in major moral debates concerning sexuality. Furthermore, religious diversity is also an intradenominational process characterized by the number of persons and organizations that mobilize their religious beliefs in opposition to the doctrinal and/or official aspects of their faith (Dillion, 1999).

3 For a discussion of this and other interfaces between nonreligious activism and religion, see Beaman and Alexander, forthcoming.

Although these three lines of research are important to understand the impact of the study of nonreligion on sexuality (and vice versa), this book offers an alternative approach. We do not take nonreligion as a conceptual tool to describe a particular group (those who distance themselves from religion), to explain their opinions and sexual attitudes or to critique their political marginalization or describe their confrontation with religious power. Rather, we emphasize nonreligion as an analytical tool to capture alternative ways of imagining the social order that do not claim to be religious (obedient to the dogmas of ecclesiastical authorities) nor secularist (emptied of values/feelings considered religious). Our approach seeks to unpack the nonreligious as a social construction in relation to what is narrated as religious and what is not in the context of marriage equality.

1.4 Same sex marriage as a public controversy

As the following chapters show, despite the general decline in the percentage of people who get married, marriage continues to play a prominent role in state governance. It is a foundational institution that serves societal, political and moral purposes. It regulates sexuality, kinship, heritage among other important functions. For religious organizations, marriage is still a central institution that plays both symbolic and material roles in the process of community building. In Catholicism, it is elevated to the status of a sacrament, and defined as "a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring" (Canon Law §2)

Though marriage remains a privileged institution across time, many of its components and requirements have changed within the law: divorce, child recognition, kinship, incest, adultery, among others. Some of these reforms, such as the legalization of divorce ignited intense public debates in most countries included in this study. By challenging the principle of the marital bond's indissolubility, divorce raised questions about the articulations between Christian normativities and state legislation. These reactions were particularly stronger in countries with a majoritarian presence of Catholicism because marriage is considered a sacrament in canon law. In Latin America, the proposed legalization of divorce generated intense reactions from various social, political, and religious groups that, led by the Catholic hierarchy, opposed legal reform (Vaggione, 2012) over the course of the 20th century, a process that ultimately culminated in Chile's legalization of divorce in 2004.

Even the question of who can formally be married has been disputed in many ways; for example, age, race, social class, gender, or religion have been part of

legal reforms in many countries. It is key that in the process of debating and redefining marriage its validity is reaffirmed as a contemporary social and political institution. In spite of its many changes and reforms, marriage remains as an organizer of life both for the state and for religious institutions.

During the 21st century, the legal definition of marriage is once again politicized and disputed, but this time through debate on the right of same-sex couples. Although the recognition of these rights has a long history, in the last two decades the right to marriage has been incorporated as a path to broaden pluralism. It is not only about the legal protection of same-sex couples (property rights, adoption, social security among others), but about defining what marriage is, and should be, in the contemporary world. Historically if certain legal forms, such as civil unions or *pacte civil de solidarité*, provided legal recognition to same-sex couples, what is being disputed now is what can, or cannot, be modified when regulating marriage. It is somewhat paradoxical, as has been noted, that this debate is being addressed through the reform of marriage – an institution inherently linked to sexual and social control.

The growing legitimacy of marriage for same-sex couples is part (cause and consequence) of the previously mentioned process of decentering of Christianity. Same-sex marriage elevates the debate on the definition of marriage to a new threshold, as it challenges two fundamental principles where Christian and legal normativities have traditionally aligned. Firstly, it autonomizes marriage from biological reproduction. When one of the primary functions of the institution of marriage (biological procreation) is challenged, its very foundations are called into question.[4] Secondly, it puts the gender system that characterizes marriage into question; particularly, the differences and complementarities between man and woman as a central aspect of marriage life. By recognizing marriage for same-sex couples, the state shifts the definition of marriage away from these components and puts the moral and religious foundations of the legal system into debate.

What is being debated, through the reform of this historic institution, is heteronormativity as a system of power that not only organizes gender and sexuality (Warner, 1991) but also shapes various aspects of social, political, and economic life. As noted above, this book considers the same-sex marriage as a public controversy that allows for the observation of different positions, conflicts, and negotiations, as a moment of condensation of multiple aspects (Diez, 2015; Smith, 2008, Vaggione & Jones, 2015).

4 It is the institutional definition what is questioned that, of course, never totally matched the lives of real people—ie those who did not want children, could not have children, etc.

1.4.1 Some methodological notes: a flexible approach

The shift toward the recognition of same-sex marriage characterized all the countries included in this study: Argentina, Australia, Brazil, Canada, Denmark, Norway and the United States. In a relatively short period of time, the seven countries have recognized marriage for same-sex couples. Whether Protestant, Catholic (or mixed) and no matter the relationship between church and state (formally allied, formally separated or a *de facto* Christian establishment) or the greater of lesser presence of nonreligious people, all countries arrived, sooner or later, between 2009 (Norway) and 2017 (Australia), at the recognition of same-sex marriage. Although not a causal relationship, we cannot help but remark on the correlation between a loosening of Christian hegemony and a reconstruction of marriage.

The research design that each country used was the result of a collaborative process. We chose to conduct country specific analysis while keeping those analysis in conversation with broader themes we observed as a group. The project team met at least 50 times by Zoom over a period of 3 years to choose and justify moments of focus, a coding framework and to share analysis. We also had two face to face team meetings. This was not always easy: we faced linguistic challenges as well as significantly different legal systems and cultures of public engagement. Nonetheless, what often surprised us were the ways in which similarities coalesced around key themes. We describe those in more detail in the chapters of this book.

In order to analyze same-sex marriage as a public controversy, each research team chose a moment of observation and coded its corresponding material. Regardless of the legal functioning of each country, all cases analyzed here were based on transcripts of legal decisions made by the Supreme Court or legislative debates in Parliament and public hearings. The cases of Canada and Brazil added other materials to the analysis, such as Litigation Campaigns (US) and a short newspaper description of a same-sex marriage ceremony (Brazil).

In our consultative process, we chose the codes that would allow us to understand what has meaning and value for the actors when talking about same-sex marriage. History, Natural Law, Human Rights and Religious Freedom were the most recurrent. Some of the codes, such Human Rights and Religious Freedom sprang up directly from the material. From the multiplicity of codes identified, two emerged as most pervasive in the material from all countries and were used to deepen the analysis: “Nature” and “history”. As two main sites of contestation, these codes are useful in analyzing the ways in which the nonreligious emerged and the arguments, narratives, and actors that were activated in the debate about marriage definitions. After this coding stage, each country proposed its

own chapter through these codes and the drafts were collectively discussed on at least two occasions.

In our analysis we relied primarily on legal documents, including transcriptions of Supreme Court rulings, parliamentary hearings, and public debates. We focus on a systematic review of the language employed in these discussions, mapping the vocabulary used while placing particular emphasis on the terms "nature" and "history" as they shaped arguments in support of various positions. Additionally, we focused on how marriage and family were referred to within these contexts. We carefully identified the discursive forms that authorized statements and provided credibility to allegations. Lastly, beyond argumentation and justification, we examined how imagination shapes uses of language: our goal was to discern how anxieties, fears, and social aspirations become tangible within the narratives of legal and political actors who, in their proposals, envision themselves voicing collective sentiments.

One initial challenge was how to define and characterize nonreligion as part of our research. From the outset we decided to take a flexible approach to the concepts of religion and nonreligion. Very broadly, we adopted the moderate social constructionist approach of James Beckford (2003) when approaching the topic and concept of religion, but we extended his insights to nonreligion. Our reasoning was that rather than rushing toward a rigid definition we would step back to see how and when the social actors involved in debates – whether in courts, legislatures or the public arena – invoked religion and, in doing so, also placed arguments and imaginaries outside of the religious boundaries. We did not want to predefine what nonreligion is, but to analyze how the actors' narratives draw the religious field and what they put outside of it. This sometimes appeared in more subtle ways, as our analysis will reveal, and under various guises.

As previously mentioned, one common alter ego for nonreligion is 'the secular', another term rife with complexity, confusion, and vague meaning. Religion's cloak was often in the form of references to a 'natural' order that was not human created. Religious groups have learned to couch their transcendental reference point in a way that is more palatable to a diverse public sphere. These realms were not mutually exclusive, and the analysis is, we hope, reflective of the rich, complex field of debate and discussion that often defies categorization as 'religious' or 'nonreligious'.

1.4.2 Some analytical notes: levels of nonreligion

During the debate on same-sex marriage, a range of narratives and arguments extended beyond the issue of rights for same-sex couples. Principles and values once

considered immutable – where cultural, moral, and legal dimensions intersected – became points of contention. Religion played significant, though different, roles in these disputes. Representatives of major religious institutions actively mobilized to block legal changes through judicial interventions, participation in public debates, and lobbying efforts. Conversely, religion also proved to be a diverse and multifaceted influence, with religious institutions and individuals in different countries advocating for the recognition of rights for same-sex couples.

A core aspect of the public controversy surrounding same-sex marriage is determining what can or cannot be altered by human laws. What was once presumed to be immutable – the complementarity of man and woman – became a point of contention. What is at stake is a change in the marriage regime based on the transcendental to one that is immanent, excluding the transcendental and reinscribing an order for relationships that does not invoke a universal.[5] As part of this debate, several imaginaries about the role of family, nation, history, nature, and morality, among others, are also at stake. These imaginaries emphasize, and even arguably destabilize, the boundaries and borders between what is taken as religious and its usual not religious counterparts, the "outside of the religious", the "against religion", offering us alternative perspectives of the nonreligious imagination.

An emerging question is how the nonreligious, as a flexible analytical category, is applied throughout the book. While each chapter presents unique reflections and proposals, two interconnected levels of analysis offer deeper insights into the dynamics and processes beyond the religious/secular dichotomy. One level concerns the relationship between civil marriage as a nonreligious institution and Christian marriage as a religious one. The recognition of same-sex marriage distances marriage from its "original" framework of meanings, partially unraveling the Christian heritage that serves as both a moral and cultural foundation. At another level, various arguments, values, and imaginaries – though not necessarily new – emerge to fill the void left by the disruption of heteronormativity, which has historically functioned as a point of convergence for religious, moral, scientific, and legal narratives.

1.4.2.1 The distance between civil and religious marriage

It is the state which, through law, establishes the requirements and formalities for a couple to be considered married and for a series of rights and obligations to be

5 (Christian, though they imagine it to be universal through the invocation of 'Judeo-Christian' and 'Abrahamic faiths' and simply claim that it is universal—see Lautsi) transcendent being but something else—equality, inclusion.

recognized. However, the state marriage governance opened a series of dynamics that involve, among other things, the absorption of competencies inherent to the historic Christian normalization of marriage. The state, through the regulation of procedures and restrictions, decides when marriage has legal existence and, in doing so, puts into tension the legitimacy of Christian marriage as a universal model. The state regulation of what counts as a civil marriage historically implied, and still does, a complex process of articulation and conflict between moral regulations and normative ideals about kinship.

In spite of the state governance, marriage retains an important symbolic function as a condensing point of religious and non-religious imaginaries. This is reflected in the centrality of the naming issue during the debate in most countries. In this sense, several qualifiers for marriage have emerged, such as marriage equality or egalitarian marriage, in order to take the civil institution to a new threshold. Reforming the legal status of conjugality is part of a political agenda linked, during the debate, to key social and political values in each country such multiculturalism (Canada), freedom (USA), pluralism (Brazil), human rights (Norway) or democracy (Argentina), among other normative horizons. The debate over civil marriage also entails a broader discussion on how to accommodate the diversity within complex societies.

The centrality of naming is also evident in the proposals that emerged in various countries to recognize rights through alternative legal institutions. “Registered partnership” or “civil union” were options to grant the same rights without modifying marriage. It does not seem to be the rights for same sex couples the cause of the strongest reactions (of course there are some), but the fact that these rights are being granted within the framework of the marriage status. In this sense, marriage should reflect fundamental values that are compromised by allowing same-sex couples to marry. Defining the name is part of a classificatory process that changes the status of sexuality and the ways in which society sees it. A process that even goes beyond sexuality and involves debates on complex issues such as equality, social cohesion or justice.

This issue brings into question the formal and symbolic distance or gap between marriage as a civil and religious institution. Civil marriage, although it is constructed as autonomous, does not lose its relation to religious marriage; it is outside the religious field, but it is also embedded in Christian heritage even as it purports to distance from it. Though the states produce the formalities and contents of civil marriage they do so in the context of mirroring with religious marriages because both share a common matrix or genealogy. The same sex controversy is an important moment in the ongoing process of debate about the distance between marriage as a nonreligious and as a religious phenomenon.

Each country has its own specificities on the ways in which the (dis)articulation between civil and religious marriages appear in the debates. While the state regulates the validity of civil marriage, there are different legal frames for marking its boundaries (real or imaginary) from the institution of religion. Most of the countries in this research do have a dual system that also grants legal effects to religious marriages rites. Couples can decide to have a religious ceremony (among others) and this ceremony, if performed with certain bureaucratic formalities, is recognized by the state. The state allows various persons (religious or not) to perform the ceremony and give legal effect to these private rites if they follow some formal requisites (such as be officially registered at the registry office).[6]

Although the debate was exclusively about the power of the state to modify civil marriage, the question about religious marriage was not absent. In Canada the Supreme Court recognized that religious institutions have the right to refuse to conduct same-sex marriage ceremonies as a concession to religious groups, even though religious marriage was not under consideration. Thus, the Marriage Act eventually stated that "religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs" (see Beaman & Steele in this volume) and that religious groups would not be sanctioned for refusing to do so. Marriage anxiety by some religious groups thus resulted in the inclusion of explicit protections for clergy and religious organizations.

In Australia, marriage is regulated at the federal level and, as in other contexts, celebrants can be either religious or civil. The debate over same-sex marriage involved a non-binding postal survey in 2017 to gauge public opinion. The results showed majority support (61.6 % of people in favor) with a high voter turnout. Consequently, the Parliament passed a bill defining marriage as "the union of two people to the exclusion of all others, voluntarily entered into for life" (see Warren & Banham in this volume). Similar to Canada, the legalization of same-sex marriage was accompanied by measures to protect religious freedom, ensuring that religious celebrants have the right to refuse to perform marriages that conflict with their beliefs.

In the United States, marriage regulation is determined by each state, and certain formalities – such as obtaining a marriage license and holding a ceremony – are required for marriages, whether civil or religious, to be legally recognized. A central point of debate in the Supreme Court decision (*Obergefell* v. *Hodges*) was

6 In general, countries with a Protestant background tend to have this dual system where State and church-conducted marriage have similar effects. (check this info). Unlike countries with a Catholic tradition, the Protestant heritage, which does not consider marriage a sacrament, presents a more flexible position on issues such as divorce, clerical marriage (these differences can be better analyzed).

whether a state can prohibit same-sex marriage without engaging in unjustified discrimination or violating the principle of equal protection under the law. Although the judicial case that legalized same-sex marriage pertained only to civil marriage, respect for religious values and the protection of religious freedom remained central in the judges' main arguments. The tension between same-sex marriage and religious freedom, highlighted in this case, has continued to spark controversy in subsequent legal disputes involving business refusals to provide services for same-sex weddings, employment policies, and adoption or foster care services provided by religious organizations.

Denmark and Norway have their own logics due to the existence of a state church which complicates the distinction, even the autonomy, between civil and religious marriage (as of 2017 Norway no longer has a state church, although the Church of Norway is still state funded). For example, in Denmark, when discussing the requirements for civil marriage, the role of the Church of Denmark (*Den Danske Folkekirke*) is at the same time being scrutinized. One important area of debate is the distinction, always fuzzy, between matters that are exclusively of the *Folkekirke* (inner affairs) from those that could and should be regulated by the Parliament (outer affairs). This is also present in Norway where marriages are still seen as a "religio legal" matter and changes to the legal framework on marriage are generally considered an interference with religious autonomy, and concomitantly a limitation of religious freedom.

Argentina has a different system and only civil marriage performed by state public officials has legal effects. Marriages celebrated by the clergy are of a symbolic nature and can only take place after the civil ceremony. Thus, it is only civil marriage what is being debated because the right of religious institutions (including the Catholic Church) to decide on the conditions for access to religious marriage is out of the question. However, Catholic influence – as religion, morality, and culture – upermeated the parliamentary debate in various ways. For instance, freedom of conscience, rather than religious freedom itself, played a central role in articulating and safeguarding religious beliefs.

The Brazilian case is distinct in that it does not center directly on marriage but rather on the recognition of same-sex couples' status as equivalent to that of civil partnerships and, consequently, their acknowledgment as family units under the law. According to the Federal Constitution, stable couples can be "converted" into marriage (as stated in Article 226). In this context, marriage was an indirect possibility within the judicial case being analyzed. However, similar to discussions in other countries, this debate encompasses both religious and secular dimensions, referred to in this chapter as legal-canonical (rooted in notions of nature and morals) and legal-civil (pertaining to politics).

These debates highlight, in broad terms, the instability of the formal distinction between civil and religious marriage. While both institutions are autonomous and governed by separate normative frameworks, the discussion surrounding civil marriage is closely tied to different perceptions of the religious, and vice versa. In countries with a dominant Christian church, such as those included in this study, the inclusion of same-sex couples in civil marriage is part of a broader process of differentiation and autonomy between the religious and the nonreligious. Through this process, marriage loses – or at the very least, sees a weakening of – its transcendent dimension and is redefined as a social and legal institution where issues of inclusion and pluralism are contested.

1.4.2.2 State laws and Christian heritages: nature and temporality

Law is not only a regulatory mechanism (distinguishing religious and civil marriage) but also an arena to observe the impact of Christian heritage as a religious, moral and cultural influence. State regulation of marriage does not necessarily mean displacing religious values from the law, but incorporating, assimilating, and transforming them. In countries characterized by the presence of a majoritarian religion (either Catholicism and/or Protestantism), the (state) law does not eliminate religious influences, it only makes them fade away and/or transmute their influence.

Thus, the debate about how the state should regulate marriage is also a debate about the role of religion, morality and culture in lawmaking processes. Same sex marriage debate is an analytical moment to understand how the frontiers between the religious and not religious are produced; or, in other words, it helps to illuminate how, in many ways, marriage remained a way of indexing religious narratives into a civil form. It makes visible the ways in which religious and nonreligious normativities are fused and stabilized as part of legal discourse. As previously mentioned, modifying the marriage regime implies criticizing norms and values that reduce marriage to an institution rooted in the complementarity of the sexes and the importance of biological reproduction.

As examined in detail in this book, the same-sex marriage debate generates different types of articulations that make the dynamic production and reinvention of nonreligion visible through two main imaginaries: history and nature. These imaginaries are central to the debate over which aspects and dimensions of marriage can be shaped by human decisions, and which, in contrast, transcend them. De-Christianization implies, among other things, a greater possibility for an alternative narration of nature and of history, more decoupled from religion as a matrix of meanings and normative horizon.

As highlighted in the following chapters, some narratives frame nature as a moral, biological, or legal boundary for recognizing same-sex marriage. Nature has an underlying topic on what is beyond human control and, as such, is out of the state abilities to modify. Nature tends to enter in connection with what are the essential/transcendental aspects of marriage and, as such, an unavoidable basement for human laws. There exists a reality, a materiality, that human laws cannot disregard and must, therefore, uphold. In this imaginary, there is no distinction between the religious and the nonreligious; instead, there is a continuous line of reasoning: both divine will, nature, and law converge on complementarity as a transcendent principle that cannot be violated.

History is another important theme across the chapters, shedding light on alternative constructions and imaginaries about time. During the debates, marriage is disrupted as a timeless and therefore immutable reality and placed as part of the public debate about its role, not only in the past but also in the future. De-Christianization implies, among other things, the temporalization of marriage as a legal institution, its placement as a worldliness and human construction. Marriage is disrupted as an immutable construct and placed as part of the public debate about its role not only in history but also in the future. In this sense, time is narrated in alternative ways and with different purposes. One type of narrative, for example, draws on the past, on a pre-existing legal and moral order to justify the rejection of same sex marriage. In general, this preservation of the past means the defense of marriage as an institution entangled in Christian values and beliefs. Other type of narrative constructs the past as a series of changes that inevitably lead to the recognition of same-sex marriage, a sort of teleology where lawmakers and judges have a central role in the production of change.

Through the analysis of nature and history as contested imaginaries, the chapters provide insightful perspectives on the constructions and articulations between the religious and the nonreligious. The Brazilian chapter points to a process of de-sacramentalizing marriage, i. e. a growing distance between legal canonical and legal civil while, at the same time, one of a pragmatic re-sacralization through matrimonial rites. Precisely, the recognition of same-sex couples as legitimate families is accompanied by a restoration of symbolic and moral values, even "spiritualizing marital bonds", outside the Christian language. Focusing on the concept of family, the chapter proposes two main mutations that can be observed when debating rights for same-sex couples: the transfiguration of family into spiritual bonds (centrality of love/affection) and the mutation of family from religious/moral to the legal.

The chapter about Argentina employs the concepts of imbrication and de-imbrication as an analytical framework to examine the intricate intersections of law, morality, and religion. Same-sex marriage challenges the presumed complemen-

tarity between man and woman, as well as the intrinsic connection between sexuality and reproduction as universal values. In doing so, the entanglement of legal, cultural, and religious dimensions regulating marriage becomes politicized, with some actors advocating for the removal of these values from state law as part of the Catholic legacy. This moment of redrawing boundaries – of normative de/re-imbrication – sheds light on alternative conceptualizations of the legal, revealing dynamic and contested constructions of what is considered religious and nonreligious in contemporary societies.

Human Rights discourses are another entering point for observing the complex articulations between religious and nonreligious normativities. Despite their aspirations to be a universal secular language, these discourses are influenced by, even interwoven with, Christianity. The chapter on Norway uses the concept of "normative universes" (Cover, 1983) to address the tension between more or less explicit religious and nonreligious bases in Human Rights discourses. The case of Denmark highlights how different understandings, imaginaries, and negotiations of the boundaries between Church and State, as well as religion and politics, were renegotiated during the same-sex marriage debate.

Nation is another construct through which religious and nonreligious standpoints emerge in the debate. How Christian heritage and national identity are articulated and/or fused is a question that leads to different constructions of the nonreligious. This is particularly relevant in the Australian case due to the country's colonial past and Christian heritage. The stakes of the debate were thus high, involving not only who can marry, but 'who are we as a nation?', implicating issues of identity and values.

The chapter on the United States highlights freedom as a central theme in understanding the complex relationship between religion and sexuality. In the judicial case that resolved the legality of same-sex marriage, religious freedom emerged as a highly contested issue, shaping different imaginaries of the relationship between the religious and the nonreligious. One perspective contends that marriage should evolve to reflect shifting values regarding gender roles, sexuality, and personal autonomy, distancing itself from traditional Christian values to safeguard individual freedoms. Conversely, the opposing position frames the issue as a conflict between the right to marry and religious freedom, arguing that recognizing same-sex marriage undermines religious freedom as a culturally and legally privileged value.

In the case of Canada, the constructions about the past and the future play a central role in understanding the key imaginaries that emerged during the same-sex marriage debate. On one side, those who argue that the present must preserve a past imagined as a source of social cohesion and shared values, derived from a pre- or supra-human natural order. In this view, truth is rooted in the past, in a

transcendent order that ties marriage to unchangeable values. On the other hand, an alternative imaginary is constructed from a narrative of future formation, which "draws on the national imaginary of multiculturalism... in which no single group, ideology, or set of values dominates."

Through the analysis of the differences and similarities across various countries, this book provides an examination of the imaginaries that emerge when marriage is debated as a legal institution. By exploring the arguments, values, and representations at play, it seeks to understand how conceptions of marriage both reflect and reshape the relationship between the religious and the nonreligious in diverse social contexts. Beyond the specific case of marriage, this volume represents a key outcome of a broader research project that will continue investigating other public controversies. By addressing these legal, political, and cultural debates, the project aims to further explore the dynamics of the articulation and disarticulation between the religion and the nonreligion, offering a more nuanced perspective on the tensions and negotiations that characterize contemporary societies.[7]

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2 Sacred without sacrament: the regulation of same-sex marriage in Brazil

Paula Montero, Renata Nagamine, Camila Nicácio, Guilherme Borges

2.1 Introduction

In May 2011, the Brazilian Supreme Federal Court[1] unanimously decided to extend the legal regime that the Brazilian Constitution in force accords to "stable unions between man and woman" (Article 226, para. 3) to what they defined as 'homoaffective unions[2].' By 'stable unions', the Justices refer to what is more widely known as 'civil partnerships', which in Brazil are distinct from 'civil marriage'. Unlike other cases analyzed in this volume, the Brazilian Justices did not discuss same-sex 'marriage' but same-sex 'unions' that is, referring solely to civil partnership. In contrast to marriage, civil unions must be formed either at a County Clerk's Office or through the court system. This requires demonstrating a "real family bond" to justices. Also, these unions do not change civil status, so those in civil partnerships are legally recognized as single and enjoy less social respectability.

This chapter begins by distinguishing between two terms, 'marriage' and 'matrimony,' considering the historical process of decentering Christianity in Brazil and the uses of both terms. The term 'marriage' is used to designate a contract regulated by Civil Law, whereas 'matrimony' is used to refer to the Catholic sacrament expressed by a ritual historically associated with Catholicism. Both have been oriented toward procreation, but only 'matrimony' creates a bond regulated by Canon Law as indissoluble and monogamic[3]. In this sense, the terms 'marriage'

1 The Supreme Federal Court is the Brazilian highest court and has constitutional jurisdiction. The court's collegiate comprises eleven Justices, ten of whom participated in the judgment: Carlos Ayres Britto (rapporteur), Luiz Fux, Cármen Lucia, Ricardo Lewandowski, Joaquim Barbosa, Gilmar Mendes, Ellen Gracie, Marco Aurélio Mello, Celso de Melo, and Cézar Peluso.

2 We use double quotation marks for citations and single quotation marks to signal the terms whose uses and meanings we are analyzing.

3 The Council of Trent (1542), which defined the canon law, established the indissolubility of this contract and the obligation of monogamy. The current Code of Canon Law, promulgated in 1983, reaffirmed the sacramental character of marriage (Canon 1055, §1). Many of the purposes of

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and 'matrimony' point to different forms of regulating conjugality; nonetheless, they have always been closely connected in the history of family life regulation in Brazil. The process of decentering Christianity in Brazil implied a progressive distancing of Brazilian courts from canonical forms of regulating conjugal relations through sacraments. We refer to the shape this process took in Brazil by 'de-sacramentalization.' However, as the chapter will also demonstrate, the rite of 'marriage' remains "sacralizing" conjugality. It still gives it respectability and social legitimacy, despite the decline of religious (Catholic) normativity.

The history of the relationship between 'matrimony' and 'marriage' regulations originated in the Brazilian monarchy. Catholicism was then the official state religion, resulting in an explicit entanglement between religion and law that rendered marriage indissoluble. However, even after Brazil became a republic in 1889 and no longer had an official religion, the indissoluble nature of marriage remained (Santos, 2018).

In our chapter, we understand that, throughout Brazilian history, 'matrimony' has inscribed the conjugal within a temporality socially perceived as beyond history, that is, a socially imagined eternity: a time removed from the flow of human events and, consequently, from the sphere of human action. For this perception of marriage as an eternal commitment to become widespread across Brazilian society, it was crucial, however, to transform the indissolubility of the conjugal bond into a legal principle, as was the case with the 1934 Constitution. This legal change resulted in the connection of the transcendent to a civil form, then to sexual difference and procreation.

From that time to the present day, Brazil has had four more Constitutions (1937, 1946, 1967, and 1988), as well as several legislative proposals that have challenged the indissolubility of marriage. The 1916 Civil Law Code established the "separation of bodies", but this did not entail the dissolution of the 'marital bond.' The dissolution of the marital bond was only recognized with the 1977 Divorce Law, which marked a significant step toward the de-sacramentalization of the term 'marriage' Overall, the more legislators and justices inscribe civil marriage in the human time of history, the more it gains autonomy from Catholic regulation and religious framework.

The constitutional provision of civil partnership in 1988 represents another important discontinuity in the history of legal protection of family life in Brazil for asserting that family is independent of marriage. By establishing that single

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marriage indicated by canon lawyers, such as the procreation and education of children, mutual collaboration between spouses and the remedy for concupiscence, were absorbed by the Brazilian Civil Code enacted in 1916.

parenthood can form a family for legal purposes, the 1988 Constitution dissociates the definition of family from all sorts of marital relationships. With the 2011 decision on same-sex civil partnership, known as the *Homoaffective Unions* case, which is analyzed in this chapter, the Supreme Federal Court validates conjugal relationships where procreation cannot occur naturally nor can its naturalness be mimicked (Strathern, 1995).

In this chapter, we will demonstrate the effects of the de-sacramentalization process, through which Catholicism gradually loses its normative force over marital and consequently family bonds in Brazil. This manifested in the linguistic dimension of the judges' votes who decided in favor of the legal protection of same sex unions. To analyze this process, we use 'history' as an analytical code to grasp discursive games centered on competing ideas of time, specifically, eternity, evoked by the term 'matrimony,' and human history, implicit in the use of the term 'marriage'. These notions of time matter not only conceptually, but also because they produce normative and semiotic effects in religious and legal contemporary discourses. It allows us to demonstrate how conjugal relations are deindexed from the Catholic framework where marriage is sacramental, and reindexed into a legal-human rights regime. Both notions coexist in current uses of the term 'marriage'. Its moral authority is not erased but recontextualized in a new moral register.

Taking on the task of analyzing the seemingly univocal character of the term 'marriage' at a moment the agents themselves framed as critical, we find it timely to shed light on the (sacred) eternity and (human) history temporalities in judicial discourses on law and same-sex relationships. We do this by suggesting that the de-sacramentalization process of marriage narratives does not imply the de-sacralization of it. What we are defining as de-sacramentalization discourses point to the decline of the normative-sacramental power of marriage in contrast to the Civil Law definition of the legal regulation of conjugal bond. Associating it with Civil Law, on the contrary, historicizes it by making it a product of human choice. It is important to distinguish between these two distinct legal narratives. As the arguments for the autonomy of the legal norm in regulating marriage unfold (de-sacramentalization), legal discourses seek to restore the social value of marriage (re-sacralization) by spiritualizing conjugal bonds without resorting to Catholic repertoire.

The judicial debate in the so-called *Homoafective Unions* case, examined in this chapter, brings to light the tensions in the process of de-sacramentalizing marriage. We understand that the Supreme Court's decision on same-sex relationships is yet another significant move in a process of shifting the association of marriage from Catholic Law to Civil Law. However, our analysis also demonstrates that, in the complex process of redefining civil unions by the ministers, marital relations

between people of the same sex gain a new sacredness; they're described in the judges' votes as a lasting family arrangement, since they are based on a new type of loving spirituality. Additionally, when the term 'marriage' refers to the Catholic rite, getting married in church continues to be a social value that, connected to the civil union contract, gives it a new social legitimacy. The shift of what "marriage" means shows that these forms are ideologically charged and index legal categories alongside moral and religious positions and histories.

Using 'history' as an analytical code revealed that the legal recognition of same-sex relationships as civil partnerships sparked a debate about the role of time – codified as 'history,' 'tradition,' and "durability of relationships" – in defining the conditions for two people to be declared spouses in the country. This debate was particularly heated because, according to the Brazilian Constitution, law shall facilitate the conversion of "civil partnership" into "marriage" (art. 226, para. 3).

The endorsement of the social uses of legal institutions and narratives to gradually frame same-sex relationships in terms of "marriage" has caused narratives about these ties to gradually shift from their association with sin and marginality to an indexation in the realm of affection and family. We demonstrate that the Justices engage with various notions of time to present the court decision as a bridge between past and future, on the one side, and on the other as a correct reading of the endless metamorphosis of legal and social institutions. The analysis of their decision with a focus on the use of temporality allows us to realize that the Justices act as if they were heralds in a social process whose direction was given prior to any enunciation. The two main questions we seek to answer through the analysis of the history code are: how and why do the Justices engage with the notion of time to describe their understanding of same-sex union? How do they contribute to the process of de-sacramentalization and (re)sacralization of marriage by redefining same-sex conjugality as 'homoaffective unions'?

With this chapter, we aim to contribute to peeling off another layer of the intricate relationship between the legal-canonical (from the order of nature and morals) dimension of social life in Brazil and the legal-civil (from the order of politics) one, which organizes the contemporary perception of family life in the legal sense. By applying the "history" analytical code to map the use of different notions of time, we seek to capture how actors understand and assess the consequences of their decision, thus inscribing same-sex relationships in the family legal order. Justices anticipate that their decision affects a whole set of dynamics that involve the relationships between religious actors and the State, as well as same-sex practices and the Brazilian social repertoire. Due in part to their position, their opinions ("votos") shape what can be imagined, legitimized, and said about these topics in public space.

In the following sections, we will analyze the Supreme Federal Court Justices' discourses and narratives voiced during the judgment sessions. The sessions were recorded and are freely accessible on YouTube, specifically on the official channel of the Court[4]. In our analysis, we will bear in mind that law and religion are recognizable as different forms of public language. Overall, we will see in the chapter that legal and religious ways of reasoning and narrating confer materiality (reality) on marriage and family – that is, they are made recognizable, legitimate, and operative in social life through language. They do so by combining various repertoires in meaningful ways. What emerges from these combining repertoires is, on one hand, the de-sacramentalization of marriage, and, on the other, the (re)sacralization of family, enduring conjugal bonds, by the spiritualization of family love – that is, its transformation from a Canonical, legal, and patrimonial arrangement into affective, spiritual bonds.

2.2 Theoretical and methodological considerations

Drawing on Hannah Arendt (2018) and Iris M. Young (1996), we assume that the actors whose practices we analyze here – namely, the Justices sitting on the Supreme Federal Court, in Brazil – speak to an immediate audience as well as to a broader, more general one. Their audience consists of both their peers and others in the physical space of the Court, as well as viewers of *TV Justiça*, a television channel that also streams live on YouTube.

The whole apparatus for public communication is part of the context of the Supreme Federal Court's judgments and invites us to take the Justices' statements as communicational acts. Taking them as such means that we will not limit our investigation to legal or abstract arguments made by the Justices. Instead, we will focus on the narratives they construct, how they use metaphors, how they address Brazilian society, which stories and characters are mentioned, and how these relate to one another.These choices may not be fully intentional, but they are never neutral; they shape how society comes to understand a judicial decision itself.

To explore the communicative dimension of the judgment in the Supreme Federal Court, we will examine how the Justices use legal and religious forms to shape different narratives about marriage and family, as well as to introduce themselves to their "imagined audience" (Arendt, 2018) – that is, a public implicitly addressed in the act of speaking, even when physically absent from the court-

4 Available at <https://www.youtube.com/@STF_oficial> (last accessed on 24/03/2025).

room. Even when actors use these forms strategically, they cannot fully control the communicative effects of such uses in interactions both within the court and with the outside world.

To capture how they represent their audience to themselves, we rely on Arendt's (1992) discussion on imagination, conceptualized as an individual faculty that mediates between living experience and understanding by giving images to thought, or simply put, through representation. Assuming that imagination, as a representational faculty, shapes how actors use language and it materializes in semiotic forms, we therefore take a step back regarding the discussion on social imaginaries to look at how the Justices use rhetoric. This includes their references to "Brazilian society" and narrative forms, such as stories (Young, 1996) of the country, the law, themselves, and others.

With this theoretical ground, we approach the uses of legal repertoire, assuming that they are primarily intended to connect and engage, that is, to communicate. That analytical choice has methodological implications. Firstly, it drives our understanding not only to legal norms and how they relate to each other, but also to how meaning is produced. Secondly, we shall take seriously the idea that actors behave through speech, that is, their utterances eventually take shape in interactions with their audience. Our approach assumes that language is performative rather than merely representational – it enacts social realities and positions. This chapter examines how actors use language – more specifically, how they produce meaning through both linguistic and other nonlinguistic, semiotic forms (Mertz, 1985; Nakassis, 2018; Harkness, 2021). We focus on the operation of "indexation," whereby actors connect social forms to objects absent from their context of enunciation, thereby making them co-present, contiguous, or consequential to the utterance (Mertz, 1985; Nakassis, 2018). In the legal case we analyze, actors craft artifacts that outlast the immediate moment of their appearance and that act upon the world. Judicial narratives are artifacts of this kind. To capture them, we systematically analyzed both Justice's written votes and videos of the judgment at the Court[5].

To fine-tune the different narratives through which Justices acknowledge a legal status to same-sex relationships, we created a set of codes as an analytical tool. Some of them spring up directly from our material, such as family, conjugal

5 To do so, we used ATLAS.Ti, a software used for the qualitative analysis of large data sets, whether textual, graphic, or audiovisual. For this work, it was used to scan eleven written documents, totaling hundreds of pages, as well as audiovisual material. The use of the software proved to be useful mainly because it was an analysis carried out by a large and multidisciplinary team, and because it organized the data by the density of its occurrence, allowing its crossing according to the convenience and objective of the research.

relationships, and human rights. Other codes, such as history and natural law, were created intentionally to capture the temporal dimension that we deemed central in the Justices' and others' narratives. The natural law code covers what actors refer to as existing outside or beyond the changing human time that we call history.

On the other hand, by privileging the "history" code, we aim to highlight the Justices' perceptions of the social process in which they participate and decide. To do that, we analyze how they justify their understanding. We will demonstrate that, when publicly articulating their reasoning for decisions, Justices interpret the Constitution creatively. In fact, they are authorized to do so by the Constitution itself. The Supreme Federal Court's case analyzed in this chapter demonstrates that justices utilize this leeway while mitigating the risk of their actions being seen as a breach of social order.

In our analysis, we applied the history code to collect actors' references to the past or the future. It is evident in our material that there is a pattern of enunciation in which the history of law, family, and humanity is recurrently told. As mentioned, we also analyzed videos of the judgment available on YouTube as some Justices preferred not to read their written statements or reproduce their oral statements in text form. Thus, bringing their oral interventions recorded on video bolsters our proposal to interpret the Supreme Federal Court's statements as communicational acts.

The following section contextualizes what was at stake in the Supreme Federal Court 2011 judgment. In Section 2.3.1, we examine how to name same-sex relationships as one of the most fundamental aspects of the debate among the Justices. Next, Section 2.3.2. analyzes a mediated interaction between the Office of the Prosecutor General and the legal representative of the National Conference of Brazilian Bishops (CNBB in Portuguese), an institution that brings together the Roman Catholic episcopate operating in the country. The CNBB was invited to participate in the decision-making process, providing information, expertise, and insights into the judging body. By analyzing the interaction between the Attorney General's Office and the CNBB, the chapter shows how the Justices, lawyers, and the Attorney General's Office interact with different images of social life. Finally, Section 2.3.3 explores how the Justices read their written statements in the judgment sessions.

As we organized this part of the chapter, we consideredthree recurrent narratives in the actors' speech, which seemed to us to be connected to the history code. These are (2.3.3.1) the actor's perception of change (of the world and the law); (2.3.3.2 their sense of the Court's role in history; (2.3.3.3) history apprehended by them as teleology.

2.3 The debate

2.3.1 Naming: homoaffective civil partnership or civil homoaffective partnership?

In the 2011 judgment, the Supreme Federal Court was asked whether the definition of the Civil Code was compatible with the constitutional premise according to which "a civil partnership between the man and the woman is recognized as a family unit" (art. 226, para. 3). The question brought to the Court was not if same-sex couples had a right to marry, or if the State ensured the recognition of an equal right to marry vis-à-vis heterosexual couples. Nor was it whether churches should be required to marry same-sex couples, as other chapters in this book address.

In Brazil, the Supreme Federal Court was called upon to decide upon the validity of the Civil Code norm regulating heterosexual civil partnerships, as the Brazilian Constitution refers to "*the* man and *the* woman," whereas the Civil Code refers to "*a* man and *a* woman." The fundamental question, therefore, was whether same-sex relationships should be excluded from legal recognition and the protection granted to public, enduring relations between a man and a woman. Until 2011, same-sex couples had been denied access to the civil registry of their relationships based on a literal interpretation of the civil partnership norm in the Civil Code. The Brazilian question then was: is this interpretation of the Civil Code compatible with the Constitution considering not only its letter, but also its fundamentals?

A particularly challenging element in this debate was that the Constitution determines civil registry to convert civil partnership into marriage (art. 226, para. 3). Justices Ricardo Lewandowski, Gilmar Mendes, and Cézar Peluso accorded same-sex couples the same legal status of the heterosexual civil partnership but were explicit that the Court should later discuss same-sex couples' access to marriage. They argued that a same-sex civil partnership was equivalent to a heterosexual civil partnership, but the "situations" were different (Cézar Peluso). Justice Lewandowski outlines a categorical approach to this difference by arguing that 'homoaffective union' is not admitted in view of the literality of the Constitution and the Civil Code texts, but the Court could constitutionally operate with the category "same-sex partnership" as a fourth way of forming a family, alongside marriage, heterosexual partnership, and single parenthood.

The dissenting Justices lost. The court's majority decided that same-sex relationships and heterosexual ones were similar "situations", so it was only logical that the legal regime applicable to heterosexual civil partnerships should also be applied to 'homoaffective unions.' The concurring Justices agreed that there

was a gap in the legal order and that the Court should overcome it by analogy. The majority, in turn, understood that the "situations" were similar and deserved equal treatment. Underlying the technical-legal discussion about how to label the situation is thus the question of how different same-sex and heterosexual civil partnerships were and how distinct their treatment should be, if there should be any differences at all.

The proposal of the minority would have ensured same-sex couples the same rights that heterosexual couples had in a civil partnership had except for marriage. As their proposal did not obtain the support of the majority, same-sex couples ultimately gained a clear path to marriage after the 2011 decision. Following the Supreme Federal Court's judgment, which was issued in May 2011, a dozen couples had registered in celebration of their newly acquired right to official recognition of their civil partnership with rituals of a religious wedding. Christian and Afro-Brazilian religious leaders joined a notary at the *Centro Acadêmico XI de Agosto* – a student representative organization at the University of São Paulo (USP) Law School – to formalize the same-sex union of those couples free of charge, in a wedding ceremony in the Great Hall of USP Law School.

A traditional ceremony was staged at USP Law School, and in the days following its celebration, the so-called "collective gay marriage" made headlines on main media outlets in Brazil. One of the religious leaders officiating at the celebration, Pastor Cristiano Valério, from the *Igreja da Comunidade Metropolitana* (Metropolitan Community Church), would clarify to the press that "gay marriages" had been celebrated for a long time, but had no legal validity and the decision of the Supreme Federal Court gave these relationships legal shape. The ceremony and the words of the pastor who accompanied it show that the actors had appropriated the judicial declaration of a right, i. e., the regulation of same-sex civil partnerships to create a scene of marriage in its churchly form and label it as such. The law had created the occasion for a public enactment of spiritual union, while the ceremonial rites, which comprise the religious convention, gave material form to the religious marriage – thus carrying out a sacralization not through theological content, but through publicly recognizable ritualized forms that function as indexes of social value.

2.3.2 Nature: An imagined audience and its effects on language

In Brazil, Christian religious organizations had been the main forces blocking the access of same-sex couples to marriage. In the *Homoaffective Unions* case, it was no different. However, this does not mean that religious actors spoke in explicit religious or moral terms in court. On the contrary, the representative of the *am-*

icus curiae,[6] the National Conference of Bishops of Brazil (CNBB) argued that recognizing same-sex partnership based on an extensive interpretation of article 226, para. 3 of the Constitution, amounted to a violation of the constitutional role assigned to the Supreme Federal Court. Although our analysis focuses on the Justices, the interaction between the CNBB lawyer and the Office of the Prosecutor General's petition helps illustrate what we mean when we discuss law and religion as forms of public language. It also highlights the significance of the actors' institutional positions within a complex web of argumentation.

The performance of the *amici curiae* and thus of the CNBB legal representative is informed by their role to make visible to their audience the interests of the party they represent in the matter under discussion. His task is to legally present the party's position on the legitimacy and validity of the request, and to convince the Justices to adopt CNBB's interpretation of the law. To persuade them, the attorney invests in communicating effectively.

But what constitutes effective communication in this context? It means delivering a speech that is both appropriate and persuasive to the court, which consists of the physically present audience in the courtroom. Given the constitutional status and pervasiveness of the principle of separation between church and state in Brazil, his main challenge is to frame his argument in legal terms recognizable within the context of the court. The CNBB legal representative challenges his audience by evoking some of these standards and common sense:

> Your Honor, President of this Court, Your Honor the Rapporteur, Your Honor the Justices, and others present. I will begin with a simple yet emblematic phrase: plurality has its limits. Additionally, it has limitations for several reasons. It has limits, Excellencies, to the extent that we have decided to contract socially around a Charter with clear political content, which establishes and deliberates upon mutual rights and duties, allowing us to live together. We know, therefore, that we submit to some demands, in short, to these limits, which I referred to when I said that plurality has limits. I don't see any risk of developing a prejudiced attitude. In fact, the word "prejudice" was mentioned here several times. From now on, I say that it was quoted in a way that is at least incomplete, not to mention fallacious. Polygamous? Incestuous? Rejoice! Here is an excellent argument to justify their behavior (CNBB —*amicus curiae*).

With these words, the CNBB lawyer reaffirms the principles of plurality and nondiscrimination, which are enshrined in the preamble of the Constitution. He refutes what he sees as prejudice against CNBB for its position against the legal

6 The *amicus curiae*, or friend of the court, is a legal figure created by Brazilian law that guarantees the participation of civil society entities or public bodies in judicial proceedings. Participation occurs in controversial matters or in those requiring technical knowledge.

recognition of same-sex unions. At the same time, he invokes polygamy and incest to suggest that the recognition of homosexuality falls outside universally accepted boundaries of plurality. For this rhetorical move to work the prohibitions of polygamy and incest cannot evoke religion, they cannot appear as religious limits, but as natural interdicts to be respected regardless of religion. The CNBB's legal representative equates the legal recognition of same-sex relationships with legally prohibited forms such as polygamy and incest. By legally indexing these two figures drawn from Christian frameworks, he juxtaposes same-sex relationships with the images of disorder by those two constructs.

On the other hand, the CNBB attorney doesn't bring before the Court arguments "of a religious or philosophical nature." He ironically remarks that he can imagine the frustration of those who assumed he would speak religiously for being the legal representative of a religious institution.

> Most of the opposing arguments heavily criticized the religious issue, as if religion were the support, the ballast of everything that I defend here in the name of the National Conference of Bishops of Brazil. (...) Incidentally, philosophy and metaphysics are also religion. There is a whole doctrine that finds in natural law a basis for justifying same-sex civil partnerships. I can tell you right now that the Catechism of the Church also recognizes this, seeing in this type of behavior something that must be fought. (...) So, metaphysical discourse for metaphysical discourse we have what we want. Natural law admits anything. It so happens that this attempt to shift the discussion from the scope of natural law to metaphysical discourse represents a misguided shift in argumentative grounds. In fact, it is malicious, because we have here a legal, dogmatic discussion of positive law (CNBB—*amicus curiae*).

The CNBB's legal representative thus reiterates that the foundation of his arguments is not religion. In a surprising rhetorical turn, he argues, moreover, that the Office of Prosecutor General employs the language of natural law. According to him, the Office of the Prosecutor General's interpretation of constitutionalized human rights, such as equality, freedom, and non-discrimination, would be metaphysical, i. e., inscribed in a non-human, unchanging, or eternal time.

To draw the boundaries that relate to, yet also separate, natural and positive law, the CNBB's legal representative applies what is technically known as a grammatical interpretation of the constitutional norm. As we mentioned previously, the Constitution, the Civil Code, and International Human Rights Law refer to "man and woman." Therefore, from the language of these legal texts, he concludes that his position is in line with the law. He then compares the case before the Supreme Federal Court with decisions from other countries, particularly one taken

by the Conseil d'État,[7] France, which had just ruled on the constitutionality of the Universal Declaration of the Rights of Man and the Citizen of 1789.

The two quotations above provide hints about how the attorney's perception of the audience, especially the Justices, influences his approach to the case.

2.3.3 History, judicial way of use.

2.3.3.1 Changes in the legal conception of family

From the first to the last vote, the Justices in the *Homoaffective Unions* case (*Uniões homoafetivas*) made it clear that the 1988 Constitution is part of a process of change concerning gender relations and family life. They emphasized the importance of being aware of this process of social change and its impact on family life throughout the 20th century, in Brazil and beyond.

So, the Justices take turns unfolding the process that they frame as "evolutionary". They present their decision as part of a broader process of "progressive change". Such a process encompasses several stages. The Justices enumerate the transitions from one stage to the next in a chronographic manner, using constitutional, infra-constitutional, sociological, and linguistic changes concerning the family, gender relations, and same-sex relationships in Brazil as markers of historical progression:

> The situation changed gradually. First, with the enactment of Law nº 4.121/62—Statute of the Married Woman, which attributed *de facto* capacity to women, also allowing them to manage reserve assets. Later, divorce, implemented by Constitutional Amendment No. 9/77 and Law No. 6,515/77, definitively changed the concept of family, recognizing the dissolution of the marital bond and the formation of new families. The evolutionary process reached its apex in the promulgation of the 1988 Charter. The 1988 Constitution marks the turning point: before that, the family was solely matrimonial, and with it came democratization—the legal recognition of other family forms. (Marco Aurelio).

Thus, the Justices relate different categories, such as divorce, family, marital bond, and matrimony to legal regulations. This allows for a glimpse into the normative and sociological framework on which their decision falls. In attempting to explain why they see the Constitution as the "apex of the evolutionary process", they reveal a first dimension of what we call the "history code". This dimension concerns what the Justices perceive as a linear and gradually emancipatory change in legal

7 The *Conseil d'état* is part of the triad of superior jurisdiction in France, alongside the *Conseil Constitutionnel* and the *Cour de Cassation.* Its nature is both administrative justice, as the highest administrative court, and advisory, assisting the French state in formulating laws and decrees.

norms that comprises the relative importance of women in marriage and the redefinition of the very concept of family by the dissolution of the marriage bond. The 1988 Constitution appears as a milestone from which other family formats besides the matrimonial could be recognized.

The way the Justices speak highlights how the subject touches social sensibilities. Analyzing how their imagination worked through their use of language helps us to perceive that the legal recognition of same-sex relationships appears as "a natural consequence" of what is already present in the Constitution: a logical corollary instead of an interpretation of the Court, as in one passage of Justice Fux's speech. In this segment of text, Fux portrays the court's decision as if it were automatic, that is, as if it didn't comprise acts of choice and understanding with effects on social life:

> In addition, if we analyze it historically, the gradation was practically the same as the emancipatory achievement of women and now this emancipatory achievement of same-sex civil partnership, as a natural consequence of what is explicit, of course, it would even deserve a literal interpretation of the constitutional text. If that were not enough, the Supreme Federal Court, in this matter, would not set any notable milestone to rewrite the history of minority protection in Brazil. (Luiz Fux).[8]

As shown above, the history of emancipation is recounted in court through legal landmarks. In this courtroom-crafted history, the regulation of same-sex relationships emerges as an "emancipatory achievement" comparable to the legal and social emancipation of women. This is a fundamental move because it is this conceptualization of emancipation that makes the comparison between women and people in same-sex relationships work in the reasoning. This comparison, in turn, sheds light on how heterosexuality anchors what the Justices imagine to be a conventional notion of family.

Despite their written and spoken words, the Justices assume that their decision contributes to making the form "same-sex spouses" socially imaginable and achievable. This assumption informs their use of the category 'homoaffective' to name same-sex relationships—a term barely known outside the legal circles at the time, but nowadays widely used in Brazil, including outside legal spheres. Even while denying their role in reframing issues related to sexuality, their reading of the Constitution is morally oriented. For them, the text holds an emancipatory potential, so their interpretation merely extends to cover an aspect of social

8 In this case specifically, it is a manifestation of Justice Luiz Fux. Supreme Federal Court Plenary – Supreme Federal Court recognizes homoaffective unions. Youtube. 42 min. Available at <https://www.youtube.com/watch?v=cQf8srquCWw&list=PL3QmGlKtQQAgtbtwBpwJ54HzfyH2sQY94&index=64> (last accessed on 14/5/2022).

life that it had not reached yet. To extend constitutional protections to this previously uncovered aspect of social life, the Justices have reconstructed the legal concept of civil partnership to prioritize affection over sexual differences and practices.

Justices emphasize that change occurs gradually, without dramatic leaps or ruptures. Like the "achievement of women", that of "homosexuals" has been "gradual" and the decision sets an understated but significant milestone in history. If there had been a leap, it happened earlier:

> [If] the essential note of family entities in the new paradigm introduced by the Constitution of 1988 is the **appreciation of affection**, there is no reason to exclude homosexual partners, which can be characterized by the same **communion and depth of feelings** present in civil relationships between people of opposite sexes, which are now widely recognized and protected by the legal system. (Celso de Mello, emphasis in the original).

As seen above, the rupture has been the Constitution itself, which replaced patrimony with the intention to form a family as the central paradigm. This intent allegedly gained shape in the stability of bonds, as opposed to the previous paradigm, which was rooted in historical ties to the Christian concept of matrimony as the sole means of forming a family. Due in part to these ties, marriage has often been viewed as a patrimonial contract religiously sanctioned, and Brazilian society has regarded it as particularly suited to sustaining the Christian ideal of indissoluble family bonds through material means.

Through historical narratives of law and family life in Brazil, the actors illustrate how semiotic changes, that is, changes in lexicon, syntax, and pragmatics have influenced the regulation of same-sex relationships. The element of 'affection' enables the Justices to articulate and apply the principle of equality in their reasoning. In their statements, this value distinguishes the 1988 Constitution and has had a strong impact on the Civil Code. Justice Marco Aurélio Mello shares his perception of how the emergence of equality in the 1980s constitutional order impacted Civil law:

> Civil law is possibly the branch of legal science most affected by including the principle of human dignity as the foundation of the Republic, as it directly reflects the customs and values of society, which is why the Civil Code is so often labeled as "the Constitution of the common man".
>
> Civil law, we know, was restricted to "having". The owner of the property was the great addressee of the norms of Civil law, and the property was the right par excellence. Family law derived from the Bevilácqua Code [i. e., the 1916 Brazilian Civil Code] concerned property issues.

> Civil law, in the expression used by Luiz Edson Fachin, underwent a "Copernican turn", was constitutionalized and, consequently, disconnected from patrimonial concerns and oriented toward social values. Property and the owner lost their central role in this branch of legal science, giving the main place to the person. It is the right of "being", of personality, of existence. (Marco Aurelio).

As the excerpt above shows, Justices frame the constitutional paradigm shift underwent a "Copernican turn" in the history of Civil Law and attributes it to the concept of human dignity, inscribed as one of the fundamental principles of the 1988 Constitution in Article One. Though the previous Constitution mentioned human dignity, it was only with the 1988 Constitution that the actors morphed it into a pre-legal norm, or, in the words of CNBB's legal representative, into natural law. From the Justices' viewpoint, the 1988 Constitution provided leeway for syntactic operations when interpreting old rules in light of new ones. They believed that these legal reasoning operations altered the meaning and practical application of Civil Law while keeping its grammar unchanged.

The Justices state that what they saw as a profound change in Brazilian society's values altered the legal protection of marriage. For example, according to Justice Marco Aurélio, family law was primarily geared towards safeguarding property until the 1988 Constitution shifted its focus to the protection of the "human person". To the Justices, the priority of the person over property and the central position it assumes in Civil Law transforms the family into a space for the development of the personality of its members. This has become its "natural vocation":

> This gives rise to a clear understanding that the family is, by nature or in terms of facts, vocationally loving, parental, and protective of its members, and is constituted, in the ideal space of the most lasting, affective, supportive, or spiritualized human relationships of a private nature. This qualifies it as the basis of society because society also longs to be civil, affective, solidary, and spiritually structured (it is not for any other reason that Rui Barbosa defined the family as "the extended homeland"). This ultimately leads to the achievement of a superior form of collective life, as it is particularly inclined towards the spiritual growth of its respective members. Human members in a concrete state of the communion of interests, values, and awareness of sharing the same historical destiny. Therefore, community life is understood as coming from "common unity". (Ayres Britto).

As the excerpt shows, the "natural vocation" of the family is to function as a "loving, parental and protective" space, in which "stable and lasting" bonds are formed. He argues that, for this reason, the 1988 Constitution enshrines the family

as the "base of society"[9]. Vested with this new meaning, the familial, "lasting bonds" is no longer necessarily tied to marriage anymore, which allows for a higher form of collective life, oriented toward the spiritual growth of its respective members.

Engaging with the Constitution and the Civil Law, the Justice twists what is conventionally seen as "the legal" and "the religious" aspects of the issue. This is a crucial step that leads to the inclusion of same-sex relationships in the familial order, and to making 'the spiritual' visible. This operation challenges the assumption of secularism according to which modernity would have separated the legal and the religious spheres (Weber, 1982; Pierucci, 1998). When deciding the recognition of same-sex couples' civil partnerships, the Justices shape legal material to speak to an audience portrayed as profoundly religious.

On one hand, family comes from the written and oral statements in the case as "naturally oriented" to "loving, lasting, and stable relationships"; on the other, the Justices are aware that they are working with a new legal concept of family, which the Constitution emancipated from procreation and opened to various "forms of coexistence", as we can see in the excerpt below:

> In fact, no one can ignore – I dare say – that other forms of coexistence are emerging, among us and in different countries of the world, alongside the traditional patriarchal family, based on heritage and constituted, predominantly, for the purposes of procreation, other forms of family life, founded on affection, and in which the pursuit of happiness, well-being, respect and personal development of its members is particularly valued. (Ricardo Lewandowski).

Justice Lewandowski reinstates in this passage the quality of coexistence, based on affectionate and respectful relationships, as a value worthy of legal protection.

2.3.3.2 The law and a changing world

The Justices emphasize that the legal changes regarding sexual orientation and gender identity are taking place in response to empirical realities and evolving dynamics of social life. As the highest interpreter of Brazilian law, the Supreme Federal Court can either disregard or validate social changes by giving them legal form, that is, value in this case is an effect of the semiotic construction of something through legal repertoire. The Court's reasoning conceals the extent to which it actively participates in the changes that the Justices refer to as underway by attributing agency to society and the law itself. The law would change as society "imprinted" their values on it, either through legislation or judicial decisions.

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9 The 1988 Constitution follows in this subject the 1948 Universal Declaration and other international treaties on human rights.

The Justices state that they are deciding in a changing world and these ongoing changes have already made the law "unaligned" with the facts:

> Initially, I would like to emphasize that we are facing a situation that reveals a significant mismatch between the world of facts and the universe of Law. We are visibly confronted here with a situation in which the law has not been able to keep up with the profound and structural social changes, not only among us Brazilians but on a global scale. (Joaquim Barbosa).

In this context, the Justices envision a specific role for the court. Quoting the former Chief Justice of Israel Aaron Barak, Justice Joaquim Barbosa writes:

> It is precisely in these situations that the role of the Constitutional Courts grows, according to the well-known Israeli jurist and thinker Aaron Barak. Barak said that the Supreme and Constitutional Courts must bridge the gap between the world of Law and Society, that is they must do what he himself qualifies as BRIDGING THE GAP BETWEEN LAW AND SOCIETY. (Joaquim Barbosa, emphasis in the original).

"Bridging the gap" is about connecting what would otherwise remain separate, creating conditions for the transition from one point to another and the transformation that occurs when these elements come into contact. Acting as a bridge entails aligning legal norms with evolving social realities. It does not mean that the law will change as intensively and rapidly as society, but it does mean that there is a path to change. As Justice Joaquim Barbosa points out in the above excerpt, if the facts change, the law must follow.

The Justices concede that social change can also take place through legislation. Some Justices recognize that for over a decade, the National Congress has discussed several bills aligning the 1988 Constitution with Civil law on same-sex civil partnerships. They pondered, however, that, despite such proposals, the Legislative branch had not been able to deliberate and decide on the subject. The Justices speak of "anomie" and a "gap" in the system, given that same-sex couples have already formed families and these are growingly accepted. As shown below, the Supreme Federal Court feels compelled to fill the gap separating law from same-sex "loving, enduring, and stable" relationships, a gap that legislative inaction continues to widen. According to the Justices, the Court must act to align the law with the evolving recognition of same-sex unions:

> This Court can, here and now, establish a historical position and make it public and cogent that the State will not be indifferent to discrimination due to the sexual orientation of each one; on the contrary, it will serve as the primary and most forceful opponent of prejudice against homosexuals in any of their forms. (Luiz Fux).

In the passage above, equality is reframed as nondiscrimination, which has been a privileged form assumed by equality since the Cold War (Moyn, 2019). By declaring that the Court "can establish a historical position" and "make it public and cogent that the State will not be indifferent to discrimination", Justice Fux reveals how he sees his role vis-à-vis social change and the Federal Supreme Court's capacity to head the State towards nondiscrimination. The law, whether crafted by the Legislative or the Judiciary, is portrayed as a driving force behind the transition to the State being committed to taking all necessary measures in the present to become an "opponent of prejudice against homosexuals in any of their forms" in the future.

There it is, then, a second aspect of the "history" code that merits attention: law as an "engine for a perfected state". The "anti-discriminatory" state is not existent yet, at least not entirely: it has been crafted and perfected in the process of deciding on the same-sex union. The court is making it in the present, in the "here and now" in which the Justices can "establish a position". For these and other reasons, the Justices acknowledge their role in shaping history through their decision on same-sex civil partnerships, as well as the lasting impact it may have in shaping the future.

The Justices acknowledge that their contribution to future forming is a "creative interpretation" of the law. Acknowledging the potential for judicial innovation to erode the Court's authority and legitimacy, actors strive to demonstrate that the "creative interpretation" they enact falls within the bounds of the law. In an illustrative speech, Justice Lewandowski explains what he understands to be Justices' role in relation to social change:

> Indeed, the Judiciary is no longer a mere *bouche de la loi*, uncritical and mechanical, as the liberal thinkers of the 18th century wanted. Rather, it admitted a certain creativity of Justices in the process of interpreting the law, especially when they are faced with gaps in the legal system. It cannot be forgotten, however, that the exegetical performance of the magistrates ceases in the face of the objective limits of the established law. (Ricardo Lewandowski).

The Justice affirms the previously regulated character of his productive activity by reiterating that the validity of the uses of his "creativity in the process of interpreting the law" depends on exercising it within the law itself. In other words, he understands that the Court can read the law critically and, depending on this critical reading, it can also interpret it creatively, as in the case of a "gap." Justice Lewandowski views the law as a language that can be used to shape the world. In practice, law is as malleable as any semiotic form, but Lewandowski reminds his peers and his audience that the Justices find some "objective limits" to their freedom to use this language in creative ways. According to Lewandowski, these "objective limits" are the rules of legal grammar.

To provide a clearer understanding of these limits, Justice Lewandowski revisits the debates concerning Article 226, §3, in the Constituent Assembly. He recalls that the first wording of the article spoke of a "family unit formed by a man and a woman", which "encouraged homosexuals" to advance his interests. A constituent, however, took notice of the buzz and renegotiated the text to restrict the status of civil partnership only to public, lasting relationships, aiming to constitute heterosexual families. The method found for this restriction involved inserting the articles "o" and "a" (denoting masculine and feminine in Portuguese), so the provision would read "the man and the woman". With this digression, the Justice shows how the social meaning of family and homosexuality in Brazil during the 1980s informed the construction of the grammatical dimension of law in the period.

Although they frequently acknowledge shifting societal views on homosexuality, the Justices imagine that the matter remains sensitive in Brazilian society, given how enduring the association between marriage, family, and heterosexuality has been, as in the excerpt below:

> From the beginning, a review of the notion of family needs to be made sheltered in the Constitutions prior to the one currently in force, noting, from the outset, that all that dealt with the subject linked the idea of family to the institute of marriage. Otherwise, let's see:
>
> i) Constitution of 1937: "Art. 124. The family, constituted by indissoluble marriage, is under the special protection of the State. Large families will receive compensation in proportion to their burdens."
>
> ii) Constitution of 1946: "Art. 163. The marriage of an indissoluble bond constitutes the family and will have the right to special protection from the State."
>
> iii) Constitution of 1967: "Art. 167. The family is constituted by marriage and will be entitled to the protection of public powers.
>
> iv) Constitutional Amendment 1/1969: "Art. 175. The family is constituted by marriage and shall be entitled to the protection of public powers."
>
> The current Republican Charter, however, does not establish this link with marriage to define the concept of family as the previous ones did. (Ricardo Lewandowski)

The brief courtroom historical review above shows that the 1988 Constitution disentangles marriage and family which had remained tied throughout the entire republican period of Brazilian history. From the proclamation of the Republic, in 1889, until the enactment of the 1988 Constitution, the association between family and marriage was taken as self-evident and, in this sense, "natural". However, the chronology that the Justices propose highlights the significant transformation of the family in which the Court's decision participates. It not only acknowledges multiple legally valid ways of forming a family but also impacts how kinship is

perceived. This is because the traditional notion of kinship based solely on the biological reproduction of men and women is no longer the exclusive standard.

Despite this, Justices remain silent about the impacts of their decision, specifically on social perceptions of parenthood. This muteness has a discursive effect, making same-sex and heterosexual relationships equivalent. It also makes any incompatibility between the existing constitutional order and the proposed regulation invisible:

> I understand that same-sex unions that are projected in time and bear the mark of publicity, insofar as they constitute a datum of the phenomenal reality and, are not prohibited by the legal system, must be recognized by the Law, because, as the Roman jurisconsults already used to say, *ex facto oritur jus.* (Ricardo Lewandowski).

As we read in this passage, the Justices acknowledge the necessity for the law to adapt to changing realities. Their concern lies in how to do it. As briefly mentioned earlier in this chapter, a slight divergence arises regarding the legal form that same-sex relationships would take. The majority vote for equating same-sex relationships to heterosexual ones if "they are projected in time and bear the mark of publicity". In turn, minorities would instead grant rights without equating same-sex and heterosexual bonds, even if giving them the same name. Speaking for the concurring minority, Justice Lewandowski argues that:

> [In] the case under examination, I believe that the constitutional norm, which resulted from the debates of the Constituent Assembly, is clear in expressing, in black and white, that a civil partnership can only occur between a man and a woman, considering its potential to be converted into marriage. (Ricardo Lewandwoski).

To Justice Lewandowski, the "legislator's intention" is another "objective limit" to judicial creativity, alongside the constitutional text. Both semiotic artifacts crafted through interpretation enable the Justices to connect legal grammar to perceptions and understandings that they imagine have endured since the enactment of the regulation. These artifacts help the Justices carve out space to address the new indexation of homosexuality in contemporary Brazil – a process that also entails semantic shifts as new indexations generate new meanings.

Regarding same-sex relationships, their recognition as civil partnerships would open the possibility of their conversion into marriage. Justice Lewandowski draws attention to this effect of the course taken by the court. He tries to block it by arguing that the most appropriate way to fill the "gap" between the legislator's intention and the letter of the law would be to "integrate" the legal order "by analogy." This way, he says, the Court would not be including same-sex relationships in the "civil union" but acknowledging a fourth way of forming a family.

The proposed additional way of forming a family, as we know from previous sections, was unsuccessful. The majority decided to "equate" same-sex loving, enduring, and stable relationships with heterosexual ones. To support this claim, the Justices needed to shift the focus from the possibility of converting the civil partnership into marriage to requalify the importance of the family. Considering that the legal institution of civil partnership had access to the family regardless of marriage, the syntagmatic operation could be carried out without much ado. It was now necessary to qualify the nature of the relationships of this form of union where sexual reproduction is not a factor. This was achieved by advancing the idea of affection as a determining factor in what constitutes a suitable legal form, such as a "civil union".

If this decision did not sanction a "fourth gender" of family, it enshrined something new, which deserved a new name, 'homoaffective union'. This is the name of the "bridge" that the Supreme Federal Court built to facilitate exchange or communication between the "legal world" and the "social world" regarding erotic-affective relationships between same sex people. Through this artifact, new names began to circulate more frequently in Brazilian society. In addition to 'same-sex marriage union', individuals used 'homoaffectiveness', the 'homoaffective person' and, most importantly, 'homoaffective marriage', which changed the axis of differentiation of relationships for legal purposes from sexual difference between the partners to their affection toward each other.

2.3.3.3 History as teleology

As the uses of history change, so does the way the Justices present what they themselves see as a "creative interpretation" of law. For the Court's majority, their interpretation would unfold the ultimate end informing legal order. Their role would be to actualize this ultimate and concealed end to reality by developing law accordingly. In their understanding, when they do this, they participate in a "historical process" in which the Judiciary is already immersed:

> [The] teleological element of constitutional interpretation is also not compatible with the reading of art. 226, § 3, of the Constitution, according to which the precept, if read *a contrario sensu*, would imply a constitutional ban on same-sex unions. In fact, the precept was inserted in the constitutional text in an effort to protect the partners of non-married unions, crowning a historical process that began in civil jurisprudence, and which turned to social inclusion and overcoming prejudice. Therefore, it is nonsense to interpret this constitutional provision, which is intended for "inclusion", as a social exclusion clause, which has the effect of discriminating against homosexuals. (Celso de Mello).

The Justices assume that a "teleological element" is embedded in law. This element is, more specifically, the inclusion of every "human person" in the legal order,

which drives the Justices to reconstruct the legal concept of civil partnership to cover unmarried same-sex couples. Justice Celso de Mello portrays it as the crowning of a historical process. This is precisely what the Justices have described as a sequence of decisions staggered in time, which are presented as sequential developments leading society toward greater equality.

When enumerating the legislative production on family life, the Justices display the changes as if they had happened in a linear time: first, women was equated with the men within marriage, then the concubine was equated with the married woman, later, children born within the wedlock were equated with "bastard children". So, the Justices' historical narrative goes in an upward spiral of emancipation toward equality. In this last analytical section, we try to show how, from their point of view, this spiral connects family and homosexuality.

To illustrate, we can take the General Prosecutor's position in the matter. As "representative of the interests of society" in the case, she states that:

> [There is] no doubt that the constitutional order protects the family, but this does not mean that it has placed it in a legal box, sheltering it in the face of liberal and egalitarian trends that are taking shape in contemporary society, which includes the gay rights movement. On the contrary, the Constitution of 88 established a new paradigm for the family, based on affection and equality. (Deborah Duprat).

By disconnecting the concept of family from reproductive functions and repositioning it in the field of affective relationships, this narrative allows for the overcoming of the opposition present in the previous paradigm. Imagining the family as a relationship based on affection broadens its scope by decentering gender.

The Justices' perception that equality is the driving force of human time appears to shape their view of history as a changing continuum. This view allows them to describe their ruling as a milestone in the legal definition of the family, while not framing it as a groundbreaking moment. Yet, contrary to the Justices, the Prosecutor frames the decision as a turning point away from the traditional family model, rooted in sexual hierarchy, where homosexuality is marginalized:

> In relation to the family, it must be borne in mind that its traditional, patriarchal, and hierarchical model is currently undergoing a profound crisis, caused by several factors, in particular the progressive emancipation of women. That ancient family model, with rigidly defined roles – the male head of the family and "provider"; the submissive woman confined to the domestic sphere; the obedient and voiceless children – is not the object of constitutional protection, because on this point, as in so many others, the constituent wanted to introduce changes aimed at making traditional legal institutes compatible with the democratic and egalitarian values underlying the Charter of 1988. (Deborah Duprat).

In the excerpt from the Prosecutor piece, we can notice a normative view of both the present and the past. She states that the traditional family model is not compatible with the constitutional protection of the family due to its roots in a sexual hierarchy, whereas the 1988 Constitution would have rooted the reproduction of order in expanding equality between men and women. An anti-patriarchalism underlies her piece.

For the Prosecutor and the Justices, time moves forward in a linear fashion acknowledged and addressed. But the Prosecutor assumes this applies mostly to post-1988 history, which means that in the present we are at a more egalitarian point than we were in the past. However, the substance of the present time in her speech is rarefied. Like the Justices, the Prosecutor characterizes the present as one of inequality and marginalization, and it serves only as a "bridge" to the egalitarian society being built through the judicial decision on same-sex civil partnerships. As the quotation from the Prosecutor's piece reads, this egalitarian society, which rejects the prioritization of differences, is "underlying the Charter of '88".

The Prosecutor's assessment of it challenges the idea of teleology underlying the Justices' shared perception of history. We understand that, to some extent, this difference is related to the constraints that bind the judicial and prosecutorial activities. The Prosecutor is not bound by the constraints of sobriety and impartiality, like the Justices. On the contrary, it is more strictly bound by the Office's self-perception and social reputation as a progressive interpreter of human rights. Therefore, the Office's authority remains intact when she characterizes the traditional model as "obsolete and archaic." While for the Justices, the 1988 Constitution is the apex of the evolutionary process, they refrain from evaluating the past as something worth preserving or redeeming. The Prosecutor portrays the past as "ancient" and as something to be left behind, while the Justices aim to make old forms and artifacts from the past "compatible with egalitarian values".

In the history reconstructed in court, the decision on same-sex civil partnership only represents a milestone because, as Justice Fux states below, what truly represented the paradigm shift was the Constitution:

> If law and, above all, the Constitution derive their efficacy from the concrete facts of life, then legal interpretation cannot disregard them altogether. (...) In other words, a change in factual circumstances may – or should – prompt changes in constitutional interpretation. At the same time, the meaning of the legal proposition sets the limits of interpretation and, consequently, the limits of any normative mutation. (Luis Fux).

By attempting to account for their perception of history and their role in shaping it, the Justices reveal a third dimension of what we have coded as "history" – its telos, the ultimate end that unfolds over time. The history the Justices tell leaves

no doubt that they understand the relations between genders, law, and the family being changed by virtue of that ultimate, egalitarian end. They tell a tale of the steady progress concerning gender and family relations in Brazilian society while reading in the course of time the very egalitarian end (*telos*) that they assert to inform it. We look at these as serial epistemic operations that assume a discursive form when the actors present the historical treatment of sexual minorities in Brazil as a "natural result" and a development implicit in the constitutional text.

A passage recovered from Judge Fux's oral statement provides some clues to help us understand the role that the religious repertoire plays in removing the egalitarian telos inherent in the history of human time:

> The Brazilian Federal Constitution, which is of unparalleled beauty, highlights in its preamble that, as an ideal of our nation and a constitutional promise, Brazil, under the inspiration of God, proposes to build a plural and just society, without prejudice. (Luis Fux).

The formula "inspiration of God" is inscribed in the preamble of the Constitution and is emphasized with a raised tone and finger by Justice Fux. In his use of that familiar and respectful image, he prepares his audience for the change Justices are promoting when acknowledging rights to minorities. This formula makes both the preamble's lines and the emancipatory history of law compatible. The Justices shape the law to create this new form of 'marriage' (i. e. same-sex civil partnerships). They name the newborn piece of judicial art as 'homoaffective union.' With this semiotic operation, the Justices infused the constitutional text with a renewed sense of sacredness and vitality, thus shaping the law's rhetoric to promote emancipation legitimately.

2.4 Final remarks

In this chapter, we analyzed how the Supreme Federal Court Justices employed different types of historical narratives to justify a decision that legally indexes same-sex conjugality to marriage. This understanding on the part of the Justices is a crucial moment in the process of de-sacramentalization of marriage in Brazil.

Our analysis begins with the proposition that the Prosecutor, the legal representatives of religious civil associations, and, above all, the Justices produce statements that acquire meaning not only through their content but through the way they are told to an imagined audience. This audience includes those physically present in the Supreme Federal Court's building and, first and foremost, "Brazilian society" – a collective entity that none of the actors can fully experience, yet all refer to as if it were unified and knowable. To speak to this audience, the actors

draw on legal and religious repertoires, and in doing so help redefine those forms through their use.

Our chapter demonstrates that, in publicly justifying their decision before an imagined audience, the Justices begin by narrating the evolving forms through which family has been constituted in Brazil. According to this narrative, the changes in this matter over time have reshaped the law, while the law has also brought about these changes. The legal institute of civil partnership is itself an expression of this broader social transformation, insofar as it opened space for the acknowledgment of enduring conjugal relationships. Before civil partnerships were incorporated into the legal system, marriage was the sole legally recognized means of forming a family, implying a lifelong commitment. Our chapter demonstrates that, in publicly justifying their decision, the Justices not only reproduce and naturalize religious meanings, but also reframe them. The sacredness historically attributed to matrimony has been silently incorporated into the juridical framework and transferred to civil partnerships. Thus, alongside a historical narrative of family, the Justices also traces the history of law's role as a tool of validation in a changing world.

The Justices bring these two histories, namely the evolving ways of forming families and the judiciary's role in social change, into alignment with a longer history of equality, which they equate with the history of humanity. In doing so, they construct a metanarrative that retrospectively reinterprets legal changes as part of a broader humanistic telos: a moral and historical goal of emancipation. To make sense of these processes, they offer a narrative in which history appears as a moral utopia.

What does this utopia consist of? A teleologically informed history implies that time moves toward the progressive realization of an ideal, such that the present always contains the seed of change. In this case, the ideal is emancipation, that is, an egalitarian ideal.

What matters for the Justices is the role they play in producing change. They understand that the Court cannot be revolutionary, and nor should it be. There are accepted and unacceptable ways to engage in social transformation. They imagine these modes of change, and the judgment society will pass on them, with great care. It is no coincidence, then, that they represent their role – to themselves and their audience – as merely actualizing an ideal that has already materialized in past transformations. What was latent in previous historical moments is now, through their decision, made manifest to Brazilian society. The Justices' recognition of same-sex conjugality may thus appear as a consequence of the loving, domestic homosexuality that has already taken root in social life.

The Justices openly acknowledge the practice of a "creative interpretation" of law, yet they also strive to frame it in ways that will be persuasive to the audience

they imagine addressing. The way they talk suggests they assume that homosexuality has long been associated with sin, disease, lack of control, and promiscuity. The two legal frameworks historically used to regulate it in Brazil – namely, as an "offense against nature" and as "indecent exposure" – are emblematic of how homosexuality has been indexed in the Brazilian social imaginary, which is deeply shaped by (Catholic) religion. The category of "homoaffectivity" thus emerges as a way to publicly associate homosexuality with rights, through forms of speech that circulate within institutional discourse.

In this process, "homosexual unions" take shape through twists and turns in common understandings of law and religion. The actors staging the judgment are the authorized interpreters of the linguistic forms conventionally referred to as law. In this capacity, they make law to work by interpreting their own practices and those of others for an audience they imagine including large segments of self-declared religious people. Their use of the idea for affection serves this purpose.

In our analysis, nonreligion served as a heuristic device. In the context of decentering Christianity, we approached the relationship between state institutions and social values not as a secular/religious binary, but as a field of semiotic negotiation. As a discursive category (Lee 2015, Quack 2014), nonreligion was useful to draw attention to what appears as an effect of the entanglement of narratives: "the legal", which conventionally overlaps with what is termed as secular, and "the religious", which common sense (including the legal one) considers as non-legal. What emerges is a socially recognizable and intelligible form, neither religious nor anti-religious but "nonreligion". Rather than a mere absence of religion, nonreligion refers to a recognizable form that emerges through indexical entanglements of discourses seen as secular and religious in the Justices' endeavor to lend plausibility to the familial character of same-sex relationships in a society that they mark as religious. As a discursive category, nonreligion allows us to trace how legal actors mobilize non-doctrinal moral repertoires, enlightening how the Justices render these relationships compatible with both law and "the profoundly religious society" they address.

Justices drew on a recognizable configuration of legal and religious discursive practices to evoke spiritual legitimacy without doctrinal reference. As an analytical tool, nonreligion brought to the focus of our analysis the entanglements between juridical and religious narratives when they produce the affective dimension of same-sex relations. It lets us capture this discursive twist – which incorporates same-sex relationships into the familial order – that leads legal reasoning to bring "the spiritual" (i. e., the sacred) to the forefront. The example discussed above, of emulating gay marriage through a religious-style wedding ceremony, offers a glimpse into how the sacralization of erotic-affective relationships between people of the same sex operate. According to our argument,

this form of sacralization results from the ritualization of a Catholic-like ceremony that cloaks a new legal form – the 'homoaffective union' – with the mantle of respectability. The rite prompts the audience to envision a marriage, even though, from a legal standpoint, there could be no marriage properly speaking, but rather a civil union – and the administration of the sacrament remains implausible.

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Timeline

1542: The Council of Trent defines Canon Law and establishes the indissolubility pf this contract and the monogamy of marriage
1889: Brazil becomes a republic
1916: Brazilian Civil Code is enacted
1934: According to 1934 Brazilian Constitution, marriage is indissolvable
1937: Brazil enacts Constitution of 1937
1946: Brazil enacts Constitution of 1946
1967: Brazil enacts Constitution of 1967
1976: A dictatorial government in Argentina comes to power
1977: The Divorce Law is passed
1983: The current Code of Canon Law is promulgated
1988: Brazil enacts Constitution of 1988
1988: A provision for constitutional protection of civil partnership is enshrined
2011: The Brazilian Supreme Federal Court unanimously decides to extend “homoaffective union “the legal regime that the Brazilian Constitution accords to “stable unions between man and woman” (Homoaffective Unions case)

3 (De)Imbricating state law and catholic heritage: contesting same-sex marriage in Argentina

Guadalupe Allione Riba, Juan Marco Vaggione

3.1 Introductory remarks

The legal history of marriage in Argentina has been, in many senses, a history about the place of Catholicism in society and, as such, a moment of definition of what religion is, should be, and its frontiers. The regulation of marriage has been connected, and continues to be , to the ongoing debate about the relationships between the Catholic Church and the State. In Argentina, the building of the nation state was closely related to the decision of which roles previously performed by the Catholic Church would now be performed by the state. In this sense, the celebration of marriage started a process of functional and institutional distinction, achieving a full functional separation in 1887 when the state reclaimed its monopoly over the legal recognition of marriage and subordinated religious – mainly Christian – marriage to a civil form.

However, the state monopoly over marriage as a legal institution does not necessarily mean the de-Christianization of legal normativities (Arlettaz, 2015). The cultural and political impact of the Catholic Church implied that – logically – the state sanction of the law harbored Catholic moral normativities. This "absorption" of Catholic principles as part of the state law was parallel to the functional separation between civil and religious marriages. The moment of church and state separation in marriage celebration was also a moment of imbrication of Catholic morality into state law. It can be said that when the state absorbed the regulation of marriage there was a transmutation of moral Catholic principles into national morality. To understand the impact of religion when regulating sexuality requires more than analyzing the *statalization* of marriage; it also involves considering the complex amalgamations between the Catholic, the national and the moral imprinted in state law. The legacies of Catholicism often become invisible under the cloak of the alleged objectivity and universality of legal regulations.

In certain political moments, these amalgamations are a source of dispute and what is religious, moral, natural, or normal become points of contestation. The debate over divorce, particularly leading up to its legalization in 1987, along with the more recent debate on same-sex marriage, which culminated in its legalization in

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2010, are examples of moments in which the sexual hierarchy was contested and the boundaries between the religious and the secular were renegotiated. In these moments the content of marriage as a civil institution and the limits the state should respect when legislating it became a matter of public discussion. These debates reinforce the discussion on the incomplete separation between church and state, a recurring theme in the country's history. However, something else was also debated: if the indissolubility of marriage and the complementarity of man and woman should be respected by the state or if they are inherited Catholic norms that can be dismantled. During this debate, the imbricated existence of the legal system, the amalgamation between legal, moral, and religious values, was also put into question.

The main purpose of this chapter is to analyze the parliamentary debate during which same-sex marriage was legalized in Argentina to understand it as a new and more radical phase of an older controversy: how the state should regulate sexuality, kinship, and reproduction. This debate opens to a critique of the prevailing religious influences and, as such, it is an important analytical and normative moment about what religion is and is not. Particularly, the chapter considers how the debate strains the frontiers between morality and immorality by disputing the clear lines that separate what is natural and what is historical in marriage as a legal institution.

We are interested in delving into the ways religion, nature, and history are produced as imaginaries during the parliamentary debate. Firstly, we ask how the legislators evaluate the impact of religious beliefs during the debate. One characteristic of the debate is that political parties made the decision to allow legislators to vote according to their "conscience"; this created the space to debate the role of religious beliefs as part of lawmaking processes. In this sense, freedom of conscience became a possibility, a shortcut, to include different positions about the place that religious beliefs have and/or should have during legal debates.

Secondly, we examine the way that legislators produce narratives on "nature" to justify their own positions on the proposed bill, introduced in 2010 at the National Parliament, to allow same-sex couples to marry. The debate over same-sex marriage is also a debate on the role of nature and reproduction when regulating sexuality. Previously, homosexuality had been defined and regulated as being outside of nature, as the anti-natural, due to the nonreproductive character of the sexual act. Finally, we consider how deputies and senators bring history and temporality to the legal debate to support their position. The recognition of rights for same-sex couples also implied debating the transhistorical character of the sexual order putting the invariability of morality into question.

In this sense, the debate over same-sex marriage offers a privileged moment for the observation of different constructions and representations of religion, morality, nature, and history: a moment when contested imaginaries emerge and the dynamical boundaries between religion and nonreligion are negotiated through the different uses and qualifications of these different imaginaries.

3.2 Methodological aspects

Our methodological approach aligns with the general framework outlined in the introduction to this volume. Following the shared strategy adopted by all research teams, we based our analysis on official transcripts of parliamentary debates surrounding same-sex marriage. Particularly, we coded and analyzed the transcriptions[1] of the debate and voting of the same-sex marriage bill in the Argentinian Congress. The voting in the Chamber of Deputies took place the 4th of May 2010 and 75 out of the 241 deputies present were speakers[2] during the 12-hour debate. Subsequently, the 14-hour debate on the Chamber of Senators started the 14th of July of the same year and ended during the early morning of the 15th. On this date, there were 49 speakers out of 63 senators present.

We produced 27 codes[3] that were constructed both by the themes and topics that emerged from the transcripts and by our own research objectives. For this chapter we focused on the "Historical reference/reasoning" and the "Natural reference/reasoning" codes. As expected, these codes were deeply intertwined with other codes through the legislators' discourses. In this sense, other codes such as "Marriage", "Family", "Democracy", "Self-identification", "Diversity", "Free-

1 The transcriptions of the Chamber of Deputies' debate are available at: https://www.diputados.gov.ar/diputados/fsola/discursos/debate.jsp?p=128,7,4

On the other hand, the transcriptions of the Senate's debate are available at: https://www.senado.gob.ar/parlamentario/sesiones/14-07-2010/14/downloadTac.

2 Deputies and Senators can be present in the Chambers and vote on the bill but not necessarily give a speech. By speakers, we refer to those legislators who gave a speech during the Congressional debate.

3 The codes used include: Natural reference/reasoning, Scientific reference/reasoning, Legal reference/reasoning, Religious references/reasoning, Historical reference/reasoning, Family, Marriage, Civil Union, Protection of Children, Human rights/fundamental rights, Laicité/political secularization, Social and/or cultural secularization, Common good, Shared values/culture, Common sense, Social struggles/fights, Democracy, Discrimination/right to discriminate, Freedom, Equality/inequality, Diversity, Affection/love, Moral/sexual panic, International reference, Provincial/regional reference, Self identification, National identity.

dom", "Equality", "Human/fundamental rights", and "Moral/sexual panic" are also part of the analysis presented in this chapter.

3.3 Contextualization

The legal regulations of the institution of marriage in Argentina have undergone numerous transformations since the end of the 19th century. While these reforms reaffirm the centrality of marriage in the construction of the sexual order, they also redefine the institution, distancing it from the sacrament defended by the Catholic Church. One of the most significant milestones concerning the legal regulation of marriage occurred in 1888, when civil and religious marriages were distinguished from one another. Church and state became, at least legally, autonomous regarding marriage: while the latter regulated the civil contract, the Church only concerned itself with the celebration of the religious sacrament. Therefore, since the end of the 19th century, in Argentina religious marriage has not had legal effects.

Like in many other Latin American countries,[4] the transition from Catholic marriage to civil marriage occurred in the last decades of the 19th century in the framework of the laicization processes that accompanied the consolidation of nation states (Di Stefano, 2021). As Calvo (2017) affirms, the civil marriage law approved in 1888 was the last one from a group of laws known as "laic laws", the others being the Common Education law and the Civil Register law. These laws marked key moments in which the state asserted its authority over domains previously dominated by the Catholic Church, redefining the boundaries between religious and civil institutions in Argentina. From this moment on, only civil marriages had legal effects, and religious marriages were subordinated to civil ones. Priests and religious leaders could only marry those that had already been married by the state.

As previously mentioned, this functional differentiation between church and state does not imply the de-Christianization of legal norms (Arlettaz, 2015). Calvo (2017) explains that, once established, civil marriage did not result in a rupture with the premises of the Canon Laws. On the contrary, the family model established by the Catholic Church and the values that informed it – a monogamous institution based on the complementarity between man and woman and in-

4 Other countries that established a distinction between religious and civil marriage during the 19th century in accordance with the liberal/lay laws of that time were Colombia in 1853, Mexico in 1859, Venezuela in 1873, Chile in 1884, Uruguay in 1885 and Costa Rica in 1888.

grained in an indissoluble bond – were integrated into state law. Therefore, the requirements and impediments established by the canonical law were incorporated by the Hispanic law and then to the Argentine Civil Code and became a persistent legal foundation of the legitimate family. Norms surrounding marriage, family, and reproduction expose in a singular way the mutable and porous frontiers between legal and religious normativities.

This imbrication of religious norms into legal regulation has been debated many times but two topics are crucial to consider: divorce and same-sex marriage. According to Giordano (2014), both laws were the result of women's, feminist, and LGBTQI+ movements during the previous decades. Unlike the legalization of same-sex marriage, which is a more recent demand, divorce was a historic claim. The first legislative debate for a divorce law was discussed in 1902 in the Deputies Chamber.[5] It had a wide repercussion and mobilized forces in favor, especially from socialists and liberals, and against, not only from the Catholic Church but also from various civil actors.[6] Subsequently, attempts to legalize divorce failed on several occasions. Bills were presented without success in 1922, 1929, and 1932. In 1954, the *Peronist*[7] government legalized divorce, with a strong impugnation and rejection by the Catholic hierarchy. In fact, the legal reform was the peak of a conflicted relation between *Peronism* and the Church and divorce was finally revoked by the military dictatorship that overthrew the Peronist government in 1955.

When divorce was belatedly recognized in 1987, Argentina was one of the region's few countries that maintained the indissolubility of the marriage bond.[8] According to Fabris (2008), the underlying issue was the Catholic Church's pretension of universality and the support of natural law divinely inspired. However,

5 It was not the first time that divorce appeared in the Argentinian parliament. Although : Juan Balestra was the first legislator that presented a civil marriage and divorce bill in 1888, it was discarded by the Congress.

6 Some of them were the national newspaper La Nación, the Catholic Association of Buenos Aires, the Laborer Circles of several cities of the country, such as Córdoba, Rosario and Catamarca, and the National University of Córdoba (Asquini & Núñez, 2019).

7 *Peronism* refers not only to a political party but also a national and popular, plural, heterogeneous, and transversal movement, bringing together various political parties, social movements, unions, and partisan groups. During the first Peronist governments (1946–1955), the relationship with the Catholic Church was fragmented and marked by fluctuations, with moments of collaboration and others of growing tensions that culminated in open conflict.

8 Uruguay, Costa Rica, and Venezuela are countries that legalized divorce at an early stage: 1868, 1888, and 1904 respectively. They were followed by Mexico in 1914, Bolivia in 1932, Brazil in 1977, and Peru in 1981. On the other hand, Paraguay in 1991 and Chile in 2004 were some of the latest countries to legalize divorce in the region.

the close connections between the military regime that ended in 1983 and the Catholic hierarchy opened a window of opportunity for the divorce debate once democracy was reinstituted in Argentina (Htun, 2003).

The legalization of divorce is considered as a novel articulation between rights, citizenship, and interpersonal (sexual) relations in Argentina (Pecheny 2010), before the expansion and consolidation of the sexual and reproductive rights agenda. Through these processes, which saw a deepened sense of civic engagement, personal relations became constructed in the language of rights. The list of rights considered legitimate was widened, the content and scope of rights were extended, and new subjects of rights were included. It was also a symbolic failure for the Catholic Church, as they could not stop the passing of this law, nor the democratization of social and sexual relationships. In this sense, the law not only challenged the authority of the Catholic Church, which had long positioned itself as the moral arbiter of family and sexual relations, but also signaled a broader reconfiguration of the laic-religious divide, making visible the tensions between state-driven democratization of personal life and religious claims to normative control.

Another crucial moment in this novel articulation was same-sex marriage, which targeted the hegemonic sexual order. This demand implied a debate on the moral and religious foundation of the state law. This reform sought to remove from the law the requirement of the complementarity of the sexes and the centrality of biological reproduction, which were, among other things, upheld by the Catholic Church. The same-sex marriage debate paved the way for other values and imaginaries to emerge as the primary ethical and legal justification for marriage, widening the gap between state and canonical laws.

The legalization of same-sex marriage in Argentina is directly linked to the LGBTQI+ movement. In 2002, the Autonomous City of Buenos Aires approved a civil union register that guaranteed similar treatment to same-sex and heterosexual couples for the exercise of rights, obligations, and benefits. This became the first instance of civil unions that included same-sex couples in Latin America. According to Meccia (2006), even though the recognized rights were limited, the legislative discussion and the approval of the civil union represented an important symbolic victory.

After the approval of the same-sex marriage law in Spain (2005), an event that had extensive media coverage in the country, many Argentine activists decided to refocus their lobbying around the issue of marriage rights for same-sex couples. In this context, and with the objective of gaining greater coordination in the fight and a greater social and political legitimacy, Bazán (2010) explains that the Federación Argentina LGBT (FALGBT) (Argentinian LGBT Federation) was created. This Federación is a network of organizations and activist groups, mainly from Buenos

Aires, but with representation in some other provinces like Córdoba and Santa Fe. FALGBT received increasing media coverage and was the main driving force of the reform of the Civil Code that enabled same-sex marriage. In February 2007, the FALGBT launched the campaign "Same rights, with the same name", showing its main goal: the extension of rights and obligations of civil marriage to same-sex couples.[9] The FALGBT also incorporated some progressive religious voices that challenged the conflict as one exclusively between religious and secular standpoints.

In a context of social mobilizations, vigils, and an intense legislative debate, in the dawn of the 5th of May of 2010, the Deputies Chamber approved the bill by 126 votes in favor, 110 against, and 4 abstentions. After the approval of the reform in the Chamber of Deputies, the Chamber of Senators proposed the realization of Public Audiences in different provinces of the country. These constituted intents of federalization of the debate, in which actors in favor and against provided their position on same-sex marriage (Azarian & Allione, 2022). After a long and convoluted debate, on the 15th of July of 2010 the N°26.618 Law was narrowly approved in the Chamber of Senators with 33 votes in favor, 27 against, and 3 abstentions. Up until the last moment, it was not known if the bill would be passed. Two weeks later, the Executive Power promulgated the law.[10]

Although the civil marriage, divorce, and same-sex marriage reforms respond to different historical moments and influences, their common element is the presence of Catholic hierarchy and allied actors as their principal antagonist. The 2010 reform shows that the Catholic hierarchy and actors continue to play a central role in public policies although they have changed and become more sophisticated (Jones *et al.*, 2011). The 2010 reform tells a successful story about the state's increasing capacity to regulate emotional and sexual bonds with greater independence from the Church, it also highlights the strong mobilization of Catholic hierarchies and conservative sectors to influence the lawmaking process.

Unlike the debate around divorce, in the 2010 debate, evangelical Christians were visible public actors. Even though these actors have a historical presence

9 In this sense, the LGBTQI+ movement was also involved with other social movements, in several popular struggles. This displaced the framework in which "diversity" claims were engraved: from a conception that focused on sexual and affective liberties to a perspective that also emphasizes material inequalities. Hence, what in other countries was named as "same-sex marriage", in Argentina it was framed as "equal marriage" ("matrimonio igualitario").

10 Argentina was the first country in Latin America to legalize same-sex marriage, and the second in the Americas, after Canada.

in the country, their marked growth in the last few decades,[11] in addition to the importance that some evangelical churches give to sexuality (Carbonelli, 2020), have boosted their public participation. This,was evident during the same-sex marriage debate in Argentina. On this issue the evangelical churches from the conservative theological field (Wynarczyk, 2010) acted in consonance and alliance with the Catholic hierarchy (Jones *et al.*, 2011). This evangelical conservative activism reveals an important shift in Argentina's politics, although not with the intensity observed in other countries of the region such as Brazil (Campos Machado, 2018).

Finally, the debate around same-sex couples also revealed other types of mutations in the conservative moral activism: the growing presence of nonreligious actors and arguments that displaced the centrality of the churches and the theological or doctrinal arguments (Vaggione, 2005). Despite the presence of Catholic and evangelical leaders, the conservative moral activism is characterized by society sectors that led the opposition to same-sex marriage. Lay groups, nongovernmental organizations, schools, universities, and professional associations engaged in diverse actions – public demonstrations, petitions, meetings with legislators, letters to the editor, judicialization, etc. – and tended to utilize a unified discourse in the streets.[12] In these instances of activism , the use of scientific, legal, and bioethical arguments was intensified to oppose the legal reform, displacing the appeal to religious values and traditions. This displacement of the religious, or even the moral, arguments has been considered as a way of depoliticizing the debate on the part of conservative sectors (Morán Faúndes, 2018).

The public and legal debate on sexuality has become more complex. On one hand, the feminist and LGBTQI+ movements have not only successfully widened the democratic context initiated in the 80s (a concept popularized by the feminist slogan "the personal is political"), arguing that "the personal also needs to be democratized," but they have also made their argument and strategies more complex with the purposes of expanding reproductive and sexual rights. On the other hand, the conservative moral activism has also mutated. While this activism can be still characterized as Catholic and Evangelical based, it has surpassed the religious field in many ways. Both sides of the opposition have transcended the

11 At the national level, between 2008 and 2019, there was a significant decline in Catholic affiliation, alongside an increase in the number of Evangelicals. In just eleven years, Catholic affiliation dropped from over three-quarters of the population to slightly less than 63%. Meanwhile, the proportion of evangelicals grew from 9% to 15.3% (Malimacci *et al.*, 2019).

12 "We want mom and dad" and "Marriage = man + woman", constituted their most common expressions.

dichotomization between the religious and the nonreligious into the level of actors and used strategies which impact the ways in which marriage is debated.

3.4 Religious beliefs and nature during the parliamentary debate

In this section, we present two main themes that emerged during the parliamentary debate. First, we explore the legislators' opinions on the role of religious beliefs as part of lawmaking processes. The debate about how to regulate marriage is also a debate about the place of religious arguments in democratic contexts. Second, we present an analysis of "nature" as a central dimension emerging during the codification process. This dimension is part of the debate in two interconnected ways: as a biological framework and as part of a legal paradigm.

3.4.1 Religious beliefs and legislative process

Political parties decided, as in other exceptional occasions[13] to leave the decision on voting to each legislator's conscience. Laws related to sexuality (divorce, same-sex marriage or abortion) seem to have a moral weight that puts the individual value systems as a crucial element when making decisions (as if economic laws, for example, were emptied of moral concerns). In a country characterized by party blocs it is very unusual that legislators from the same party vote in opposite ways as was the case with same-sex marriage. This resolution implied that, with some exceptions, a division within the different political parties regarding the legal reform project took place.

Asking legislators to vote according to their conscience produced a debate on the role of Catholic beliefs and morality during parliamentary debate. In this sense, freedom of conscience allowed legislators to bring their inner beliefs to the forefront of the public debate and to discuss the legitimacy of religious beliefs as part of the lawmaking processes. Although this freedom encompasses both religious and nonreligious beliefs, public debates typically center on Catholic values and moral principles. In a country characterized by a strong Catholic influence, for moments even hegemonic (Malimacci, 2015) over the moral field, it is not sur-

13 The same happened during the discussions on the legalization of divorce in 1986 and on abortion in 20 years later.

prising that some references to freedom of conscience are equated with religious freedom (Vaggione, 2022).

During the debate, legislators refer to the role of religious beliefs (mostly Catholic ones) in different ways. With no intention of summarizing the wide variety of postures, imaginaries, and arguments, it is possible to identify two main positions. A first group of legislators, belonging to different political parties and ideologies, consider that religious arguments, while relevant, cannot be part of the parliamentary debate. This position insists that religious beliefs and arguments are a part of private life and cannot be displayed in parliamentary debate. Two dichotomies are presupposed in this line of reasoning: the distinction between the religious and the nonreligious and the differentiation between the public and the private. This position, aligned with a widespread understanding of *laicité*, emphasizes the separation between the person as believer and as legislator. As it was stated during the debate: "Religious arguments are all valid – I have them – but they are useful as intimate convictions. However, when I come to this Senate to legislate, I have to do it without forgetting that there are believers and nonbelievers. I cannot impose my religious beliefs on anyone and based on them determine who and who does not have protection" (Nicolás Fernández, Chamber of Senators).

In line with this posture, different legislators publicly identified as believers, almost all as Catholics,[14] to argue that they did not base their decision on their religious beliefs. These legislators openly declare their Catholic beliefs, but when arguing for or against the project, they include secular arguments to support their positions. Freedom of conscience, then, allowed some legislators to reveal themselves as religious believers but with the purpose of justifying their position as different from their beliefs. This position reflects the distinction between the legislators' arguments and the world of their personal beliefs as two different and distinguishable spheres. The coming out as believers was done by this group to separate their public decision from the private beliefs.

It is interesting to note that within this group there are legislators that voted both in favor and against the bill. For instance, one legislator who voted in favor of the project affirmed that:

> There are Catholic Church's postulates that I believe in, but they aren't applicable in this case. I reiterate that we aren't talking about religious issues nor the sacrament of marriage. This is a great debate about civil rights and individual freedoms (Gerónimo Vargas Aignasse, Chamber of Deputies).

14 We only found one legislator who identified as Buddhist.

For this legislator there is a clear differentiation between marriage as a sacrament and as a contract regulated by civil law. Among those who voted against the project, it is common to self-identify as Catholic but to affirm that their arguments are not religious, their beliefs are not the justification (at least publicly) of their political position. These legislators declare that it is not necessary to refer to their beliefs because there are legal and scientific reasons not to recognize same-sex marriage. In this sense, during the debate a variety of research was circulated to prove the damages and risks of recognizing same-sex marriage; this type of argument is discussed further below.

A second group of legislators not only identify as Catholic, but also consider their religious beliefs to have an important – but not necessarily exclusive – influence in their voting decision. For this group, freedom of conscience implies the legitimization of religious beliefs as a part of the parliamentary debate. This type of position does not exclude, like the previous one, exposing the religious motivations as a part of the lawmaking process. As one senator expressed, the existence of a lay state "does not mean to erase the convictions that each one of the speakers had the moment they made public their positions" whether they are speaking "from faith, like in some cases… or from another conviction, that is also a faith, like it can be atheism or agnosticism" (Liliana Negre de Alonso, Chamber of Senators), they all address the issue "based on the interest of the public". Even more, for some legislators, as one deputy affirms, it is impossible to distinguish between the believer and the legislator and that "to ensure the plurality of the debate is good that each of us speak about their own faith and their own interpretation of it" (Elisa Carrió, Chamber of Deputies).

This group of legislators either consider religious beliefs and arguments as a legitimate part of lawmaking processes or affirm that it is not possible to separate the religious and the nonreligious, at least when legislating sexuality. Like the previous group, the legislators that gave space to their religious beliefs voted in favor and against the reform. Among the legislators that declared themselves as Catholic and voted against same-sex marriage, references to religious arguments (coming from the Bible or the Papal Encyclicals) were included during the public debate. One legislator, for example, justified his vote by reading some chapters of Genesis on the creation of the man in God's image and the mission to "be fruitful and multiply and fill the earth and subdue it." (Julio Rubén Ledesma, Chamber of Deputies).

It might be assumed that acknowledging Catholic beliefs as part of the vote's motivation implies agreeing with the Church's official position. On the contrary, there were legislators who voted in favor of same-sex marriage as Catholics. In this sense, it is interesting to note that the rupture between religious beliefs and the position towards sexual and reproductive rights that characterized civil

society was also reflected in the parliament. In a country where most of the population identifies as Catholic, it is not surprising that the support of the legal reform also came from those religiously identified legislators. For instance, these legislators made reference to: a group of priests[15] that publicly supported the project, arguing that "they have defended the Gospel and freedom of thought" (Elena Corregido, Chamber of Senators); principles of the faith such as "tolerance, solidarity and protection to the defenseless" (Lucía Corpacci, Chamber of Senators) that lead to the support of marriage for people of the same sex; and the wrongdoings of the Catholic hierarchy – at that time, cardinal Bergoglio, today's Pope Francis – for the aggressiveness it showed against the project.

Finally, we could only identify one legislator who publicly positioned himself as a non-believer during the debate. The exceptionality of this position indicates that being a non-believer was a difficult position to assert publicly. This legislator maintained that "I'm not a religious believer and I made this affirmation to set myself free at the beginning that some confessional influence might have fallen on my thoughts" (Carlos Favario, Chamber of Deputies). His vote was against the project because "marriage is, by nature, heterosexual. The union between two same-sex persons must be legitimized but it doesn't constitute marriage. Considering it marriage would mean to be unknown to the significance of marriage". Though it is an exceptional case, this non-believing legislator voted against the bill in contrast to the results of some research showing that nonreligious people tend to be more progressive on moral issues (Aizenberg *et al.*, 2024).

As explored in this section, releasing legislators from party discipline and allowing them to vote according to their conscience raised questions about the role of religious beliefs in the lawmaking process. The debate exposed various narratives and constructions regarding the influence of beliefs, particularly Catholic ones, on legislators' decision-making. As previously considered, there are disagreements about the legitimacy of religious beliefs as arguments to be used when justifying one's position. For some legislators, these beliefs cannot be incorporated as motivations for the decision; from this narrative, there is a (normative) frontier between the believer and the legislator. For others, however, this differentiation is neither possible nor necessary, as religious beliefs can be, or even inherently are, part of the motivations behind decision-making. Allowing each legislator to vote according to their individual conscience meant that, in this debate – unlike most others – Catholic beliefs could explicitly inform the justification of their decisions.

15 A group of priests identified with liberation theology wrote a letter supporting same-sex marriage.

However, a legislator's stance on the role of religious beliefs in lawmaking processes does not necessarily determine their position on same-sex marriage. Although Catholic hierarchies and groups were the most active opponents of the bill, many legislators expressed support for same-sex marriage grounded in their Catholic beliefs, even citing religious arguments to justify their positions.

3.4.2 The natural during the debate

The debate over how to regulate same-sex marriage also brings different constructions and meanings of nature and the natural.As stated in the introduction, at the moment of debating the regulations of the sexual order, the connection with the natural world emerges as one of the main cleavages. The appeal to the existence of nature's rules that must be respected is debated as a moral and legal dimension in the regulation of sexuality. Thus, it is not surprising that the question about what is natural emerges when debating a legal reform that looks forward to widening the definition of marriage to incorporate same-sex couples. During the parliamentary debate, what is "natural" about sexuality and in need of moral protection and legal preservation was an underlying question.

The analysis of the legislators' discourses allowed us to identify a multiplicity of uses and significances associated with nature during the debate. We grouped these uses in two main axes: the natural order as reference to a biological reality and as reference to a legal paradigm. In the first case, what is being debated are the laws of nature while in the second case the debate is over natural law. Even though both these axes are related, they refer to distinct uses of the natural as a part of the argumentation both against and in favor of same-sex marriage.

3.4.2.1 Nature and homosexuality – laws of nature

The perspective of nature as biology appears in many moments during the debate and with different purposes. One of the ways it emerges is in connection to the existence of the right to discriminate. In this sense, several legislators justified that nature makes people differently and, therefore, legislating homosexuals and heterosexuals in divergent ways does not imply discrimination. One legislator argued that if nature makes us different – in relation to race, physique, health, or intellectual capacity – then "if a same-sex relationship is not the same as a heterosexual relationship, it is not valid to denominate them the same way" (Norah Castaldo, Chamber of Deputies). In this line of argument, another legislator stated that "nature does not discriminate when it makes us man or woman" thus "confirming a difference is not discrimination" (Mario Merlo, Chamber of Deputies).

In some cases, the use of nature as biology included an explicit reference to God and/or God's plan, suggesting that the natural order is also a religious one. From this standpoint, there is a continuity between laws of nature and laws of God. One of the legislators argued that, having lived in the countryside, his experience "in permanent contact with nature, showed me every day the things that God put in our way and in what forms" (Josefina Angélica Meabe, Chamber of Senators). According to this legislator, it is precisely in nature where not everything is the same because "a male and a female, that translates into society as a man and a woman, and family understood as the basic cell of society that, in spite of everything, still survives".

At the same time, the reference to nature as biology is also used to justify the support of same-sex marriage. Some legislators refer to scientific research proving the existence of homosexual behavior in the animal world: "there're 1500 species that have homosexual behavior and in 400 species homosexual acts have been confirmed, from more evolved animals to more primitive, even birds" (Eduardo Torres, Chamber of Senators). From this viewpoint, homosexuality is part of nature (human and other species) and, as such, it is a normal behavior that needs to be granted marriage rights.

Another way to appeal to the natural is by arguing that people attracted to people of their own sex always existed and that this proved it as a normal (enduring) behavior. According to one legislator, "If throughout history and in every period and culture there were always a more or less stable proportion of homosexual people, it is clear then that possibility is part of human beings' nature, between other species" (Óscar Aníbal Castillo, Chamber of Senators). In this sense, ancient Greece is used as a moment in which "erotic love between two adult men was a model that had gained social tolerance".

Nature as biology is, then, used with opposite purposes during the debate. On the one hand, it is used to recognize the existing diversity in natural life and the dissimilarities between man and woman, which reinforce the need to legally distinguish between same-sex and opposite-sex couples. In this sense, an essentialist understanding of sexuality (either connected or not to God) legitimizes the rejection of sexual rights. On the other hand, nature is inscribed in support of same-sex marriage. Both biological and historical arguments are considered to prove that homosexuality is a "normal behavior" and, as such, a justification for its legal recognition. Thus, essentialism has also been used to support same-sex marriage.

3.4.2.2 The legal nature of marriage

Another way in which references to nature entered the debate was in the discussion about whether marriage has a specific, inherent nature as a legal institution.

According to this line of reasoning, there are some essential characteristics of marriage that need to be kept when being regulated. Thus, what is at stake during the debate is the existence of a natural legal foundation which limits what can or cannot be reformed. In Argentina, this debate is linked to the status that natural law theory has had and still has due to the influence of Catholicism in the legal education and practices.

One line of reasoning emphasizes the need to limit what can be subject to debate and change. The essential characteristics of marriage are viewed as pre-legal and pre-state, transcending human decision, with the law's role merely to acknowledge them. Among the narratives that appealed to this line of thought, two essential components of marriage were considered by legislators to oppose same-sex marriage: heterosexuality and reproduction. As it was mentioned during the debate: "we aren't standing before a private deed or a religious option, but before a reality that has its roots in man's nature itself, which is a man or a woman" (José Fernández, Chamber of Deputies). As one of the legislators affirmed: "Marriage is specially a heterosexual institution. This is an anthropological fact and law is just limited to taking note" (Ivana Bianchi, Chamber of Deputies). Another legislator stated that: "Marriage is the union between a man and a woman, which is natural for a society as a condition for procreation with the purpose of preservation of the species. A same-sex marriage would find itself unable to fulfill those roles" (Roy Cortina, Chamber of Deputies).

However, we also observe other forms of interventions, in general in favor of same-sex marriage, criticizing the position that essential features of marriage exist. This type of approach de-naturalizes the marriage institution, stripping it of some elements that are considered essential, such as heterosexuality and reproduction. From this perspective, law is a human construction and as such its content can be altered to include same-sex couples' rights. According to one legislator, marriage is a "social, economic and cultural construction, because if it wasn't like that it wouldn't have had changes throughout time, because if it was natural, it would have to be harmonious and foreseeable and every day we know it is not like that" (Liliana Fellner, Chamber of Senators).

The lack of biological reproduction was contested many times by legislators, mentioning adoption or assisted reproduction techniques as possible options for same-sex couples. Even some legislators considered the fact that children were already being raised by same-sex couples. An interesting point raised by one legislator was to affirm that the model of the "nuclear" family could be considered as unnatural even from a religious viewpoint. As it was affirmed during the debate, the denaturalization of the family could also be connected to a Christian conception of the family: "the gospel's family is the opposite of the nuclear family. The gospel says that if you want time to bury your father and mother, you aren't

good for the Kingdom of God. And when Mary says, 'here are your brother and mother', Jesus answers 'my brothers are everyone'" (Elisa Carrió, Chamber of Deputies). This quote shows how a religious argument was even used to de-essentialize and de-naturalize both marriage and family institutions in favor of changes of the legal order.

Another way in which this discussion entered the parliamentary debate was in connection to the existence of a natural law that needed to be respected by the state legislation. As mentioned before, the Catholic influence on the juridical realm is very much connected to the expansion of a natural law paradigm that articulates civil, moral, and religious normativities. This aspect was brought into consideration by some legislators: "If legal recognition of the union between two persons of the same-sex is given or placed into a legal level analogous to marriage and family, the state would act wrongly and would enter into contradiction with its own obligations by altering the principles of the natural law and the public order of Argentine society" (Julio Rubén Ledesma, Chamber of Deputies). In this sense, natural law limits the content of human laws and should be respected.

However, other legislators used the concept of natural law to advocate in favor of same-sex marriage. Instead of values such as heterosexuality or reproduction, these legislators considered identity, freedom, pluralism, love, or diversity as rights that were part of natural law. According to one legislator, same-sex marriage "doesn't belong to culture, but to the natural rights of every human being to be recognized in their identity, in their singularity, in their individuality and in their differences, because they're precisely what enriches us" (Patricia Vázquez, Chamber of Deputies).

This legislator stated that the right to choose emerges from human nature, which was our closest link to God:

> We are simply speaking about legislating from the absolute responsibility over love between human beings. What power can we recognize to the state, beyond the one that the God from the ancient scriptures has given to men? We are speaking about the ability to choose, which is an unrestricted and inalienable human nature right, but at the same time, it makes us closer to God (Patricia Vázquez, Chamber of Deputies).

The content of natural law was being debated: instead of basing sexuality in reproduction – a Catholic understanding of natural law – other types of values were being instrumentalized, such as equality, identity, love, or the right to choose. It is interesting to note that this second alternative can also be connected with narratives about the divine.

Finally, some legislators rejected the existence of natural laws or considered that these should not be the basis of state laws. The discursive strategies aimed at questioning the notion that there are essential requisites to marriage. As one leg-

islator affirmed, "Homosexual marriage is as unnatural as heterosexual marriage is. Patria potestad, surnames, inheritance, property, are all human inventions... There is no natural law that regulates who can get married. Civil laws are the ones in charge of marriage" (Roy Cortina, Chamber of Deputies). For others, this does not mean to negate the existence of a natural law regulating morality, but this law "is reserved to confessional spheres, but not to the civil sphere which is what concerns us as legislators and with respect to which we must overcome the particular visions in order to advance." (Daniel Filmus, Chamber of Senators).

The question of what is an essential, unalterable aspect of sexuality was a central preoccupation during the process of modifying the law. In this sense, to dispute the natural is also a way of debating what can, or cannot be modified, by human decisions. In their narratives, legislators intertwined nature, as an imaginary, with the religious in different ways. In various interventions, nature is signified as being outside of the religious as the giver of universal rules based on scientific discourse that goes beyond religious beliefs' particularisms. In others, instead, the natural is knotted to the religious because both the biological and legal orders must be comprehended by their link to the transcendent, to the divine. However, the appeal to nature was made both to support and oppose the legalization of same-sex marriage. The essentialist understanding of sexuality, the existence of natural function, generally emphasized by the most conservative sectors, is also instrumentalized by some legislators in favor of same-sex marriage.

3.5 History and temporality during the parliamentary debate

How did the deputies and senators use history and, most importantly, bring the *past* back to the *present* (and the *future*) to support their arguments? We are interested in examining the diverse imaginaries of time, namely, the ways in which past, present, and future are articulated during the debate. We discuss the different forms history is retrieved and narrated by the legislators during the debate for the legalization of same-sex marriage. We do not focus on past events that "strictly" occurred in the country,[16] nor do we try to delineate an exact chronology to

16 In fact, we have already reconstructed these events in the contextualization segment of this chapter.

determine or "fact check" the veracity of these narrations of history.[17] Our intention is to reflect on the rupture with the pre-established legal and moral order that the legalization of same-sex marriage marked: a rupture that produced a tension between the constructions of past temporalities and the future horizon. The debate around same-sex marriage allows us to understand that constructed component of time – and the possibilities of conceiving it in different ways – because it meant an inflexion point in a social and political narrative about intimacy, affection, and the subversion of reproductive sexuality.

As a result of the coding of the parliamentary debate in both the Senate and the Deputies Chambers, and focusing on the history code, we propose three main dimensions: the possibilities of changing the law; the Christian roots of the legal system; and the discussion of whether society is prepared for the changes the law would bring.

3.5.1 Change vs. unchangeability of the law

The first dimension is connected to the narratives of legal change(s) or, on the contrary, legal unchangeability: some legislators retrieve the past during the debate to depict law as a result of history while others convey law as being beyond the framework of history. On the one hand, some legislators bring past events to argue about the different changes of marriage as a legal institution. Within this narrative, or imaginary, history is portrayed as a continuum of social and legal changes, positioning the expansion of rights to same-sex couples as part of this ongoing evolution. Some of the most important legal milestones are civil marriage and divorce, and same-sex marriage is included as a part of a long-lasting timeline of other legal changes. These transformations are recreated in a way that emphasizes their linear progression in evolutionary steps: "Until finally, in 1888, there was a more inclusive law of civil marriage. Are not we adding another chapter of that progress in our law of civil marriage by including now the possibility of marriage celebrated by persons of the same sex?" (Samuel Cabanchik, Chamber of Senators).

Same-sex marriage is linked to divorce in that it signals that the legal dissolvability of marriage was possible following the transition to democracy. Therefore,

17 "Regime of historicity" (Hartog, 2015) is a helpful notion to understand this process as it explores crucial moments of change in societies and their way of relating to the past, present, and future. It is especially helpful in those "moments of crisis" when these relations between past, present, and future stop seeming obvious.

the democratization[18] of the "private" and the democratization of citizenship,[19] both present in the debate around divorce, are reapproached in the discussion of same-sex marriage. One legislator expressed this in this sense: "It is another step to build that deep and truthful democracy that we dream for everyone: for our sons, daughters, grandsons and granddaughters. It is a step towards the construction of civil, social, political, economic and cultural rights that, I insist, we dream for the population as a whole" (Martín Sabbatella, Chamber of Deputies).

These legislators conceive history as an evolutionary temporality in which the law goes through different reforms to show that these changes meant in no way a dissolution or crisis of the family, addressing narratives that were believed to be especially catastrophic.[20] In this sense, many legislators use the past as a tool to indicate that marriage reforms – civil marriage and divorce – did not produce any of the negative results that those narratives evoke. Law is conceived as an indeterminate and dynamic institution that incorporates the changes that society experiences. For instance, one legislator stated that "122 years ago, with the establishment of civil marriage, the Church used the same arguments they are using now: taking the measure as if it was the end of family, against natural law and with deadly results for society. It is important to remember that within Argentina exists an explicit division between Church and state" (María Rosa Díaz, Chamber of Senators).

Another instance in which legislators frame legal changes as part of an evolutionary progression is the conception of history as a force that deters discrimination and inequality by opening horizons for pluralism and acceptance. The question of how the state/society should regulate and value (or not) diversity is answered profusely by constructing a timeline of previous discriminations that occurred in history , and the same must be done with the restriction of marriage for same-sex couples. As one of the legislators affirmed:

> This is not the first time that the Argentinian state debates on what to do. There was a moment in Argentina when we women had to fight to reach the status of citizens of full rights [...] Throughout the history of humanity, struggles have always been towards that direction, because a moment comes where the state has to decide what to do: if it keeps restricting rights or not to a sector of the population. (Juliana di Tullio, Chamber of Deputies).

18 This is not the only way democracy and the democratic horizon is brought back into the debate and the construction of temporalities, as we will observe multiple times throughout this section.

19 Some authors in Argentina refer to this as "ciudadanización", meaning those processes of exercising and enhancing the frontiers of citizenship. (Pecheny, 2010; Giordano, 2014).

20 This type of narrative will be addressed in the next section.

Similarly, a succession of events is linked together and constructed as part of the same history of social struggles and liberation. During the debate, historical references like the Holocaust, racial apartheid, gender inequality, and military dictatorship were evoked. In that regard, we believe it is important to emphasize the experience of the dictatorship because, as previously stated, some legislators located the possibility of marriage for same-sex couples as part of the democratization imaginary in Argentinian society:

> My generation knew a diverse form of persecution and discrimination, far before the most brutal dictatorship of Argentina history took power the 24th of March of 1976. Being young was being suspicious, it was accepted that having long hair was being suspicious. Everyone was asked for their IDs, in any manner. And let's not even talk about sexual preferences, it was like they deserved the discrimination, the rude insult, the brutality and the violence [...] It is good news for Argentinian politics that we are discussing this subject. Indeed, I believe this makes our country better. (Miguel Bonasso, Chamber of Deputies).

On the other hand, contrary to this position, other legislators argue in favor of the legal unchangeability of marriage: according to them, its legal status is beyond time and then, beyond human decision. Previously, we have addressed discourses that also sustain the legal inalterability of the marriage institution, but that discussion focused on what is "natural" about sexuality and, therefore, needs to be preserved within the law. Here, we see something different: some legislators affirm that marriage is an integrated system that has worked properly for years and has a historic value that should not be changed:

> Our civil marriage law has many years of validity, it is based on the congruence with the Civil Code and we have to be careful with any modification that we carry out on this Code. It is clear that here has arrived a project that does not contemplate the serious effects to the Civil Code, Vélez's code, a code that has ruled a great part of civil life, the institutions of marriage, filiation, succession and adoption. (Guillermo Jenefes, Chamber of Senators).

Some legislators use history to highlight the core foundations and intentions of the law. Within this position, changes like same-sex marriage are harmful towards the norm because they do not contemplate its immutable and long-lasting fixtures. The legislators argue that these distinctive traits exist for a reason and altering them brings imbalance and incongruence to the functionality of the legal system. For instance, as this legislator expressed, "kinship", "motherhood", and "fatherhood" were created by law and same-sex marriage interferes with these institutions.

> Why am I not supporting the Chamber of Deputies' sanction? Because the Argentine Civil Code has regulated for its time the institution of marriage as the cornerstone of filiation

> and kinship. That structure of filiation and kinship is made by the law with a basis on a heterosexual relationship. Maternity is determined by birth; paternity is determined by marriage. The husband of the mother is presumed the children's father, and all the regulations of kinship are from there. (Sonia Margarita Escudero, Chamber of Senators).

Some of the legislators opposed to the bill proposed to recognize civil unions as a way of recognizing rights to same-sex couples and defending marriage as a heterosexual institution. As in other countries, the naming of the institutions was an important part of the debate: the counter proposal was to legalize same-sex partnerships without modifying the recognition of marriage, preserving this institution only for unions formed by a man and a woman. For this position, to preserve marriage only for some couples and not others does not discriminate. In fact, on legislator stated that "marriage, as the union between man and woman, has a social significance of continuity, of procreation. [...] Before this reality and history, the state must protect people without discriminating against them, but to circumscribe marriage to the union of the man and the woman is not unjust discrimination, because it is about two different realities" (Gladys Esther González, Chamber of Deputies). Therefore, from this point of view, civil unions were the best alternative to recognize rights for this group and tackle the bigotry they were subjected to: "I reiterate that by legislating on this matter we are not doing it for the next week or the next year; we may be doing it for the next hundred years. I insist that the rush is meaningless. Even more: a very interesting alternative project has been suggested here, that speaks of civil union to avoid the concept of discrimination." (*Ibidem*)

The discussion on the language around civil unions reveals that there is more at stake than just the rights of same-sex couples. What is being contested is, in effect, a social order that privileges heteronormativity as a framework for distributing resources and rights. It is not merely a legal reform to expand formal equality for same-sex couples but also a debate about the boundaries of what is, or what is not, subject to change.

3.5.2 Christian roots of the legal system vs. the dechristianization of law

A second theme related to our discussion is the role of religion in law, focusing not only on the distinct context of Argentina's legal system, but also giving a broader outlook regarding the roots of law in general. We found two distinct positions, or imaginaries, that support different notions of temporality and religion: one affirms that we are inhabiting a moment of deeper secularization of the law,

while the other argues that legalizing same-sex marriage goes against the foundations of certain legal institutions, legitimizing the Christian roots of these norms.

Some legislators applied history to support the need to modify the religious influences of the law, illustrating a history of confrontation against the Catholic hierarchy and a progression towards a secular state. For some legislators, the religious roots of the political and legal system are an element that belongs to the past and the laic state is the figure of the present. The dispute on the role of religion within the law and the secularization process also brings back the discussion of the democratic horizon in Argentina and the role that the Catholic Church should have in the democratic regime:

> I think we should insert the debate in terms of the growing secularization process that several aspects of human life have shown throughout history from a past in which there was a theological predominance over those aspects. Thus, the term 'secularization', that I would like to replace for 'worldliness' [mundanización], has served to designate the progressive independence of the political power from the ecclesiastical power and also to refer to the cultural weight of the Church in the contemporary world. (Samuel Cabanchik, Chamber of Senators).

As in other historical moments, sexuality becomes a crucial aspect for understanding church-state separation and/or *laicité* as a political regime. One legislator stated that "even though the 2nd article of our National Constitution recognizes Catholic worship, it is not about a state's religion and not everyone must profess it. There is no type of moral union between the constitutional state of law and Catholic religion that allows the translation of the contents of said religion to civil society in terms of regulation of rights." (María Rosa Díaz, Chamber of Senators).

Additionally, some legislators recreated a historical narrative that emphasized the Catholic hierarchy as the main opposition to the process of secularization that society is experiencing. This confrontation is revisited during the discussions and passing of civil marriage, reinforcing the idea that the Catholic Church was – and still is – the principal antagonist in these disputes:

> I believe that it has been the Argentinian church that has taken this discussion to the extreme, like it did when civil marriage was treated, like it did in '87, when president Alfonsín elevated to Congress the law of divorce. In that opportunity too it was argued that the family (was going to be) disintegrated. It was said that there was going to be a waterfall of divorces that were going to destroy the family. A discourse constructed always on the wish to stick religion to the state, to the homeland. (María Luisa Storani, Chamber of Deputies).

On the other hand, different legislators justify and defend the religious basis of the law by arguing that the claim for the "separation of church and the state"

should not ignore or deny the religious roots of legal norms. From this standpoint, temporality indicated that the foundations of law itself were found in Christian morals that were later translated to codes and legislation. One legislator affirmed that:

> Many here argued from their faith and there was a recrimination that we were legislating for a lay state. But in reality, in judeo-christian history, this is very closely related. If we want to absolutely forget religion or look at limitations and regulations from positivism, we will see that in almost all the penal codes of the world robbery, murder, rape, sexual abuse are penalized. In fact, if we go to the origin of the judeo-christian religion, the Ten Commandments don't do any other thing but penalizing: do not steal, do not commit adultery, do not rape, etc. That is to say that even though we want to separate them there's a moment where because of our own history and our own tradition they have a common argument. (Liliana Negre de Alonso, Chamber of Senators).

3.5.3 "Are we as a society prepared for these changes?"

We propose a third cleavage to address the discussions about whether Argentinian society is prepared for the impacts the bill would produce and the debate on the capability of the present time to confront the changes that same-sex marriage legal reform would carry. For some legislators the present is not fully prepared to confront such transformations. "I want to make a last reflection: let's advance with caution. We have a huge framework of diversity. Welcome diversity, but let's focus on that diversity from the standpoint of our society, our reality, from the families throughout the country that are not prepared for an advance and reform of this nature in our legislation." (Norah Castaldo, Chamber of Deputies). This position, in general sustained by legislators against the project, is based on the construction of a society that is not ready to accept same-sex marriage. These arguments stress the idea that legislators should be cautious and pay closer attention to the reality of Argentinian society, throughout the whole territory, and what their actual needs and desires are. Similar to other countries, the defense of federalism is usually done in order to oppose sexual rights, as if smaller cities and provinces were not able to cope with a change that belongs to the biggest cities.

On the opposite side, others profess a strong certainty that society is prepared to face these changes – or has already accepted them. These legislators believe that the Congress should acknowledge its responsibility as representatives of the people and that the law should reflect the generally agreed upon beliefs of the people, like same-sex marriage: "When other standpoints lay out the doubt if in today's Argentinian society is ready for this debate, I respond that the minority will continue being a minority if the majority collective and its representatives prevent them from exercising their rights, as they should be able in a society that must

not discriminate but, on the contrary, integrate them." (Daniel Filmus, Chamber of Senators). This type of intervention emphasizes the majoritarian character of democracy while de-emphasizing pluralism (the recognition of diversity) as part of democratization as an open process.

The discussion on the preparedness of Argentinian society to face these changes brings the *future* into consideration. These future-forming narratives (Beaman, 2020) focus on the effects the law might have on society, children, and/or the future of the country in general if it is approved. Within this framework, some legislators highlight the expansion of the democratization process in the country, asserting that the approval of same-sex marriage will allow the nation to have a more equal, democratic, free, and just society. As previously said, democratization is a crucial process upon which the debate on sexual rights took place:

> What we are proposing today is, without a doubt, changing the social physiognomy. I heard that someone said that we were trying to change the social physiognomy; without a doubt. We come to give answers to a change that has already happened in our society [...] I think that with this project we are advancing towards more freedom in Argentinian democracy; we are generating an act of historical reparation for those who have been offended in our society and that are reclaiming a response from our part to be able to live their lives to the fullest. (Remo Carlotto, Chamber of Deputies).

On the contrary, we found discourses that aim the attention towards the adverse and harmful effects that the law might – will – have if passed. As we previously addressed in this work, there are several discourses that reproduce a catastrophic rhetoric, a slippery slope reasoning as in other countries in this book, regarding the legalization of same-sex marriage. For instance, one senator stated that "we must reflect if this legal modification doesn't reform a social model, and if that change of social model will have negative or unpredictable consequences" (Adolfo Bermejo, Chamber of Senators). These narratives focus especially on how children will be affected, stressing the dangers they will face if they are adopted by a same-sex couple or how they will process the new reality: "I consider this is not a light matter. Shouldn't the issue of adoption be discussed deeper? [...] What is the state going to teach the children? That everything is equal, that it doesn't make any difference? I respect sexual orientations but we cannot look to the other side, because children at a certain age don't have their identities absolutely established" (Juan Agustín Pérez Alsina, Chamber of Senators).

These arguments usually make use of negative emotions that accentuate a distressing and frightening language. One legislator expressed that she is

> Not worried about homosexual people getting married if they want to, but I'm worried about the effect on third parties. I'm worried about what we are going to do with sexual education, because, from this bill, sexuality is constructed. [...] My biggest regret is the impact it will have on education. The [sexual education] manual outlines a naked boy and girl and little things to apply in each of them, depending on how one wants to construct sex, sex is considered a construction. (Liliana Negre de Alonso, Chamber of Senators).

These types of discourses mobilize fears regarding the effects same-sex marriage would have on society in general and children in particular, looking to translate certain moral values into a specific legislative result.

3.6 Conclusions

Same-sex marriage, as a public controversy, implies a discussion over the (de)imbrication between a civil and religious institution and between state and church normativities. As such, this is a moment when the frontiers between the moral, religious, cultural, and legal are debated and, even, retraced. Its analysis not only allowed us to challenge the narrative of law and religion as two separated arenas, but it also enabled us to reflect on porous, complex, and fluid zones of transitions between religion and nonreligion. These zones are dynamic spaces where the religious and the nonreligious intertwine and disentangle in complex and dynamic ways.

Three main axes emerge in connection to these (dis)articulations during the analysis. First, the modification of the marriage regime ignited a debate on the role of religious beliefs as part of the lawmaking process. Unlike other deliberations, the marriage reform prominently featured freedom of conscience, prompting legislators to openly express their religious convictions, in general Catholic ones, when casting their votes. A myriad of imaginaries on the role of these beliefs emerged: from those who sustained that religious arguments cannot be the basis of the legislators' public positions to those that, on the contrary, considered that this exclusion was impossible or inconvenient. The interesting point is that within those that publicly identified themselves as Catholic many supported same-sex marriage and, in some cases, referred to their own religious beliefs and values as a justification to their vote. The ways in which religious beliefs and values intertwine with legal arguments are fragmented, complex, and heterogeneous, challenging any linear or monolithic interpretation of their influence and revealing the shifting and contested terrains through which these articulations take shape.

Second, nature – an imaginary that intersects with religion in multiple ways – is another axis in the analysis. The appeal to nature was made both to support and oppose same-sex marriage, revealing, among other things, essentialism and uni-

versality as contested issues. On the one hand, nature, both as biology and as the source of moral principles, is utilized to defend the sex complementarity as an essential component of marriage. Through this imaginary, different conceptions of the universal, the transcendent, and the essential are constructed pointing to what cannot, or should not, be reformed. On the other hand, nature in the two main connotations, is used to support same-sex marriage: to show that homosexuality is part of biology or to justify that there is a natural right to identity or to love, as universal values. Thus, rather than a stable or self-evident reference, nature emerges as a contested site where divergent moral and political projects are negotiated.

Finally, history is also narrated and imagined in different ways during the debate. In this dispute over temporalities, history does not function as a neutral account of the past, the present, or the future, but rather as a terrain of struggle, where different visions are at stake. Those who oppose same-sex marriage tend to enforce past-preserving narratives (Beaman, 2020) to foreclose some changes of marriage regime. Furthermore, they consider the present as not ready – or not yet ready –) to include same-sex couples as part of marriage. This position also includes a threatening construction of the future in case this reform is approved. However, history is differently imagined by those in favor of same-sex marriage. The past is considered as a story of evolution, of progress, of changes that made a more democratic society possible. Precisely, democratization as a normative horizon, appears as an important aspect of future-forming (Beaman, 2020) narratives.

The debate over same-sex marriage in Argentina did not merely reflect a conflict between pre-established categories but rather revealed a more complex and shifting interplay, where religious and nonreligious framings were often mobilized in unexpected ways. Through our analysis, we showed how these categories were not fixed but strategically reconfigured depending on the context and the positions at stake. By examining how beliefs, nature, and history were narrated, we highlighted the tensions and ambivalences that cut across the debate. These axes were not merely deployed in support of or opposition to the bill but served as sites of contestation where religion and its counterpart, nonreligion, took on diverse and, at times, novel meanings.

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Timeline

1853: Civil and religious marriages are distinguished from one another in Colombia

1859: Civil and religious marriages are distinguished from one another in Mexico

1868: Uruguay legalizes divorce

1888: Costa Rica legalizes divorce

1904: Venezuela legalizes divorce

1873: Civil and religious marriages are distinguished from one another in Venezuela

1884: Civil and religious marriages are distinguished from one another in Chile

1885: Civil and religious marriages are distinguished from one another in Uruguay
1887: Argentine state reclaims its monopoly over the legal recognition of marriage
1888: Civil and religious marriages are distinguished from one another in Costa Roca
1888: Civil and religious marriages are distinguished from one another in Argentina (as a part of the laic laws)
1914: Mexico legalizes divorce
1922: Failed attempt to legalize divorce in Argentina
1929: Failed attempt to legalize divorce in Argentina
1932: Failed attempt to legalize divorce in Argentina
1932: Bolivia legalizes divorce
1954: The *Peronist* government in Argentina legalizes divorce
1955: The *Peronist* government is overthrown
1977: Brazil legalizes divorce
1981: Peru legalizes divorce
1983: The military regime that had close ties with the Catholic hierarchy ends
1987: Divorce is recognized in Argentina
1991: Paraguay legalizes divorce
2002: The Autonomous City of Buenos Aires approved a civil union register that guaranteed similar treatment to same-sex and heterosexual couples for the exercise of rights, obligations, and benefits.
2004: Chile legalizes divorce
2005: Same-sex marriage legalized in Spain
2007: In February, the Federación Argentina LGBT (FALGBT) (Argentinian LGBT Federation) launched the campaign "Same rights, with the same name"
2010: Same-sex marriage is legalized in Argentina
May 4, 2010, voting in the Chamber of Deputies takes place
July 14 – 5, 2010, voting in the Chamber of Senators takes place

4 Same, same – but different? The road to same-sex marriage in Norway

Helge Årsheim, Stian Alexander Skandsen

4.1 Introduction

This chapter examines the historical relationship between church and state regulations of marriage in Norway, tracing its emergence in the decades after the Protestant Reformation up to the present, discussing the most prevalent regulatory, social, and cultural concerns that the gradual evolution of the legal framework on marriage has encapsulated. The chapter explores the development and consolidation of history, nature, and human rights as themes that have emerged in the discussions of changes to the law, with an emphasis on the process leading up to the legal recognition of same-sex marriage in 2008, during which these themes played a key role in modulating the arguments and positions of opponents and supporters of the proposal. The chapter pays attention to the extent to which these themes interact with the socio-cultural divide between religious and nonreligious social and political actors in Norwegian society, a divide that has been growing steadily since the 1960s, leading to the gradual decentering of Christianity – common to the case studies in all the chapters in this volume. The data presented and examined in this chapter is retrieved from open databases provided by the Norwegian government at its official website, regjeringen.no. The methodology for the coding of material is the same as for the rest of the chapters in this book, explained in the introduction by the editors.

4.2 Historical backdrop

In 2009, the Norwegian parliament amended the *Act on Marriages* to include the right for mutually consenting adults above the age of 18 to enter into marriage with whomsoever they wish, regardless of gender or any other identity characteristic.[1] For a marriage to be valid under the amended marriage law, it must be

1 *Act on Marriages*, §1. An English-language translation of the Act is openly available at Lovdata, https://lovdata.no/dokument/NLE/lov/1991-07-04-47.

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overseen by a registered officiator, including but not limited to clergy or other religious leaders, the union must have two witnesses, and be entered into freely without any form of coercion.[2] Legally recognized marriages have numerous effects upon the partners, including but more limited to, citizenship, inheritance, mutual economic responsibilities, child custody, taxation, debts, and testimonies during criminal prosecution. Due to these wide reaching and profound legal effects, the political, cultural and social status of marriage has always been and continues to be an ideological battleground. This has resulted in numerous revisions over hot-button issues, from underage, forced and religious marriages to marriage fraud, same-sex marriages, and cousin marriages.

The formal legal recognition of marriage in Norwegian law dates back to the *Ordinance on Marriages*, implemented in 1589 (Robberstad 1960). Before its enactment, marriages were regulated by non-written, customary law in the pre-Christian era, and Catholic canon law following Christianization around the year 1154[3] until the introduction by law of the Protestant Reformation in Denmark-Norway in 1537.[4] Although the institution of marriage lost its sacramental status after the Reformation, only ordained clergy could conduct marriages among members of the Evangelical Lutheran Church until the 1845 *Act on Christian Dissenters*, which allowed for marriages of Christian non-members of the church before a *notarius publicus* – later expanded to allow the same for Jews (1857) and non-Christians (1863). This expansionism represents the earliest instances of a loosening of the association between Evangelical Lutheranism and the institution of marriage. These early laws were primarily designed to give rules on the creation and dissolution of marriages, as the legal effects of marriage for other issues was largely a matter of custom.

The 1918 *Act on the Institution and Dissolution of Marriage* regulated certain economic and social aspects of marriages and their dissolution, laying the groundwork for the detailed rules under present-day law. This included a provision that made it possible to choose between civil and church marriage, the legal effects of which were similar, representing the first explicitly nonreligious marriage option

2 *Act on Marriages*, chapter 3.

3 The Christianization of Norway was a drawn-out affair, starting in the late 900s and only finishing by the 13th century. In 1152–54, the country was visited by Bishop Nicholas Breakspear – later Pope Adrian IV – who has been attributed with the foundation of the archdiocese in Nidaros, indicating a comprehensive foothold in the area. See https://snl.no/Kristendommens_historie_i_Norge.

4 At the time of the Protestant Reformations, Norway was part of Denmark under king Christian III, who introduced Lutheranism to the realm through law in the wake of the Wars of Religion that erupted in Continental Europe in the early decades of the 16th century.

in Norwegian legal history. Over the course of the more than 100 years since the 1918 *Act*, Norwegian society and the laws that regulate it have gone through major transformations. Some of the most notable ones can be traced through amendments to the legal framework on marriage: prohibiting underage marriages, removing obstacles to marriage for the "insane," and the duty to inform spouses of venereal diseases, simplifying rules for the dissolution of marriage as well as clarifying the rules of custody, taxation, and inheritance.

4.3 More human rights, less religion

Parallel and related to the gradual changes to the marriage law, two notable major social shifts took place in Norwegian society that are relevant for our purposes. Both found their fullest expressions from the 1960s and onwards: the increasing importance of human rights norms[5] in general – gender equality in particular – and the waning influence of Christianity in social, public and political life, including but not limited to the Evangelical Lutheran Church. These are entangled processes that amount to the notion of "Nordicization" discussed in the chapter on Denmark in this volume.

Early indications of the ways in which these two trends interacted with one another in the legal domain were the decriminalization of sexual relations between men in 1972, the law on abortion in 1975, the law on gender equality in 1978 and the criminalization of hate speech on account of "homosexual way of life or orientation" in 1981; all of these were victories for the incipient human rights movement and defeats for a gradually more marginal Christian conservatism. These interrelated trends are not unique to Norway or the Nordic countries, but can be traced in numerous countries around the world, as evinced in several of the other case studies presented in this book.

Parallel to these legislative changes in 1969 the Nordic countries, which have a long history of cooperation and coordination of their legal systems, initiated parallel law commissions that started working on proposals to amend and update the marriage laws across the region, which were considered to be old-fashioned and untimely.[6] The Norwegian commission gave its final recommendation in 1987,

5 We use "human rights" here not in the sense of material international human rights law being incorporated into Norwegian law, but in the sense of a set of legislative reforms whose understanding of basic legal guarantees and end results were rules, procedures and legal frameworks that for all means and purposes strongly resembled the provisions of international human rights law, which were first implemented in Norwegian law over the course of the 1990s.

6 See NOU 1986: 2 Innstilling til ny ekteskapslov, at 1.2.

proposing a comprehensive overhaul of the existing law, which resulted in the *Act on Marriages* (1991) that is still in force today. Two issues in particular stand out in the proposal from the commission. First, there is no mention of same-sex unions, which were clearly considered to be beyond the pale of such legislation – although this situation was soon changed (see below). Second, the proposal briefly discussed the merits of mandatory civil marriage as a replacement for the established choice between civil or religious marriage in the 1918 law.[7] As a result of the popularity of church-conducted marriages, which constituted the vast majority of marriages in Norway at this time, a purely civil law on marriage was dropped, and the proposal kept the choice and equality between civil and religious marriage. Although the question of creating a singular civil marriage act – which would strip the legal effects of religious marriages altogether – has been discussed several times after this,[8] the present-day *Act on Marriages* still regulates both civil and religious marriages. Due to this arrangement, marriages conducted by officiators in faith communities are subject to state approval in order to be recognized under the act.[9] State approval is subject to review by The Norwegian Directorate for Children, Youth and Family Affairs.[10] To accommodate the autonomy of religious communities to decide for themselves who may be eligible for marriage beyond the requirements of the act, a specific provision allowing exemptions for religious communities was added,[11] much in the same way as in the Danish case covered in this book.

7 With the entry into force of the *Act on Religious Communities* in 1969, *the Act on the Institution and Dissolution of Marriage* was amended to encompass not only church marriages, but marriages conducted by all registered religious communities.

8 The creation of a purely civil form of marriage was proposed by the majority of the law commission on religion in NOU 2013: 1 *Et livssynsåpent samfunn*, and has repeatedly been proposed by the Liberal party (Venstre) in parliament.

9 *Act on Marriage* § 12 a.

10 Approval is only available for religious communities that are already registered under the *Act on Faith Communities*. Additional conditions include a prohibition of dowry, such as the Islamic *mahr*, equality in the questions asked of both spouses and an assertion that the officiator will follow the procedural rules in the *Act on Marriage* § 11. Approval is conditional on an application that describes the procedure comprehensively. See https://www.bufdir.no/ekteskap-og-skilsmisse/godkjenning-av-vigselsritualer/ (accessed 02.06.2023).

11 *Act on Marriage* § 13. Originally, the provision allowed exemptions only in cases of non-membership or in the case of divorcees. The provision has since been amended to include same-sex marriage as a valid ground for exemption.

4.4 Separate status: partnership

Legal recognition for same-sex couples was first proposed in the Norwegian parliament in 1990, through a proposal for a law on same-sex partnerships, granting the same set of rights to same-sex couples as married couples, with the exception of the right to adoption.[12] The proposal was dismissed by parliament, but picked up again as an addendum to the recently adopted *Act on Marriages* (1991) in 1993. The proposal for a separate *Act on Registered Partnerships* was specifically designed to preserve the "economic and legal rights and duties" between same-sex partners. The choice of "partnership" over "marriage" was intentional, signaling the preservation of the "ideological and religious position of heterosexual marriage",[13] in order to avoid concerns that such legislation may dilute and harm the sociocultural position of heterosexual marriages as the basic unit of social organization.

During the pre-parliamentary hearing, the proposal for a partnership act was met with widespread support, but also opposition, mainly from parishes and bishops within the Church of Norway, who voiced their concerns with the potential ramifications for marriage as a "core social institution" that deserved protection and support.[14] Similar concerns were voiced by the Christian Democratic party during the parliamentary debate on the proposal, during which the conservative party groups split, resulting in a narrow 58–40 vote in favor of the proposal.[15]

The Norwegian law on same-sex partnerships cannot be viewed in isolation, as it emerged in tandem with several other neighboring states that went through similar legal reforms: Denmark was first among the Nordic countries in 1989, Sweden followed in 1995, Iceland in 1996 and Finland in 2002. By the mid 2010s, all major Western democracies had enacted legislation to recognize same-sex partnerships, confirming the success of what has been characterized as a "startling trend towards policy convergence", whose one major limiting factor appeared to be the level of traditional religiosity (Kollman 2007).

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12 The proposal was sponsored by three different political parties – the Labour Party, the Socialist Left Party and the Progress Party. Dokument 8:50 (1990–1991). *Forslag fra stortingsrepresentantene Lisbeth Holand, Jan Erik Fåne, Grete Knudsen, Trond Jensrud og Kristin Halvorsen om lov om registrert partnerskap.* 13.06.1990.

13 Innst.O.nr.70 (1992–1993) Innstilling fra forbruker- og administrasjonskomiteen om lov om registrert partnerskap, at 1.

14 Innst.O.nr.70 (1992–1993) Innstilling fra forbruker- og administrasjonskomiteen om lov om registrert partnerskap, chapter 5.

15 At the time of the proposal, the Norwegian parliament was bicameral, hence the low vote count despite the total tally of 169 members of parliament. It has since been unified as one singular chamber.

Because religious marriages were retained as an equal option to civil marriage in the 1991 *Act on Marriages*, marriages are still widely seen as a "religio-legal" matter in Norway, in the sense that changes to the legal framework on marriage tend to be viewed as a form of interference with religious autonomy, and is also seen as a limitation of religious freedom.[16] A core concern among many Christians in the run-up to the amendment of the *Act on Marriages* in 2008 was the ways in which the sanctity of the union between man and woman, which the law was perceived to safeguard, would be sullied by opening up for same-sex unions under the same legislation. While this position goes against Evangelical Lutheran mainstream thought, which views marriage as a purely civil function, it was one of the major counterarguments among Christian actors in the hearing on amendments to the *Act on Marriages* (see below), not unlike the similar debate in Denmark covered elsewhere in this book.

4.5 Equal status: marriage

The first steps towards the legalization of same-sex marriage were taken in 2004, when a proposal to amend the existing *Act on Marriages* to make it gender neutral was presented to Parliament by two MPs from the Socialist Left party.[17] The proposal referred to the principle of non-discrimination and the decision of the European Court of Human Rights in *Christine Goodwin v. United Kingdom* (Application no. 28957/95), in which the court recognized "major social changes in the institution of marriage", finding that the ability to procreate was not a necessary precondition for marriage. In the same way as the law on partnerships ten years earlier, the proposal for same-sex marriage was part of a wider international trend. The Netherlands, Belgium, Sweden, as well as parts of Canada and the US were identified in the proposal as examples of states that had already implemented such laws.

The proposal did not receive support in parliament. Unlike the debate about partnership, where the very foundations of marriage as a social institution were perceived to be endangered, the concerns raised at this juncture were mainly re-

16 Somewhat ironically, while the capacity of the Church of Norway to conduct marriages has never been regulated by Norwegian law and is hence not affected by any legal changes, other religious communities wishing to conduct marriages must be registered, and must gain approval from the Directorate for Children, Youth and Family Affairs, items that potentially represent genuine limitations of their religious freedom.

17 Dokument nr. 8:52 (2003–2004) *Forslag fra stortingsrepresentantene Siri Hall Arnøy og May Hansen om lov om endring i lov 4. juli 1991 nr. 47 om ekteskap. (Kjønnsnøytral ekteskapslov).*

lated to procedural aspects – the need for a thorough overview of potential changes to other laws and a firm commitment in each of the political parties in parliament – and to the child's best interests, in case same-sex couples should be given the possibility to adopt children.[18] This latter point was raised by the Christian Democratic party and the Progress party, both of which had opposed the law on partnership altogether ten years prior. The final step towards a comprehensive law proposal that would regulate same-sex marriage was taken as part of the political platform of the new center-left government that took office in 2005. In the coalition government plan of action, known as the *Soria Moria Declaration*, the government parties pledged to "amend the *Act on Marriages* to allow same-sex marriage with the same rights as opposite-sex marriages",[19] thereby confirming its intent to allow not only a gender-neutral law, but also a law that would make it possible to adopt and for women to use assisted reproduction healthcare services.

4.5.1 The law proposal

Norwegian law proposals are formatted according to a strictly defined set of guidelines,[20] and always feature an assessment of the status of the area under regulation and a prognosis of the potential effects of new regulation. Due to the complexity of the issue at hand, the proposal to amend the *Act on Marriages* featured five expert assessments – which is unusually high for Norwegian law proposals – detailing (1) philosophical aspects of marriage, (2) theological and ecclesiastical views of marriage within the Church of Norway, (3) the ramifications for adoption and children's rights, (4) consequences for international law and (5) a literature review on the effects of growing up with same-sex parents. The drafters of the proposal also consulted with a broadly conceived reference group with representatives from civil society, including several religious organizations, indicating the

18 Odelstinget – Møte torsdag den 18. november 2004 kl. 13.07. Date: 18.11.2004 Dokumenter: (Innst. O. nr. 9 (2004–2005), jf. Dokument nr. 8:52 (2003–2004)) Dagsorden Sak nr. 1 Innstilling fra familie-, kultur- og administrasjonskomiteen om forslag fra stortingsrepresentantene Siri Hall Arnøy og May Hansen om lov om endring i lov 4. juli 1991 nr. 47 om ekteskap. (Kjønnsnøytral ekteskapslov).

19 Plattform for regjeringssamarbeidet mellom Arbeiderpartiet, Sosialistisk Venstreparti og Senterpartiet 2005–09 https://www.regjeringen.no/globalassets/upload/smk/vedlegg/2005/regjeringsplatform_soriamoria.pdf.

20 Instructions for Official Studies and Reports, 24.06.2005. https://www.regjeringen.no/globalassets/upload/fad/vedlegg/statsforvaltning/utredningsinstruksen_eng.pdf.

sensitivity of the issue to religious actors. To achieve full equality with heterosexual marriage, the proposal featured changes not only in the *Act on Marriages*, but also in the *Act on Children*, the *Act on Adoption* and the *Act on Biotechnology*, in order for same-sex couples to be able to adopt and to gain the right to assisted reproduction.

The law proposal represents a striking example of the different and shifting "imaginaries" of marriage examined in the introduction to this volume, across a range of different social actors in Norway. It exemplifies how Christianity in general and the Church of Norway in particular has become decentered and has receded from positions of authority, while still playing vital and important roles in the discussion of issues that have traditionally been governed by religious norms and regulations. The law proposal and the process related to its implementation also provide a rich illustration of the many nonreligious imaginaries that are developing to fill the void left by the once-prominent majority religion, offering up different modes of reasoning and different rationales for how marriage should be governed.

In the proposal, the Ministry of Children and Equality[21] discussed the ramifications of these legal changes as they play out from the expert assessments. During the assessment of the philosophical aspects of marriage, on the question of adoption, Philosophy Professor Tove Pettersen highlighted the order of nature as a religious outlook, the rights of the child to have a father and a mother, and the fear of stigmatization as counter-arguments. Arguments in favor, on the other hand, included the elimination of a hierarchy between different sexual orientations and the general requirement that children should have access to the parents that are most likely to be able to provide for the child, regardless of gender or sexual orientation.[22] Commenting on these arguments, the ministry stressed that amendments to the law would not generate a right to adopt, but an eligibility to be considered on par as adopters with opposite-sex couples, a consideration that would always have the best interests of the child as its guiding principle.

On the question of assisted reproduction, the ministry discussed information received from the Norwegian Biotechnology Advisory Board, an administrative entity created to monitor the *Act on Biotechnology*,[23] under which assisted repro-

21 The present name of this ministry is the Ministry of Children and Families, following a government reshuffle in 2019.

22 Høring – Felles ekteskapslov for likekjønnede og ulikekjønnede par 16.05.2007 – Høringsnotat, p. 52. https://www.regjeringen.no/no/dokumenter/felles-ekteskapslov-pa-horing/id467527/?expand=horingsbrev

23 For background on the Board, see https://www.bioteknologiradet.no/english/.

duction was only eligible for cohabiting or married, heterosexual women. In its assessment, the Board discussed the existing research on the consequences of growing up without a male parent, and found it to be limited, but adequate to legitimize the proposal. On the topic of whether assisted reproduction should be allowed, the Board was split (ten in favor, six against), and both sides referred to the concept of "the natural". According to the majority, family variations and social differences indicated that the "natural" was fluid and subject to constant change, and therefore should not be used as an obstacle to equality. The minority, on the other hand, stressed that it would be discriminatory towards the specificities of each gender to claim that one gender could replace the other, underlining the biological and psychological differences between the genders that were expressed through role models, gender identity and parent-child relationships.[24] The ministry, siding with the majority, also stressed the fluidity of the "natural" and argued in favor of equal access to assisted reproduction.

On the question of whether the *Act on Marriages* should be turned into an entirely civil law with no relationship to religious marriages, the ministry, somewhat surprisingly, did not discuss the expert assessment of theological and ecclesiastical views of marriage within the Church of Norway. According to this assessment, commissioned by the ministry and written by Erling J. Pettersen, then director of the Council of the Church of Norway, the theological view of the church was that marriage, while not sanctified, could be summarized in three points: (1) as an institute for the continuation of the created world through heterosexual reproduction, (2) as a framework for sexuality and a protective environment for raising children, and (3) that the relationship between mother, father and child was foundational to the social and religious order.[25] Rather, the ministry discussed prior suggestions of a purely civil function for marriages, and the potential burdens for officiators if religious marriages were stripped of their legal effects. Finding these burdens to be excessive, the ministry argued in favor of keeping the dual track model, in which religious and civil marriages are equal in legal effects.

Taken together, the expert assessments within the law proposal and the ways in which the ministry comments and weighs the arguments shows how the question of same-sex marriage has continued along the general path that emerged in Norwegian law in the 1970s, whereby increasing recognition of human rights norms has gradually eclipsed the socio-political influence of religious institutions and worldviews, effectively shifting the dominant frame of reference for marriage away from religion, and towards nonreligion. Hence, whereas earlier discussions

24 *Op.cit.*, 63.
25 *Op.cit.*, 25.

of marriage legislation had been dominated by a concern for the disruption of religious social institutions and values, the 2008 proposal featured expert assessments that would allow voices from many different sectors of society, religious and nonreligious alike. In this way, the law proposal picks up and further develops arguments from the discussion of the law on partnerships in the 1990s, in which the foundational role of marriage to the social order played a key part, although in a different tune. While the partnership law was seen as a compromise that would protect traditional marriage while offering a legal framework for same-sex couples, the proposal to recognize same-sex marriage was seen as an enlargement of the institution of marriage itself in the name of equal rights, as an institution whose religious connotations were increasingly becoming irrelevant in comparison to its rights-based effects. This development closely parallels that of the language used in other case studies explored in this book, where the discussion has evolved from a gradual toleration and acceptance of same-sex cohabitation and partnership, and to a full and comprehensive notion of marriage equality.

Unlike previous discussions, however, the Norwegian proposal to recognize same-sex marriage also featured in-depth discussions of the consequences of such a law for children and parenting, and, *inter alia* to the very nature of the social and natural order itself. This interpretation of the proposal, while implicit in earlier debates, was fully developed for the first time in the law proposal, and was also picked up extensively in the responses to the hearing of the proposal, to which we now turn.

4.5.2 The hearing

As an integral part of the Norwegian law-making process, law proposals must be made public and available for general review from any interested parties.[26] While anyone can submit comments, the ministry in charge of the law proposal is obliged to provide specific invitations for those institutions and social actors most likely to have comments and views on the matter at hand. For the proposal to amend the *Act on Marriages* in order to recognize same-sex marriage, approximately 300 public and private institutions were invited to submit their com-

26 This requirement is specified in the Instructions for Official Studies and Reports, section 5, see note above.

ments.[27] In order to trace the influence of themes that have emerged during the long and winding process towards the legal recognition of same-sex marriage, all the hearing responses have been coded according to the extent to which they emphasize (a) the interrelationship between historical and social development and the concept of marriage, (b) the role of marriage in maintaining and affecting the natural order, or (c) the relationship between marriage and human rights.[28] The discussion provided below does not provide a representative view of the many different positions taken up by the actors contributing to the process, beyond itemizing the overall number of opposing and supporting views. The excerpts and subdivisions presented below are intended to display the scope of actors' responses, not their representativity for the whole process.[29]

4.5.2.1 Actors

The hearing of the proposal received 107 responses from organizations with comments on the proposal and an additional 100 individuals submitted comments in opposition to the proposal. Of the 107 submissions with comments, 55 were negative towards the proposal – among these, 54 represented Christian denominations[30] while one was written by a parental rights activist.[31] Thirty-five submissions were positive towards the proposal, of which eight were Christian or humanist in orientation,[32] the remaining being public entities, labor unions and

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27 For the complete list, see Ot.prp.nr.33 (2007–2008) Om lov om endringer i ekteskapsloven, barnelova, adopsjonsloven, bioteknologiloven mv. (felles ekteskapslov for heterofile og homofile par), annex. 1. All the responses are openly available at https://www.regjeringen.no/no/dokumenter/felles-ekteskapslov-pa-horing/id467527/?expand=horingsnotater [accessed 25.11.2022].

28 The coding was conducted by Stian Aleksander Skandsen, according to a coding scheme developed in the *Nonreligion in a Complex Future* project. See also the introduction to this volume for details on the coding process.

29 The Catholic Church is a case in point – while the denomination it represents is fairly small in Norway, its responses are amongst the most comprehensive, meriting their inclusion in the discussion.

30 This includes numerous institutions within the Evangelical Lutheran Church of Norway, several branches of the Catholic Church, the Baptist Church, the cross-denominational Christian Council of Norway, several missionary organizations, the Anglican Church, the Norwegian School of Theology, Foursquare Norway, the Salvation Army, the Methodist Church, the Norwegian Missionary School, the Seventh Day Adventists, the Pentecostal movement and several NGOs and other institutions created in order to protect the Biblical definition of marriage.

31 Forum for Menn og Omsorg (Forum for Men and Care), directed by Ole Texmo. Website at http://www.krisesenter.org/.

32 The eight in question were The Faculty of Theology at the University of Oslo, the majority vote in South Hålogaland bishopric, the Norwegian Humanist Association, the Church City Mission, The Religious Society of Friends – Quakers, the Norwegian Christian Student Union, The Unitarian

a variety of NGOs with no discernible religious connection, thus meriting the label "nonreligious" under the approach favored by the editors of this volume. There were no submissions from non-Christian religious groups, nor did any organizations representing ethnic, cultural or linguistic minorities submit responses. The preponderance of Christian participants in the hearing reflects the widespread support in the general, largely nonreligious population, which saw no apparent reason to submit comments to the proposal. The lack of participation from amongst minority religious communities is slightly more surprising, but may be due to the exemption clause in the *Act on Marriages.*

4.5.2.2 History

The historical dimension to the question of same-sex marriage appeared in several of the submissions to the hearing. To some opponents, the historical weight of marriage as the basic unit of social organization and the role of marriage as a mechanism to ensure the continuation of the created world was front and center. The Church of Norway dioceses of Agder/Telemark, Bjørgvin and Hamar stressed the bonds created by history, which by Agder/Telemark diocese was characterized as the "long, historical and cultural perspective of which we all are part", warning against breaking down an institution with such an immense historical presence, not only in the worldwide Christian church, but as an "anthropologically universal arrangement".[33] The Catholic Diocese in Oslo (CDO), on the other hand, pointed to the unique role of Christianity as "a historically determinative factor" to the institution of marriage and family, a view echoed by the Christian Leadership Forum, which added that the historical influence of Christianity had helped "lifting our culture and our nation up from dark heathenism, to a civilized level that has become an ideal to other nations".[34] Expanding on the vital contributions offered by Christianity and the threats posed by meddling with this tradition, the CDO warned against the "intrusion into the private sphere" represented by reforming the legal framework on marriages, urging the ministry to recall that:

> …historically, state intervention into the home is nothing new. Rather, the prevention of such a development was one of the main reasons for the provisions on family life in the European

Church Bét Dávid and Open Church Group, a group within the Church of Norway established in order to promote same-sex marriage.

33 Agder og Telemark bispedømmeråd: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/agder_og_telemark_bispedommerad.pdf, accessed 05.03.2025.

34 Kristent leiarforum: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/kristent_leiarforum.pdf., accessed 05.03.2025.

> Convention on Human Rights. If one wishes to be honest, an important rationale will be the role of the family for a society and different regime types, including experiences from totalitarian regimes[35].

Whereas the actors from the Church of Norway primarily presented the issue as one of breaking a general, universally human chain of tradition, the Catholic Church not only placed the church itself as one of the historical guarantors of the present state of family life and marriage, but intimated that changes to this order could be an early indication of the totalitarian state intervention into the private sphere that originally inspired the modern notion of human rights.

Among the supporters of the proposal, history played a different role. The Faculty of Theology at the University of Oslo and the Directorate for Children, Youth and Family Affairs[36] both highlighted the historical significance of the changes to the socio-cultural order by legally recognizing same-sex marriage, but simultaneously voiced their concern that the proposal had not assessed more thoroughly the broader ramifications of so momentous a change. Mental Health Norway and Norwegian People's Aid,[37] on the other hand, pointed to the historical injustice towards same-sex unions, as the latter observed that:

> Work for equality and human dignity is often delayed in righting previous wrongs. History is full of discriminatory laws and regulations, and looking back, one cannot help but wonder why it took so long to eliminate such an obvious injustice. For most discrimination grounds, state sanctioned instruments of discrimination have been erased. But state sanctioned discrimination of homosexuals and lesbians remains today, as two people of the same gender cannot formalize their relationship in the same way as opposite sex couples.[38]

History, on this reading, is marked by successive stages on the path towards increased justice, in which previous wrongs must be acknowledged and dealt

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35 Oslo katolske bispedømme: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/oslo_katolske_bispedomme1.pdf, accessed 04.03.2025.

36 The Directorate is a state entity in charge of child protective services, children's welfare, equality and non-discrimination, adoption and marriages. For more information on the work of the directorate, see https://www2.bufdir.no/en.

37 "Norwegian People's Aid is a politically independent membership-based organisation working in Norway and in more than 30 countries around the world. Founded in 1939 as the labour movement's humanitarian solidarity organisation, NPA aims to improve people's living conditions and to create a democratic, just and safe society. NPA's international work covers three core areas: Mine Action and disarmament, Development and Humanitarian relief aid." See https://www.npaid.org/about-us.

38 Norsk folkehjelp: høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/norsk_folkehjelp.pdf, accessed 04.03.2025.

with for equality and human dignity to prevail. This way of interpreting the role of history clearly parallels the views of actors in the debate in Canada that espoused a different, more inclusive social imaginary for society.

Despite the different tones in the views of the historical aspects of legally recognizing same-sex marriage among opponents and supporters of the law proposal, there is a shared sense of history as a weighty element that has and should have specific considerations upon the choices we make in the present and, in particular, the consequences of these choices for the future. Their views of these potential futures, on the other hand, are markedly different – to opponents, the future is in peril, not only because of the diminishment of a long and continuous tradition, but because of the kinds of additional state interference they may be the harbinger of; to supporters, the future holds the promise of a society freed from the shackles of discrimination and traditionalism that has been holding it back for so long.

4.5.2.3 Nature and natural order

The role of nature and the natural order is the most prevalent theme amongst opponents to the proposal. These concerns reiterate, and several times cite, the three key aspects of marriage outlined by Erling J. Pettersen in his theological expert assessment of the proposal (see above), i. e. (1) the continuation of the created world; (2) the framework for family creation and child rearing; and (3) the role of married families as the foundational unit upon which social order is premised. Among these aspects, it is the perceived offense to (1) by detaching the process of procreation, and therefore the continuation of the species on par with the rest of the created world, from the institute of marriage that is seen as particularly worrisome. Equally problematic, however, is the perception that the challenges posed by such detachment will serve to destabilize (2) the family structure, whereby ultimately also (3) the social order will be in peril.

Variations of this theme, and in particular concerns related to (1) can be detected in virtually all the negative responses to the proposal, in more or less extended form, while the linkages to (2) and (3) are more unevenly distributed. A telling example of the linkages between these different aspects can be found in the response from Normisjon, a missionary organization:

> It is a banal fact that it takes cooperation between man and woman in order to create children and a future. And in order to create safe children and a safe future, a safe relationship between mother and father must be established. This is etched into nature itself, and is confirmed by research. Our faith is that this is God-given from creation, yet the argument is universal. If society allows that homosexuals can adopt, or even go to the test tube, they will still depend on the opposite sex. Our sexual orientations or preferences notwithstanding, we are

> still the products of heterosexual relationships. In a liberal democracy, people must be allowed to live together as they please, after some limits have been established to protect the vulnerable. But should society therefore say that everything is equally good and should be regulated equally? Should legislation only mirror people's choices, be they fleeting or committing, between same and different genders, in triangles or squares?[39]

Some of the opponents – notably the Catholic dioceses – are not only critical towards the "unnatural" split between an opposite-sex couple that can conceive with no assistance and same-sex couples that need some form of assistance. These opponents are equally critical to any form of assisted reproduction *in toto*, citing the rights of the child to know his or her parents as an inherent right that is inviolable. As such, the resistance towards the law proposal re-rehearses opposition to allow any form of assisted reproduction, whether for same-sex couples or for opposite-sex couples. The Catholic dioceses are also the only ones to bring up natural law to any larger extent, elaborating at some length about the combined violations towards natural law as a moral system, and the order of nature as an empirical fact engendered by accepting same-sex marriage. The Catholic Diocese in Northern Norway observed that:

> Children require long and extensive nurturing, care and education, regardless of social order. According to natural law, this responsibility is tied to the child's origins, i. e. its biological parents. This responsibility requires many years of community and fellowship with the child, an obligation that is most optimally met if such community and fellowship also exists between the parents of the child. This reproductive obligation is so permanent and independent of culture and time that it can be seen as a main cause for the existence of marriage as a phenomenon that transcends the state, culture and religion.[40]

The Catholic Diocese in Oslo, on the other hand, paid particular attention to the order of nature and the emphasis upon ideological and social aspects at the expense of the biologically and naturally given order, tying this emphasis to "positivism" and "constructivism":

> The proposal for a new law on marriage must be seen as a child of positivism. The proposal assumes that humans can decide for themselves what can be given, seeking to unite the experiential sciences, including the social sciences, leading to a systematic worldview that only

39 Normisjon: høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/normisjon.pdf, accessed 04. 03. 2025.
40 Den katolske kirke i Nord-Norge: høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/den_katolske_kirke_nord-norge.pdf, accessed 04. 03. 2025.

> recognizes that which can be empirically observed and controlled through science. In this way, our relationship to nature is altered, and becomes not what goes before us, but what we can control scientifically. From this train of thought, constructivism follows logically.[41]

While this passage clearly resembles the sentiments from the theological expert assessment of the proposal, it also adds a more systematic critique of the sciences to a point where it endangers the natural order as a whole.

Throughout the submissions that oppose the proposal, questions of natural law and order are frequently juxtaposed with Biblical passages, ecclesiology, statements from catechisms, and more general observations regarding the mission of Christianity as a creed, an ethos, and a communion of believers on Earth. While some of these are clearly denominational, in the sense that they pronounce doctrinal and theological points that are exclusive to their own organizations and fellowships, many also point to the jointly theological and universal aspects of the Christian faith, and to the role of this faith in providing society with its moral and ethical fiber and foundation. The statement from the Priests' Union captures this double function of marriage:

> The institution of marriage, which encompasses so many different cultures, age groups and individual differences, does not lose its most important ideals and characteristics (such as children, conjugality, faithfulness, lifelong duration, etc) because some of these characteristics are not fulfilled in every individual marriage. The law should confirm the special status that marriage holds in society, the role that is made explicit in the Biblical passages that infuse the marriage liturgy of the Church of Norway (1 Gen 1,27–8a and Matt 19,4–6). Here, gender polarity between man and woman is constituent to the institution of marriage. Historically, gender polarity is a more defining characteristic of marriage than its limitation to two individuals. Hence, a "degendering" of marriage will remove its element as a carrier of identity in marriage as a cultural institution.[42]

Unlike the opponents to the proposal, the supporters do not comment upon natural law or the order of nature, hinting at the strength with which these perspectives are tied in with Christian views of creation. This can be seen in their understanding of the family and society as a naturally given, preordained organism that exists prior to any man-made social, political, or legal instrument. To some extent, this perspective was already hardwired into the law proposal through its central position in the theological expert assessment, to which many opponents offer

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41 Oslo katolske bispedømme: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/oslo_katolske_bispedomme1.pdf, accessed 04.03.2025.

42 Presteforeningen: høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/presteforeningen.pdf, accessed 04.03.2025.

their support. Given the strength of this support, however, it is notable that none of the supporters of the proposal engage directly with the question of natural order or natural law. Rather, whereas the "degendering" and "decoupling" from nature and "positivism" detected in the proposal by opponents represent a harmful challenge to the order of nature, the supporters appear to see the very same processes as constructive and conducive to equal rights. Further supporters see these processes as not in conflict with their own understanding of the Christian faith. The Faculty of Theology pointed out that:

> Within the Evangelical Lutheran Church, we understand marriage to be a "worldly" and therefore civil arrangement. Hence, the church shares the central point in the grounds for the proposal, i. e. that marriage is "a civil institution, a concern for civil law" (4.1) According to a Lutheran view (unlike a Catholic), marriage is no sacrament for the church to administer, but part of the civil arrangements that exist for created life. The management of these arrangements lies with the public authorities of society.[43]

Whereas opponents pointed to the rupture with creation, procreation, family life, social order, the Faculty dismissed any such rupture, highlighting the detachment of marriage from the sacraments administered by the church that took place with the Lutheran Reformation; this position was echoed by the Church City Mission and the Christian Student Association.

Similar sentiments were voiced by other supporters of the proposal, who shared the view of marriage as a civil institution that should be available for all with no difference in treatment. Several of the supporters voiced their support for turning the *Act on Marriages* into a mandatory civil registration, removing the civil law effect of religious marriages altogether, expressing their regret that the proposal did not feature this option. The Directorate for Children, Youth and Family Affairs, which oversees the registration and recognition of marriage rituals in registered religious communities stressed the benefits of a purely civil arrangement:

> The Directorate would like to point out that mandatory civil marriage would have several positive effects. First, it will be easier to keep an overview of recognized officiators. Second, the capacity to wed would be entrusted to one institution, securing a more unified and predictable practice, which will likely lead to fewer illegal marriages. (…) Additionally, the Directorate would like to point out that mandatory civil marriage will advance equality and the right to marry, because it would remove the right to exemption enjoyed by officiators in the Church of Norway and other religious communities today under the *Act on Marriages*

43 Det teologiske fakultet: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/teologisk_fakultet.pdf, accessed 04. 03. 2025.

> §13. We would also like to point out that other countries in Europe have arrangements that require mandatory civil marriage.[44]

Taken together, the centrality of natural order and natural law to opponents and its absence among supporters signal the coexistence of fundamentally opposed views of marriage and its codification in law among the submissions to the law proposal. Actors positioned themselves along a sliding scale between two polarities: one that sees the legal regulation of marriage as subservient to, yet inextricably linked to the primordial, existential nature of marriage as a religious, cultural and social custom, and one that sees the legal regulation of marriage as purely a matter of clarifying the rights and duties among equal partners wishing to spend their lives together.

4.5.2.4 Human rights

The question of human rights occupies a central position in the hearing, among both opponents and supporters. Compared to the other case studies in this volume, this feature is quite pronounced in the Norwegian material, in no small part due to its connection to questions concerning children which were central to the Norwegian debate. While a few submissions raise the issue to the level of principles, discussing the nature and foundation of rights, their legitimacy and function in modern society, the majority of submissions that discuss rights frame it as either a question of the rights of children or as a right to equality. A substantial number of submissions also stress that the proposal violates the Universal Declaration of Human Rights (UDHR) article 16 (3), which proclaims that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State," on the assumption that the term "family" must be reserved for heterosexual couples. The majority of the submissions, however, do not refer explicitly to established human rights standards like the UDHR, but use "rights" in a more colloquial and nonformal sense, pointing to the rights of parents and the rights of children in particular, as common-sense, non-specific concepts that do not refer to specific legislation.

As in the matter of natural law and natural order (see above), the disagreement between opponents and supporters of the proposal are in kind, rather than in degree: to opponents, human rights in general are secondary to "biological law", as pointed out by The Norwegian Israel Mission, a Christian missionary organization:

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44 Barne-, ungdoms- og familiedirektoratet: høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/bufdir.pdf, accessed 04.03.2025.

> The proposal is not clear on the question of the rights of children and the conditions under which they grow up. Biological law has arranged reality so that all children have one father and one mother as the ideal starting point. We think that monogamous marriage provides children with the best conditions for growing up, providing them with role models from both genders. We therefore oppose the right to adopt or to receive assisted reproduction for homosexuals and lesbians. Several questions and consequences related to the rights of children and conditions for growing up in same-sex couples have not been adequately assessed.[45]

This division, between rights whose origins can be traced back to natural order, and rights that cannot, is stated repeatedly among the opponents, pointing out, as the Baptist Community did, that there can be "no human right to procreate". Extending this reasoning, several opponents pit the right to reproduce and to gain legal recognition of same-sex marriage as a preference for the rights of individual adults over those of children, as underlined by the Norwegian Missionary Association:

> The stated purpose of the proposal is to secure the rights of homosexuals and lesbians to live openly and to battle discrimination. This ideological starting point appears to limit the rights of the child at the expense of the rights of adults. (…) Children are being used instrumentally in order to secure equality between heterosexuals and homosexuals in society.[46]

This line of argument is prevalent among the opponents to the proposal, who tend to view the right to marry and have children regardless of gender to be "individualistic" and indicative of a "social" rather than a "natural" concept of rights. Supporters of the proposal, on the other hand, stress the right to equality in terms of legally recognizing same-sex couples under the same law as opposite-sex couples, with a particular emphasis on the right to have and raise children together. While the opponents see this aspect of same-sex marriage as particularly problematic, supporters emphasize that many children already grow up in same-sex households, and that the proposal will help provide these families with a more orderly legal framework, as maintained by the children's and families' organization of the Norwegian Confederation of Trade Unions:

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45 Den norske israelsmisjon: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/den_norske_israelsmisjon.pdf, accessed 04.03.2025.
46 Det norske misjonsforbund: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/det_norske_misjonsforbund.txt, accessed 04.03.2025.

> Many children today grow up with same-sex parents. These children do not have the same legal rights as other children. A common law on marriages will provide better legal security for these children, while also signalling that their families are of equal value. Many different family formations beyond the nuclear family exist in society today, and we believe different lifestyles must be respected and treated equally.[47]

Among the supporters of the proposal, some also stress the role of the state as an arbiter of rights, underlining the discrimination inherent in offering the possibility to adopt or receive assisted reproduction on the basis of sexual orientation, as pointed out by the youth group of Mental Health Norway:

> Same-sex couples do not have the right to joint custody, nor do they have equal rights to have children, i. e. through adoption, We consider this to be discriminatory by the state. This implies that the state defines heterosexual couples as more valuable than same-sex couples.[48]

Whereas opponents of the proposal point to the dangers of adopting a law that will dilute traditional forms of marriage and harm the rights of children, supporters see the primary obligation of the state in this matter to rectify a historical wrong by granting everyone the same rights regardless of gender or sexual orientation.

The views and use of human rights to frame both support and opposition to the proposal show the flexibility and adaptability of human rights norms, which can be put to work to defend and oppose diametrically opposed views of the legitimacy of legal regulation. While this may confirm the utility of human rights as a common language, it can also be viewed as a potential challenge to the coherence of a legal framework that can be used to argue completely opposite positions, offering no resolution.

4.5.3 The parliamentary debate

After the hearing, in preparation of a full parliamentary debate, the law proposal was sent to the Parliamentary Committee for Family and Culture for further deliberations. Introducing the proposal to the committee, the ministry observed that the hearing had evoked “great resistance” in the Church of Norway and

47 Landsorganisasjonen i Norge: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/landsorganisasjonen_i_norge.pdf, accessed 04. 03. 2025.

48 Mental helse ungdom: Høringssvar. Retrieved at https://www.regjeringen.no/globalassets/upload/bld/horinger/2007/felles-ekteksapslov/mental_helse_ungdom.doc, accessed 05. 03. 2025.

other faith communities, and had "aroused strong sentiments and emotions among religionists".[49] Crucially, while noting this resistance, the ministry decided to keep the proposal virtually unchanged, stressing that "dissent in several faith communities show that attitudes are changing", and that these changes should be "affected positively", declaring its willingness and intent to use legal change to reform religious views of marriage, further decentering the role of Christianity.[50] While this declaration of intent is unusually blunt, it is very much in line with a Norwegian – and Nordic – view of the symbiosis of law and religion (cf. Christoffersen 2006), as well as the attendant acceptance of state involvement in religious matters, values, and concerns. Hence, unlike the processes of "desacralization" or "deimbrication" observed in other case studies examined in this volume, Nordic approaches to the interrelationship of law and religion appear to extend the model of state management of religion developed under the many centuries of majority churches governed by the state.

The committee issued numerous comments to the proposal, dividing into several differently constituted majority and minority positions. Nevertheless, the overarching issues in the proposal were adopted by a considerable majority, while being opposed outright only by the right-wing Progress Party and the centrist Christian Democrats. As the proposal went up for debate in Parliament, the MPs reiterated many of the points raised in the hearing. Supporters lauded the historical nature of the proposed changes, while opponents lamented the disconnect from nature and biology, and both sides framed the issue as one of rights, albeit with different emphasis – the rights of children or the rights of adults, or both. Much of the debate was dominated by procedural issues, as MPs engaged in point-scoring on how well the proposal had been prepared and the extent to which their own alternative proposals had been heard by the ruling coalition or not.

Additionally, however, the Parliamentary debate featured a concern with "the religious perspective" that differed substantially from that of the hearing, whereby representatives voiced their concern for religious issues that they did not necessarily subscribe to themselves. Progress Party MP Ulf Erik Knudsen stressed that:

49 Innst. O. nr. 63 (2007–2008) Innstilling fra familie- og kulturkomiteen om lov om endringer i ekteskapsloven, barnelova, adopsjonsloven, bioteknologiloven mv. (felles ekteskapslov for heterofile og homofile par), p.2. All the documents from the parliamentary review of the bill, from the committee to the transcription from the debate in the chamber, is available at https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=39243 . [accessed 25.11.2022].
50 *Op.cit.*, p.5.

> …even if you are not Christian, you have to acknowledge that our society is based upon Christian values, and a large majority confess to the Christian faith. From this point of view, marriage between man and woman is central. But also other religions, like Islam, have the same views of marriage between men and women. We have to acknowledge that we are challenged by people who come to Norway from distant cultures. This is particularly the case for Muslims. The new definition of marriage may further alienate immigrants and increase the divide between ethnic Norwegians and immigrants. I believe it is naïve to expect that in the next 300 – 400 years, Muslims will accept marriages between two men.[51]

This concern for the divide between immigrants and ethnic Norwegians is notable, given the complete lack of engagement with the proposal from immigrant communities. To the Conservative party MP Olemic Thommessen, on the other hand, concerns with the religious perspective, while clearly relevant, could not be decisive:

> Even though many have a religious approach to marriage, it must be clear to us as legislators that this is first and foremost a legal concern. In a secular, multireligious society, there is good reason for public authorities to accommodate civil marriage as a mandatory mechanism.[52]

The sharp division between state-made law and religious sentiments notwithstanding, Thommessen also stressed the need to respect those with a different opinion, "…because these are sentiments deeply embedded in faith, in deep and long traditions concerning the order of nature and its significance to our arrangements". The deeply held sentiments about the issue from supporters and opponents alike was also reflected by the testimonies by numerous MPs regarding the engagement they had been met with from their constituents, as many had received letters and e-mails by the hundreds, turning this case into one of the most intensely debated in recent Norwegian political history.

Taken together, the Parliamentary debate on the proposal added a few notable items that had not already been addressed in the hearing, and to which the ministry had offered its responses. Lasting eight hours, the debate was unusually long, and featured numerous personal opinions and reflections from MPs in both camps. Further demonstrating the polarization caused by the proposal, the parliamentary groups of the Conservative party and the Centre party released their members from following the party line, and substantial minorities in both

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51 See See https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Odelstinget/2007-2008/080611/1, accessed 19.03.2025.

52 See https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Odelstinget/2007-2008/080611/1, accessed 19.03.2025.

parties joined the minority that opposed the proposal. At the end of the debate, the proposal was adopted by 84 to 41 votes, a considerably higher margin than the *Act on Partnership.*

4.6 Different normative universes?

The different and sometimes completely opposite views of the role of history, nature, and human rights in the submissions demonstrate the extent to which supporters and opponents to the law proposal on same-sex marriage inhabit different "normative universes", in the framework suggested by Robert M. Cover (1983). According to Cover, the binding force of positive legal rules cannot be divided from the narratives in which they are embedded, as narratives are essential to invest rules with "jurisgenerative" power that can inspire their creation and maintenance through the interpretative communities that are set to administer them:

> The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" – a warrant that we share a *nomos.* (Cover 1983)

Across the amendment process, the communal and narrative character of the interpretation of the proposal among the actors in opposition and support are on display in the different manners in which they frame their arguments and view the interrelationships between the themes of history, nature, and human rights. The law proposal, while clearly designed to convince the public about the need for legal reform, was explicitly assembled with a multiplicity of voices whose internal consistency was only briefly touched upon by the responsible ministry, opening up several potential lines of interpretation for the actors involved in the hearing.

The opponents to the proposal picked up the inherent tension between the theological views of marriage and the arguments in favor of equal rights regardless of gender and sexual orientation that were both contained within the expert assessments in the proposal. Their shared views of Biblical and Christian narratives as authoritative provide the locus for their views of how history and the natural order are intertwined and form the basis of their views of human rights. While denominational differences are evident across their submissions, the communal unity of a cross-denominational Christianity is emphasized by several actors, stressing the civilizing effects of the Christian faith, its strong correlation with

"biological law", and conditions imposed by nature and its crucial role in upholding social order.

To supporters, on the other hand, the dominant, uniting narrative is not an authoritative tradition, but a shared, celebratory view of the gradual rise of gender equality and anti-discrimination, encapsulated in their views of history as a progressive movement towards increased legal recognition of alternative modes of family life independent of gender or sexual orientation. While some of the Christian organizations framed their support by referring to the Bible and the civil nature of marriage in the Evangelical Lutheran tradition, thereby confirming their allegiance to the Bible as a binding narrative, none of the other supporters engaged with the theological arguments in the proposal. Crucially, while the community envisaged by the opponents – all of whom were Christian – was a shared, yet diverse sense of Christianity, the community of support was more loosely arranged, referring to society and the social order, and the need to keep legislation in tune with an ever-changing social dynamism. Hence, where opponents see the changes as a destabilizing threat to their view of the intimate relationship between history, natural order, and human rights, supporters see the same changes as a confirmation that society is willing and able to evolve and adapt to new circumstances.

Interestingly, the normative universes on display in the preliminary period to the recognition of same-sex marriage did not conform to a divide between "religious" and "nonreligious" participants or points of view. Religious organizations, individuals, and arguments could be identified on both sides of the divide, indicating the ineligibility of religion as a marker for the view of marriage equality. This confirms the "mutation" of religious references in the public sphere addressed in the introduction to this volume, whereby religious references can be drawn upon on both sides of the divide on contentious issues like same-sex marriage. Nonreligious organizations, individuals and arguments, on the other hand, were exclusively to be found among participants in the debate that were in favor of legally recognizing same-sex marriage, indicating a convergence between a nonreligious outlook on life and support for marriage equality. This may suggest that the "mutation" of religious references has no counterpart among the nonreligious, whose supportive views of same-sex marriage appear united and undivided.

4.7 Conclusion

Despite polarized and heated discussions of the amendments to the *Act on Marriages*, the recognition of same-sex marriage appears to enjoy wide and growing acceptance and support. A legal challenge to the law initiated by opponents of the

amendments in 2009 was promptly thrown out of the courts and failed to be heard at the European Court of Human Rights in Strasbourg for lack of legal standing.[53] While the issue continues to be controversial within the Church of Norway, the adoption of an inclusive liturgy for same-sex marriages in 2017 by the synod of the Church indicates growing support.

Survey data suggests that approval rates of same-sex marriages and the recognition of other LGBTQ-I rights are steadily growing in the Norwegian population, in line with similar trends across Western Europe (Digoix 2020; Hollekim and Anderssen 2022). While there is no clear pattern as to whether the changes have been caused by legislation or by other social trends, those who still oppose same-sex marriage and related rights tend to be older and to report a stronger level of religious faith than the population average, extending the trend observed during the earlier wave of partnership legislation (see above). Crucially, the public visibility and contestation of legal questions relating to religion in the Nordic countries appears to be increasing despite the gradual and steady decline of belief, membership, prayer, and attendance as documented through recent, large-scale projects like *The Role of Religion in the Public Sphere: A Comparative Study of the Five Nordic Countries* (NOREL, 2009–14) and *The Impact of Religion: Challenges for Society, Law and Democracy* (IMPACT, 2008–18). Summarizing the findings of NOREL, Furseth et.al observed in 2019 that the many different and contradictory trends observed in the project behaved and interacted in unpredictable and non-linear fashion, problematizing earlier conceptions of a steady decline of the significance and influence of religion across all social areas because of lower numbers of believers and increased differentiation of social spheres (Furseth et al. 2019). Arguably, the growing support of same-sex marriage, and its role within the larger LGBTQ-I rights movement provides an illustrative example of the non-linearity and unpredictability of how social and political trends reflexively interact with religion. While all the organizations opposing the amendment to allow same-sex marriage were Christian, their arguments were multi-layered, drawing both on explicitly religious arguments and on themes and topics that were available to all, regardless of religious belief or belonging. Both sides considered the weight of history, the order of nature, and the balance between different sets of rights. In this

53 The purpose of the suit was to establish the continued legality of their marriages and to achieve an official confirmation that the newly amended act was void in relation to their marriages. According to the authors, the case turned on the scope of their consent, an issue that they claimed was beyond the authority of Parliament to regulate, and would have to be decided by the courts. The case was dismissed and appealed all the way to the Supreme Court, which observed that the authors appeared to have no legal standing, as their claim was "a question of values", rather than a legal question (Case no. Rt. 2010–880, 2nd of July, 2010).

sense, the opposition, which at the surface appeared to yearn for the same "monolithic Christian society" imagined by the opposition in Canada, framed its arguments drawing both on religious and nonreligious references. Similarly, the support for same-sex marriage was framed using arguments that drew both from explicitly confessional and religious themes as well as nonreligious topics, ranging from the progressive development of history to the importance of equal rights.

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Timeline

900 – 1200s: Christianization of Norway
1152 – 1154: Norway was visited by Bishop Nicholas Breakspear – later Pope Adrian IV –
1154: Marriages are regulated by non-written, customary law in the pre-Christian era, and Catholic canon law from Christianization
1500s: Norway is part of Denmark under King Christian III, who introduced Lutheranism to the realm through law in the wake of the Wars of Religion
1537: Marriage introduced in the law of the Protestant Reformation in Denmark-Norway
1589: *Ordinance on Marriages* is implemented and creates legal recognition of marriage
1845: *Act on Christian Dissenters* which allowed for marriages of Christian non-members of the church
1857: *Act on Christian Dissenters* expanded to Jews
1863: Act on Christian Dissenters expanded to non-Christians
1918: *Act on the Institution and Dissolution of Marriage* enacted
1939: Norwegian People's Aid is founded
1960s: Socio-cultural divide between religious and nonreligious social and political actors begins
1969: Nordic countries initiate parallel law commissions that start working on proposals to amend and update the marriage laws across the region, which were considered to be old-fashioned and untimely.
1970s: Question of same-sex marriage arises in Norway
1972: Decriminalization of sexual relations between men
1975: Abortion is legalized
1978: Law on gender equality is enacted
1981: Hate speech on account of "homosexual way of life or orientation" is criminalized
1987: The Norwegian commission gives final recommendation, which is a comprehensive overhaul of existing law
1989: Denmark legalizes same-sex partnerships
1990: Legal recognition for same-sex couples is first proposed in the Norwegian parliament
1991: *Act on Marriages* is enacted
1993: Previous proposal for legal recognition of same-sex couple is added as an addendum to *Act on Marriages*
1993: *Act on Registered Partnerships* is enacted, in effect until 2008
1995: Sweden legalizes same-sex partnerships
1996: Iceland legalizes same-sex partnerships

2002: Finland legalizes same-sex partnerships
2002: *Christine Goodwin v. United Kingdom* is decided
2004: A proposal to amend the existing Act on Marriages to make it gender neutral is presented to parliament by two MPs from the Socialist Left party
2005: New-center left government takes office in Norway, proposes law that would regulate same-sex marriage as part of their political platform through a government plan of action called the *Soria Moria Declaration*
2008: Legal recognition of same-sex marriage through changes to the *Act on Marriages*, the *Act on Adoption*, and the *Act on Biotechnology*
2009: The Norwegian parliament amended the *Act on Marriages* to include the right for mutually consenting adults above the age of 18 to enter into marriage with whomsoever they wish, regardless of gender or any other identity characteristic.
2009: A legal challenge to the *Act on Marriages* was brought to the European Court of Human Rights in Strasbourg, but was thrown out for lack of legal standing

5 “Something old and something new”: same-sex marriages at the intersection of the liberal self-image and imaginings on the People’s church of Denmark

Karoline Marie Donskov Dige, Lene Kühle

5.1 Introduction

Denmark was the first country in the world to legalize same-sex unions through the Registered Partnership Act of 1989. Despite this first step toward equal access to marriage, it was not until almost 25 years later that same-sex unions were replaced by an equal opportunity to marriage. Denmark, an early actor in the first phase of equal rights, moved rather slow in the second phase, where same-sex marriage replaced registered partnership (civil union) in 2012. The delay was due tosame-sex marriage being introduced simultaneously as a civic and a religious event, due to the dual track marriage system in Denmark, where both civil and religious marriages are recognized. Liberal yet conservative, this chapter explores the logics and ambiguities of the Danish discussions on same-sex marriages, and places them in regard to the distinction between religion and nonreligion as well as in relation to the majority Lutheran church, which encompasses 72 percent of the population.[1]

The Parliament which is both a political body and the synod of the Evangelical Lutheran Church of Denmark, in the constitution named ‘the Danish People’s Church’ (the *Folkekirke*,) due to this double role had the power to implement the law that introduced same-sex marriage in the *Folkekirke.* But at previous occasions[2] the Parliament tried to avoid this introduction, as it was by many seen as a clear violation of the church’s self-determination regarding its ‘inner’ affairs. Drawing a rhetorical distinction between the ‘inner’ and ‘outer’ affairs of the church, it establishes an understanding that there are matters of the *Folkekirke*, which pertains to the ‘outer’ affairs, and as such could, and should be regulated by the parliament. The politicians are supposed to refrain from interfering with the ‘inner’ affairs, which regarding the content of practice, like the specific design

1 https://www.dst.dk/da/Statistik/emner/borgere/folkekirke/medlemmer-af-folkekirken.
2 In 2005, 2006, 2007, 2008 and 2010.

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of rituals, and what and how pastors are preaching. Legally, no such division exists, even though there is a tradition of the Minister of Ecclesiastical Affairs to be cautious in regulations of the church. The distinction is said to have originated from the First Council of Nicaea (325) and is considered to be crucial in Luther’s theories of church-state relations. However, in contemporary political and theological debates, this lack of division appears as an ambiguously formulated means of differentiating between the religious and civic aspects of the activities of the *Folkekirke* (Nikolajsen 2023). This constituted a core element in the conflict over the same-sex marriage bill in Denmark, as we will see throughout this chapter.

When the bill to replace the *Registered Partnership Act* with a new *Marriage Act* was presented in Parliament, it happened alongside a bill that was to allow individual pastors in the majority church, the *Folkekirke,* to be exempt from marrying same-sex couples on ‘grounds of conscience’. If a pastor wished to be exempted it was to become the duty of the Dean to find another pastor to perform the wedding and the exemption was therefore only a matter of the individual pastor’s position towards same-sex marriage. The two bills were discussed concurrently and were in many instances treated as a single bill as one presupposed the other. The simultaneous concern for the rights of same-sex couples, on the one hand, and the rights of the pastors, on the other hand, epitomizes the dynamics and tensions within Danish societal, political, and legal debates on same-sex marriage. The focus on the right of the pastor to abstain from performing same-sex marriages may, on the one hand, be seen as an individual freedom right, which is not dissimilar from the rights of Danish nurses and doctors to abstain from participating in the conduction of abortions on ethical and ‘conscienceness’ grounds. On the other hand, it is also entirely consistent with and supportive of the stress on the local congregation centered around its pastors, which is a central part of the self-understanding of the *Folkekirke.* The unique religion-state relations in Denmark means that the *Folkekirke* is a state church without a central body to speak on its behalf and where the executive power lies on the central level within the Ministry of Ecclesiastical Affairs and with individual pastors and parish councils on the local level.

The Danish self-image is of Denmark as a liberal, free-spirited, modern country with high levels of tolerance. The nation’s self-image was confronted in various ways during the discussions on the introduction of same-sex marriage by the country’s specific – and unique – religion-state relations. Denmark thus hosts one of the few remaining state churches, with a state church being understood as a religious organization with low legislative and executive autonomy and with a clear preferential position grounded in the Constitution (Kühle et al. 2018). Within the *Folkekirke* the identity as a state church is not embraced and is often rejected as a fundamental misunderstanding of the identity of the

church by its representatives. This resistance to the term 'state church' is a historic remnant of debates of the 19th century, where the constitutional act named the Evangelical Lutheran church the *Folkekirke*, meaning 'the people's church', representing and represented by the people as opposed to the government or 'the state'. The intention of 'the constitutional fathers'[3] was to draft specific legislation for the *Folkekirke* with details of authority structures and decision-making processes promised in the unfulfilled A Article 66 of the Danish Constitution. As a result of this article never being fulfilled, the legislative and executive autonomy of the *Folkekirke* remains with the Parliament and the Ministry of the Ecclesiastical Affairs. As we will see, this ambiguous identity places the church in an ambivalent position regarding the implementation of same-sex marriages in the church. The change was widely supported in the public and in Parliament, but opposed by many frequent churchgoers, who felt a greater 'ownership' of the *Folkekirke* including what should be allowed within it. This ambiguity relates to the *Folkekirke* being both a religious institution – as the People's Church – and a nonreligious, civic institution as part of the state's administration and thus an institution that – as part of the state – should serve all citizens, including the LGBTQI-community. Due to the *Folkekirke*'s legal position as part of the state it has been included in the Danish self-image as free-spirited, modern, and inclusive. This is because it still marks most major life transitions[4] for the majority of the Danes. This might be why the church is imagined to represent the same values as the state, which could be seen in the overwhelming public support[5] for the idea of same-sex marriage.

The case of same-sex marriages in Denmark allows us to pose the question of the role of the state in promoting liberal values. What is the role of the Danish state in forming new understandings of concepts like marriage, which traditionally has been shaped by Christian understandings of the term? What voice do religious minority and majority representatives have in public debates on the political scene and in the media, which are both arenas, commonly perceived as skeptical towards religious voices? Which role does the specific Danish church–

3 They were all men. Women only gained the right to even vote in elections in 1915.

4 Even though most Danes do not frequent the church on a weekly basis, the church still provides the setting for most major life events such as baptism, confirmation, weddings and funerals. Furthermore, naming of a newborn, no matter the belief of the parents, still takes place through registration in the parish of birth and thereby includes the local church (Familieretshuset 2025).

5 A poll of 2011 shows support from 65 % when asked whether same-sex couples should be able to get married in the same way as heterosexual couples in the *Folkekirke* (Danmarks Radio 2011). As most Danes do not frequently use the church this figure is remarkable, as it shows a broad imagining of what the (modern) church should be even if it is not used (often) by the majority.

state and general legal system play in preventing or promoting same-sex marriages?

Danish church-state relations are an extreme case of state interference. Yet, extreme cases often provide richer information than the average cases as they tend to reveal more information through their activation of more actors and give insights into basic mechanisms and the causes behind a given problem (Flyvbjerg 2006). This approach is supported by the fact that many of the characteristics of the Danish cases are also present in cases from the other Nordic countries (similar to the chapter on the Norwegian case in this book) as well as in other countries which like Denmark allow for legally binding marriages to be entered in city halls and in religious organization like the *Folkekirke.*

Based on the research question above, the structure of the chapter will be as follows. First, a short introduction to the Danish legal and political system, including the nation’s state-religion relations. This will be followed by an introduction to the methodology and the three types of data sources on which the analysis is based. The material will be examined with regard to its utilization of history and natural law-type arguments leading to the presentations of the findings. Finally, there will be a discussion exploring the interaction between the three levels.

5.2 Religion, politics, and law in Denmark

Denmark has been a democracy since 1849, when the first constitution was signed. The Constitution remains largely unchanged since 1849 (Christensen 2020, 9) and the overall preservation of its original wording means that concepts like democracy and freedom of religion are not mentioned in the Constitution even if Danish legal scholars believe that pillars of democratization of rights are upheld by the antiquated formulations of the Constitution (Christoffersen 2006). Religion is mentioned six times striking a balance between an absolute right to freedom of belief and a relative right to religious practice (Lodberg 2000). As the Constitution was drafted in a situation of almost complete monopoly of the Evangelical Lutheran Church, the freedom of religion presented in it is often read through the statement of Article Four that “The Evangelic Lutheran Church is the People’s Church of Denmark and is supported as such by the state” (Denmark: Constitutional Act 1953). This formulates the privileged role of the Evangelic Lutheran Church as “supported”. The exact content of the support is not specified, but Denmark’s has a dual track marriage system may be understood as a part of the fulfilment of Article Four Freedom of religion is established in Article 67, which appears to formulate it as the right to establish religious communities. It thus states “Citizens shall be at liberty to form congregations for the worship of God in a manner

which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be taught or done". Remarkably, Article 67 is often read as a clause that protects freedom of religion and belief only if interpreted in a broad way (Lassen 2020, 140). Article 68 states that "No one shall be liable to make personal contributions to any denomination other than the one to which he adheres". Initially, this clause included a last part that "yet anyone who cannot document that he is a member of a recognised religious community is obliged to pay his dues to the Church of Denmark or to the school system" (Kühle 2004, 108). The aim was to prevent resignations from membership for economic reasons. The clause was abolished in 1915, but the concept of a recognised religious community continued as designation for a group of religious groups, which has privileged relations to the state. Article 69 along with the previously mentioned Article 66 are the so-called articles of promise, which present the intention to draft specific legislation for the majority religion, as well as for the minority religion. The specific legislation for minority religion was introduced in 2017, after 168 years. A specific Church constitutional act has not been presented, even though a number of laws addressing specific aspects are routinely discussed and amended in the Parliament. The Danish Parliament, the *Folketing*, a 179-member assembly, is the only constitutionally established state body, and thereby plays a significant democratic role by its direct popular mandate (Christensen 2020, 15). The *Folketing* shares legislative powers with the government, who introduces bills to the Parliament, who may pass or reject a bill after three readings. Article 70 bans discrimination on the basis of religion by stating that "No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons". Article Six of the Danish Constitution states "The King shall be a member of the Evangelical Lutheran Church". This establishes a relationship between the royal family and the *Folkekirke*. This means on the one hand that the King is formally the head of the *Folkekirke* but also that the King is the only citizen in Denmark who cannot freely choose his or her religion (the former Queen Margrethe was legally the king) (Kühle et al. 2018, 85–9).

Interestingly, the adaptation of the constitution directly entailed the need for access to marriages outside the church. This sprung from the need to ensure that people who did not belong to a recognized religion would be allowed to marry, and so in 1850 the Proposal for the Freedom of Religion Act was put forward. The bill aimed to give all the country's citizens access to civil marriage, naming, and confirmation regardless of religious affiliation, but it was met with opposition

from both the Parliament[6] and the population. A petition gained signatures in the thousands protesting the bill in order to keep the "faith of the fathers and inherited church customs" as it was stated. A different law proposal was presented and adopted as Law of 13th of April 1851, which meant that civil marriage was a kind of 'emergency marriage' for couples where neither belonged to the *Folkekirke* or a recognized religious community. If one of them was a member of the *Folkekirke* or a recognized community – at that time this included the communities of Reformed Protestants, the Jewish community, and the Catholic church –marriages could take place within that community. Some found this to be problematic and too advantageous to the *Folkekirke* and the recognized religious communities and attempts were made to offer freedom of choice between civil and religious marriages, which was also the suggestion made by the joint Scandinavian commission established in 1910 and prepared a report on a number of draft laws on marriages. Yet, the Danish Minister of Justice preferred compulsory civil marriage under the argument that this was common in many countries (Kühle 2010). It was therefore surprising that the law, when it was finally adopted in 1922 (*Marriage Bill of 30th of June 1922*) gave freedom of choice between civil and church marriage within the *Folkekirke* and in the recognized religious communities. The long negotiation on marriages, which was initiated in 1851, thus led to the right to perform civilly valid marriages as a key privilege of the recognized religious communities. The specific character of the other privileges and duties of the recognized religious communities has changed over the years, but the stable core, i.e. that religious leaders within the recognized religious communities may apply to obtain a wedding warrant from the state, has remained. The *Marriage Bill of 30th of June 1922* also granted access to divorce.

Since Article 66[7] has never been implemented, the *Folkekirke* has no synod nor other representative organ, and decisions are left to the politically appointed Minister of Ecclesiastical Affairs and the Ministry of Ecclesiastical Affairs to constitute the executive committee of the church. The Ecclesiastical Affairs Committee, a subgroup within the Parliament, as well as the Parliament in general is responsible for "parliamentary scrutiny of the administration carried out by the Minister for Ecclesiastical Affairs of the government's ecclesiastical policies and with observance of laws passed and mandates agreed in the Danish Government related to ecclesiastical affairs"[8]. The Minister of Ecclesiastical Affairs is bound by

6 The original two-chamber system of a Folketing and a Landsting was abolished in 1953.

7 That states that the *Folkekirke* should be constituted through legislation.

8 https://www.thedanishparliament.dk/en/committees/committees/the-ecclesiastical-affairs-committee.

Article Four [9] of the Danish Constitution. Much of the discussion regarding the introduction of same-sex marriage in the *Folkekirke* therefore centered on church-state relations, what constitutes the Evangelic Lutheran Church, and how widely the confessional foundation can (and should) be stretched before the Church ceases to be Evangelic Lutheran. In spite of the small size of the country, the local government system is one of the most decentralized local government systems in the Western democracies (Munk Christiansen, Elklit, and Nedergaard 2020). This means that many decisions are left to local authorities and institutions like schools, prisons, and hospitals and practices therefore differ across the country. This is also the case for the *Folkekirke*, where decisions are often taken by the local parish council or in some cases one of the ten bishops. This corresponds well with the lack of one central religious authority figure of the *Folkekirke* and the attempt of the ministry of Ecclesiastical Affairs to restrain in most cases from dealing with the 'inner' affairs of the church. There are however exceptions to this informal rule. In 1948, female ministry was thus enforced on the *Folkekirke* by the Parliament even if leadership within the church was divided on the issue. And in 2023, the voices within the *Folkekirke* have protested against the way the government decided to regulate the holiday calendar of the Church by abolishing the Great Prayer Day as a public holiday without due negotiation with the Church (Law no. 214 of 6th March 2023). The controversy shows that the distinction between the 'outer' and 'inner' affairs are somewhat blurry, as it can both be seen as a bank holiday (which the government is completely in charge of) and as a religious holiday that pastors and other representatives of the church think they should have consideration (Christoffersen 2023).

Another characteristic of the Danish politico-legal system is the Scandinavian Legal Realism that is shared with other Nordic countries. Among the 'Nordic' traits is the way the legal systems have escaped the civil law/common law dichotomy (Sunde 2021) as a civil law system with elements of common law. Legal Realism is 'the legal ideology of the Nordic Welfare State that insists on the primacy of politics over law and has entailed the marginalization of the judiciary on behalf of the legislative and executive powers' (Strang 2018, 203–4). Denmark does not have constitutional courts and the Supreme Court has in its review of the constitutionality of acts of Parliament "not engaged in dynamic and creative interpretations of the Constitution" (Christensen 2020, 25). Instead, the court has "kept its feet on the ground and focused on common legal principles of interpretation based on the wording in the Constitutional Act and the meanings that can be pre-

9 That states that the Evangelical Lutheran Church is the *Folkekirke* of Denmark and should be supported as such by the Danish state.

sumed to be behind the formulations” (Christensen 2020, 25). This means that the courts are not drivers of social change to the extent that is the case in many other countries (as seen in the chapters about the USA and Brazil in this book).

Legislation often promotes change beyond the strict area directly addressed by the law. The *Registered Partnership Act* of 1989 initiated for instance discussions within the *Folkekirke* and by 2005, it was official practice in six of the ten dioceses to allow pastors to bestow a blessing on same-sex couples following registration of partnerships thereby mirroring the practice of bestowing blessings following city hall marriages. In the light of increasing public interest, in 2010, the Minister of Ecclesiastical Affairs appointed a working group of different-level representatives of the church. The working group was split with half endorsing a full ritual for registered partnership in the church and the other half being reluctant (Nielsen and Kühle 2011, 184).

The discussion on same-sex marriage in Denmark leading to its adaptation in 2012 thus did not come out of the blue. It was the accumulation of a long internal discussion within the church as to whether a legally binding marriage for same-sex couples in the church should replace the churchly blessing that some churches (and other religious communities) offered after the legal civil union had been consummated in the city hall. Like in Argentina, it was considered a deeply personal/moral question, and some parties chose to release their members from the party discipline (i. e. voting customarily according to the ‘party line’) in the matter of the Parliamentary vote on the amendment of the *Marriage Act* in 2012. The option to release members from the political line of the party is only used when the issue at hand has ‘ethical implications’ (oftentimes with religious overtones) and personal morals rather than party ideology dictates what a member of Parliament thinks of a matter.

5.3 Material and methodology

The material examined is threefold. There is firstly the political level, which is present through the Parliamentary debates from the three readings of both bills in Parliament in 2012 (similar attempts to implement a same-sex marriage ritual in the *Folkekirke* had been made in 2005, 2006, 2007, 2008, and 2010 without passing). The discussions in the Parliament when a bill is read are transcribed and made available at the website of the Parliament, www.ft.dk. In the current analysis only the material pertaining to the bill of 2012 has been retrieved and coded.

Secondly, the Parliament invites responses from the civil society, which in this debate resulted in 114 consultation responses submitted during the readings of the bill from both organizations (bishops, religious, and nonreligious organisations)

and private individuals. This material is also available from www.ft.dk and has been retrieved and coded for the current analysis.

Thirdly, the court of law is present through rulings from the High (2016) and the Supreme Court (2017) on the constitutionality of the amendments of the *Marriage Act* that was the result of the passing of the bill in parliament. High and Supreme Court verdicts are available from https://www.pro.karnovgroup.dk/ and deal with claims of unconstitutionality (specifically Articles four, 66, and 69 on the Evangelical Lutheran nature of the *Folkekirke*) and a violation of the European Human Rights Charter's Articles nine and 11 on freedom of conscience and religion and the freedom of assembly and association. These rulings were also retrieved and coded.

The coding revealed a basic problem in the Danish context of having a combination of a constitutionally protected and state governed state church that often acted and was understood as much as a part of the state as a religious organization. In the presentation of the material, the political level of the parliamentary debates and the civil-society level of the consultation responses will be treated simultaneously, as they in large part correspond with one another. The court level of the High and Supreme Court rulings will be treated separately as they work according to a different logic. Further, the court level is only relevant regarding the history and temporalities-analysis, as natural law elements were absent from the court material.

The consultation response material consists of objections and comments made by 114 different religious, nonreligious, organizational, and individual actors, who submitted a response during the readings of the bills. The consultation response actors were predominantly Christian and conservative, and except for the LGBT+community, the only non-Christian organizations were representatives of marginal religious actors. These comprised a progressive Jewish, a Norse [10], and an Alevi[11] group in addition to the Humanist Society (which is much smaller in Denmark compared to its Norwegian counterpart).

Most consultation responses (71) were against the proposed change to the Marriage Act, but none were against the proposed release of pastors on the grounds of conscience. This matched the discussion of the bills in Parliament, where the bill regarding the freedom of conscience of pastors carried unanimously after an almost non-existent debate during the readings, whereas the bill on

10 A neopagan group worshipping the old Norse gods.

11 Alevi is ethnic and religious identity, which includes Shia, sufi and Kurdish folk religious elements. In Denmark, Alevi groups are recognised as a faith community in their own right, i. e. not as a part of Islam.

amending the *Marriage Act* resulted in an unusually long seven hour debate throughout the three readings before it carried 85 to 24[12].

Most of the consultation responses came from Christian organizations or individuals, many of whom self-identified as pastors, MAs in theology, or faithful churchgoers who asserted their right to have a say in the debate, underlining the ‘ownership’ of the *Folkekirke* found among the more frequent churchgoers. This ‘own authority’ code was further used by two theologians in Parliament, one supporting the bills and one opposing them.

The High and Supreme Court rulings on the constitutionality of the *Marriage Act* amendment likewise only pertained to the bill on introducing same-sex marriages in the church, as the constitutionality of the freedom of choice of pastors was not challenged.

5.4 History and temporalities; preserving the past and forming the future

In this section, we will look at the ways history was used to both argue for the value of tradition and preservation of the past, and how the future would be formed by the decisions made in Parliament.

History as a past-preserving and retrospective narrative was used in both the Parliamentary discussions, in the consultation responses from the civil-society actors, and in the argumentation made by plaintiffs and defendants in the High Court, although in a slightly different way. As it is the case in many of the other chapters throughout this book (Argentina, Australia, Canada, and Norway), the history as past-preserving and retrospective perspective was both strongly linked with arguments on the traditional way of things and the strength of passing ‘the test of time’, including the danger of changing things that had been culturally cemented for hundreds of years. This line of argument was mostly, and unsurprisingly so, used by conservative Christian actors, who composed the majority of actors, especially among the consultation responses. Here, history and tradition served as proof to why it was dangerous to change the meaning of marriage and why it was not simply a matter of equal rights, as the pro same-sex marriage actors presented it.

12 The reason this does not match the 179 members of parliament is the wide use of clearing agreements, where members of parliament can be excused from votes in Parliament through informal agreements between the different parliamentary groups without swaying the majority (The Danish Parliament 2025).

For those in favor of same-sex marriage, history and tradition referred to newer developments than for those against the amendment of the *Marriage Act*. When the opposing politicians referred to the past, this was a far more distant past than those in favor of the bill. The opposing politicians and civil-society actors referred to 500 years of (reformed) Christianity, to 1,000 years of Danish Christianity, and to 2,000 years of Christian history; they used these periods as a reference point. For instance, this consultation response included Jesus to argue for marriage as a traditional institution: "it is sad when we move away from the very first church that Jesus Christ founded almost 2,000 years ago" (BF, private individual) and:

> if marriage of homosexuals are to be accepted, a new teaching has to be introduced, where we assume Luther et al. would have thought differently today, in light of today's values [... but] it is not in the Evangelical-Lutheran spirit to interpret the Bible according to the contemporary norms (Faderhuset, a controversial Evangelical-Lutheran organization).

In the last quote the idea is presented that it is the very identity of the *Folkekirke* as an Evangelical-Lutheran church that is at stake. This idea would later be part of the lawsuit against the state and the claimed unconstitutionality of the bill.

Likewise, a politician from the national conservative Danish People's Party argues that the introduction of same-sex marriage in the *Folkekirke* would be a "radical change of a foundation that rests on the 500-year history of the Lutheran Church, which in turn rests on the 2000-year history of the church" (MP, The Danish People's Party, national-conservatives). Coupled with the idea that "the cornerstone of society is the family that is based on the heterosexual cohabitation" (Evangelical-Lutheran Network). For these actors, it is elements of individual identity that are at stake.

For those in favor of the bill, history was either far nearer than for the opposing actors and referred to progressive developments within the last century or was an example of how society and institutions change, meaning that marriage 'today' refers to something different than the institution 500 years ago and therefore can and must evolve. This points to the imaginary today today of marriage as something else than the religiously guarded institution it was in the past and maybe even a break from this all together, as marriage to a larger degree is understood as something nonreligious that God and the church does not necessarily have much of a say in, even if the marriage is entered in a church. The references to more recent history were also an argument for future-forming, and sometimes a direct response to the past-preserving arguments, as these more progressive politicians argued that without the foresight and action of forward-thinking and progressive politicians, equality would never be obtained. "There was also a thou-

sand-year tradition of only having male pastors. However, we changed that at some point to make it possible for women to perform the deed as well" (MP, The Liberal Alliance (right-libertarian party). The tradition of only male pastors is to be understood as diametrically opposed to the core Danish value of equality (between the sexes) and therefore an example of how progress does not happen on its own. The politicians in favor of the bill also argued that it was overdue to make it possible for same-sex couples to get married in the *Folkekirke* as Denmark was far from being a foremost actor on the equality agenda in this area, which the self-image required the country to be. Like in Australia there was therefore an urge to 'correct the law' by 'following through' on the promise of equality that had been given through the *Registered Partnership Act:*

> In 1989, Denmark was the first country in the world to introduce the registered partnership, which made it possible for persons of the same-sex to enter into a registered partnership, and at that time Denmark was a pioneering country, and that was a good thing, but for many years there has been a need for us to move on. I think that for many years it has been quite obvious that it was time that we got straight and gay people equal in relation to marriage. (MP, the Red-Green Alliance)

The same notion is expressed by some of the respondents from the civil society:

> [it has been] unfortunate that Denmark, which used to be a pioneering country in this area [the equality agenda] has lagged behind other countries for many years. And the council therefore finds it satisfactory that equality is now introduced in the ecclesiastical area, regardless of gender and sexuality. (Parish council of Sct. Stefan's Church)

Whereas the conservative Christian actors broadly speaking saw marriage as an everlasting and unchanging institution, based on everlasting and unchanging scripture, the supporters of same-sex marriage understood marriage as a dynamic and changing institution, based on something different today than 500 years ago, just like the rest of society. This argument is backed by references in a few cases to the confessional foundation, but with a clear understanding that these should be interpreted in accordance with the *zeitgeist* and emphasize that marriage in the Protestant church is not a sacrament, but a civic and legal institution. "We do not regard marriage – as an institution – as a particular Christian order but rather as a civic system to which society attaches importance" (council of the Frederiksberg castle parish). Here a transition becomes apparent, as the parish council argues for the more nonreligious understanding of marriage as an institution.

A curious outlier to the general tendency of explaining the innovation of the ritual, was a Norse religious group, who argued that same-sex marriages were a return to the traditional ways: "In our religion there is no judgement of sex be-

tween people of the same sex. On the contrary it was the practice in many comparable religions all over the world in ancient times" (Harreskovens Blotgilde). Here they argue that since homosexuality was part of many pre-Christian traditions and religions, the amendment of the Marriage Act is to be praised as a return to the true and ancient Nordic roots."

5.4.1 Tradition and the state-church relationship

Even though the supporters of same-sex marriage in the *Folkekirke* did not, generally speaking, have as far-reaching of historical charge in their arguments as those opposed to it, both supporters and opponents referred quite extensively to tradition. Tradition, however, was used and understood differently. For the opponents, tradition was closely linked to definitions of marriage in a historical view and the traditional relationship between church and state, as expressed in the Constitution:

"If the government and the parliament enforces the obligation to wed same-sex couples on the *Folkekirke* as a whole, the Evangelical-Lutheran church is no longer supported by the state[13]" (PF, private individual, pastor of the *Folkekirke*).

Likewise, the supporters referred to the Constitution and the state-church relationship but saw this quite differently from the opponents. For instance, supporters would make reference to "the spirit of the country" distinguished by tolerance, equality, and liberalism which highlighted individual choice norms as fundamental.

> We have to deal with the reality that surrounds us and the questions that arise. We know other things and think differently about relationships, families, love and sexuality than people did in Palestine at the time of the apostle Paul – or in Denmark in the time of our great-grandparents. [... it is] an obligation to interpret the gospel into the *zeitgeist*. [...] In a few years' time I think we will look back at the bill with the same obviousness as most of the members of the *Folkekirke* look at female pastors today. (Peter Fischer-Møller, Bishop of Roskilde)

The opposing civil-society actors and politicians argued that the Minister of Ecclesiastical Affairs overstepped his jurisdiction and put the relationship between church and state at risk by meddling with the *Folkekirke*'s understanding of marriage. They supported this argument both by referring to separation of church and

13 As is the case in article 4 of the Constitution.

state and by referring to Article 4 of the Constitution[14]. Both arguments along with references to the 'articles of promise' of the Constitution were variants of a 'what would the 'constitutional fathers' have wanted?' – arguments and thereby a sanctification of the Constitution in its original form, as is also the case in the lawsuit – material. The supporters admitted that the Minister of Ecclesiastical Affairs had traditionally been more passive and restrictive regarding interfering with the 'inner affairs' of the *Folkekirke*, but they argued that since the minister holds the executive power of the church, this was his and the Parliament's right.

Furthermore, it was argued that keeping with the tradition of not interfering with the Church was less important than amending the lack of equality in access to the Church. It was argued that it is a tradition in Danish society to be able to be wed in the church, and that it was about time this tradition and right was extended to all members of society. In addition to this, one supporting politician argued that the *Folkekirke* as the *People's* church must be shaped by what the members think, because "the members of the *Folkekirke* in general are the *Folkekirke.* It is not the bishops, nor the theologians […] the *Folkekirke* is its members" (MP, The Social Liberal Party 2012). He further states that the reason this is discussed is due to a wish from 'at least some' of the members of the *Folkekirke*, who should be taken seriously as they constitute the *Folkekirke* and therefore should have a say in its regulation. This argument refers to a survey from 2010 that found that a majority of the Danes wished for the *Folkekirke* to wed same-sex couples (Lind 2010). Another variant of this argument was that "it is not the tradition of the confessional foundation to discriminate" and that discrimination of same-sex couples is not "in the spirit of the *Folkekirke*" (MP, The Green Left 2012).

Another avenue of this discussion was brought up by members of The Liberal Alliance, a right-libertarian political party, who wanted to discuss the consequences of the amendment for the other part of the dual track marriage system. The MP therefore asked if opponents of same-sex marriages in the church were also against same-sex marriages in the city hall, as all of the opposing arguments centered on religious arguments or the status of the *Folkekirke.* "Marriage is essentially a civic institution […] it is a question of law" (MP, The Liberal Alliance). They furthered this claim with statistics, including that "60 % of the marriages performed for Danish citizens in 2010 were civic, and therefore there is nothing religious about it" (MP, The Liberal Alliance). Here, the MP in a speech act changes marriage to a purely nonreligious, civic institution, and "only a matter of law" similarly to what was seen jwith the parish council earlier. The dual track marriage system at the nexus of a state and folk church system thus separates the legitima-

14 On the *Folkekirke* as supported as an Evangelical-Lutheran church by the state.

cy of the decision to introduce same-sex marriages from religious arguments. Some politicians also argued that implementing same-sex marriage in the *Folkekirke* was necessary to align the dual track marriage system:

> In many other countries the religious communities only have the option of blessing people, who have entered a civil marriage. In Denmark, the politicians of the past have chosen that approved religious communities can also be equipped with the right to marry [...] I do not want us to remove the possibility for citizens to enter a marriage with legal validity in their religious community, as some of the parties to the consultation mention. (MP, the Social Democratic Party)

Referencing tradition, the Clergy Association likewise argued that it was "essential to maintain the church as the framework around the performances of marriage" (the Clergy Association 2012), thereby seemingly 'admitting defeat', but underlining the importance of keeping the dual track system to ensure keeping marriages in the churches' repertoires.

5.4.1.1 The High and Supreme Court cases

Next, we are turning towards the court case materials from the High (2016) and Supreme Court (2017) respectively. The court material somehow connects the supporting politicians and the opposing consultation responses, as the plaintiffs were a group of the consultation response actors who had summoned the Minister of Ecclesiastical Affairs and the Minister of Social and Children's Affairs – in favor of the bill – on grounds of the supposed unconstitutionality of the amendment of the *Marriage Act.* The plaintiffs claimed that the introduction of same-sex marriages in the *Folkekirke* violated their right to freedom of religion and freedom of assembly (as they could no longer be sure their local pastor preached according to their understanding of scripture and therefore lost their access to their local church) and violated the status of the *Folkekirke* as an Evangelical Lutheran church. This last claim was in accordance with arguments presented in the political debates. These included marriage being reserved for one man and one woman according to both the Bible and Luther, and therefore with the introduction of same-sex marriages, the Church ceased being the Evangelical Lutheran church outlined in the Constitution.

The Court itself is not very vocal and merely summarizes the 'winning arguments'. The material examined here is primarily the arguments from the plaintiffs (of the civil society) and the defendants (the state). Past preservation and tradition arguments played a central role for both parties, but with different interpretations. For the plaintiffs history and references to the Constitution was a matter of 'what the constitutional fathers' had meant and the church they had known:

> It is the plaintiffs' impression that it was the clear intention of the Constituent Assembly with the articles 66 and 4 of the Constitution wanted to create a basis for the church itself – without the possibility of intervention from the legislative power: it being an absolute king or the government and parliament in unison – to regulate its inner affairs (Plaintiffs, the High Court)

They furthered the claim of a theological reinterpretation of the concept of marriage and asked if a survey and a note from the Bishop of Copenhagen could outweigh Luther: "no legislation can be passed on the inner affairs of the *Folkekirke* contrary to the wording of the church's confessional writings, based on the looser theological interpretation of the Bishop of Copenhagen" (Plaintiffs, the High Court). Since the state-church relationship in this understanding is bound by the historic context of Article Four, the Minister of Ecclesiastical Affairs could not just impose same-sex marriages, as it would break with the church known to the 'constitutional fathers'. Moreover, it far overstepped the argued precedence of only regulating what was absolutely necessary regarding the *Folkekirke*'s 'inner' affairs. Further, the claim of the unconstitutionality of the amendment of the *Marriage Act* was built on what 'the true nature' of the *Folkekirke* was, and that it was something other and more than "a department under the Ministry of Ecclesiastical Affairs". Along with this, the plaintiffs also argued that it was against their individual freedom of religion, as they would no longer be able to practice in the *Folkekirke*, because it would cease to be an Evangelical Lutheran church:

> [the Marriage Act amendment] must be regarded as such a violent redaction of the confessional basis of the Evangelical Lutheran Church, that it must be regarded as new reformation. The plaintiffs claim that the church that hereafter exists, is no longer the Evangelical Lutheran Church [...] that the state of Denmark is obliged to uphold and support according to article 4 of the Constitution. (Plaintiffs, the High Court).

Here they both argued for a discrimination against them as individuals, and against the *Folkekirke* as a faith community, because other faith communities could choose not to use the new ritual and the new legislation, but the *Folkekirke* was forced to. Therefore, they also argued that it went against the separation of church and state as argued in the quote above.

The Constitution, the role of the Minister of Ecclesiastical Affairs, and the state-church relationship looked different for the defendants. They argued that since the Church is submitted to parliament and the government, and the Ministry of Ecclesiastical Affairs therefore is the executive organ of the *Folkekirke*, and since there is no legal separation of the 'inner' and 'outer' affairs of the *Folkekirke*, it was well within the right of the state to pass this new amendment. Further, they argued that the *Folkekirke* as the People's church had no representatives outside

of the People's Parliament and that Article Four of the Constitution left a wide margin for interpretation of the confessional foundation. They argued that historically and even before the Constitution, it was custom to interpret the Bible and Luther's work in accordance with the *zeitgeist.* It was therefore in accordance with historical and traditional practice to do so – and more importantly, in line with the church the constitutional fathers knew:

> The Constitution does not say anything about the details of the understanding of the confessional writings and does not determine whether they are to be interpreted literally or based on a freer interpretation. It is therefore a theological task to determine how the biblical scriptures are to be read. At the same time, there is room to follow a theological view that agrees with the spirit of the times, which was also the case before the Constitution (Defendants, the High Court).

Therefore, the sanctification of the Constitution goes both ways in this material, which might be an effect of the High and Supreme Courts' traditional interpretation based on the wording and presumed intention behind the formulations of the *Constitutional Act* (Christensen 2020, 25). This interpretation further points to a sense of morality outside the church based on the imagining of Denmark as a pioneeringly free-spirited and equality-oriented country as scripture has been interpreted in accordance with "the spirit of the times" even "before the Constitution". A move away from Christianity as the patron of morality is thereby grounded in the past as an authentic and nonreligious way of approaching scripture.

Both courts ruled in favor of the defendant and emphasized that the interpretation of the confessional foundation is not fixed and allows for a wide margin of interpretation. They further stressed that even though the Minister of Ecclesiastical Affairs had in the past acted more cautiously in regard to the *Folkekirke* there was no arguing the executive and legislative powers of the Ministry of Ecclesiastical Affairs and the Parliament over the Church and there existed no precedence of limiting this executive right. For the courts, the debate on what constituted the 'inner' and what constituted the 'outer' affairs of the church became therefore irrelevant, exactly because no legal distinction exists.

Finally, the courts found that the amendment did not interfere with the individual's right to practice in accordance with his or her own belief, and that this was still possible, optionally outside of the *Folkekirke* in one of the free church organizations[15] that was not subjected to the new legislation.

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15 Free churches in Denmark are churches that are 'free' of the state, as they do not receive subsidies from the state directly, but if the organization is 'recognized' it gains considerable tax deductions and thereby indirect support from the state (https://www.km.dk/andre-trossamfund/

5.4.2 Language as a cornerstone of social cohesion

Within the Danish debate, a subgenre emerged that focused on deliberating the significance of words, similar to the discourse presented in the Canadian chapter. This subgenre also examined the potential risk of weakening social cohesion if marriage were no longer defined exclusively as a union between one man and one woman, potentially leading to a slippery slope that could undermine the significance of wider systems of meaning. Basically, there are two different understandings of marriage at play. The supporters of same-sex marriage, generally speaking, understand marriage as fundamentally a juridical and contractual agreement, as we have already seen above. This agreement can therefore unproblematically be extended to same-sex couples. The conservative, Christian opponents of the same-sex marriage, on the other hand, understand it in more religious (pro-fertility) terms and fundamentally as a family founding unit and thereby the core of society. This is strongly connected with perceptions of natural law and the fact that it biologically requires a man and a woman to conceive a child. It was further argued that it was a matter of “two equal but different forms of human co-habitation”, and that it therefore would be “confusing” for the opponents if “something else” should be called by the same name as the historically proven heterosexual, family founding marriage. An attempt to accommodate this view was made by conservative (but ultimately supporting) politicians, who suggested the word “life companion” instead of “spouse”. This led to a rather contradictory debate, as progressive politicians shot the suggestion down, because it would put an unfair amount of pressure on the same-sex marriage in comparison to the heterosexual marriage:

> If you look at the divorce statistic, it shows that 40 % of all marriages in 2011 ended in a divorce. Then isn’t it a bit much to ask someone to have a life companion? In my mind being a life companion is a bit more long-term than being a spouse, when we look at the divorce statistics. (Minister of Social Affairs, the Social Democratic Party).

Other progressive politicians from the opposition argued that full equality was the aim, and that this would not be obtained with two separate terms because it would further demarcate and stigmatize same-sex couples.

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oekonomisk-stoette). The free churches themselves emphasizes that they are free to choose how to practice within their church and that the government cannot interfere in their confessional foundation or how they interpret it (as opposed to how they see the *Folkekirke*) (https://frikirkenet.dk/side/hvad-er-en-frikirke).

A recurring theme in the same-sex marriage opponents' concerns for the word used was an argument that if the institutions of heterosexual and same-sex marriages were to be called by the same name it would lead to an unending slippery slope for society as a whole. As we have also seen in the Argentinian chapter of this book, moral panics and fear mobilization came to play a central role for the opponents. In the Danish case this was expressed as a fear among the opponents that allowing same-sex couples to be married would lead to zoophile, polygamic and pedophile marriages in addition to complicating things for the individual language user, who would "have to distinguish between 'biological or traditional marriages' and 'the same-sex institution'" (MJ, private individual). This would ultimately lead to a loss of meaning and social cohesion, as constructionism would get a hold and destabilize the meaning-making of the world. As one consultation respondent expressed it: "The legislation is stealing the word [from citizens] and I cannot express what I want to without lengthy explanations! [...] The bill, if it passes, will further redefine all existing marriages to be something else than they were when they were entered" (MJ, private individual).

In this, an understanding of marriage as a zero-sum game becomes likewise evident, which characterized a lot of the opponents' take on the debate. Here there is a concern that something is being taken away from heterosexual marriages. That they are "forcefully converted to gender neutral institutions" (MS, private individual) as another of the consultation respondents expressed it. Hereby the heterosexual marriage is seen as losing its 'sanctity' and the godly ordained meaning because gender polarity is no longer a requirement for entering a marriage. Gender neutrality was overall a considerable theme within the opponents, as supporting politicians presented the bill with a wish to make gender neutral legislation, which was (intentionally?) misunderstood by opposing politicians to be an expression of a social-liberal agenda to construct a society without differences. "[The Government] wants gender neutrality even though the gender is not neutral" (MP, The Conservative Party) and:

> There is a difference, and that difference should not be trumped by something gender neutral, which is completely at odds with reality. But this is what the government is now forcing us to do: A gender neutrality is imposed on the entire Danish people and the *Folkekirke*. [...] with a stroke of the pen [the government wants] to wipe out an ancient culture and popular theological self-understanding, namely that we are two sexes and we are the minority and the majority (MP, The Liberal Party).

This was spoken against by one of the advocating parties, who branded gender neutrality as a common feature in legislation and a matter of equality before the law:

> We have advocated gender neutrality in the legislation, which is something we also do in many other laws. I have read the consultation responses, and I have seen that some of these claim that [the amendment] makes the population gender neutral; I think that’s nonsense. Making a law gender neutral does not change a person’s personal gender, but it does change equality in relation to the law and equality in the common civil society in which we live (MP, The Social Democratic Party).

This debate, although at times almost caricatured, also makes it evident that something more was at play for the conservative, Christian actors. This possibly could be due to the state’s direct interference in what should happen in the *Folkekirke.* It becomes much more than a discussion on individual rights, it becomes a discussion of the fundamental understanding of the world. The conservative, Christian position has a clear threat perception of the bill as they feared social cohesion and they believed the world as they knew it was at risk. This also shows in the consultation responses and in the parliamentary debate, opponents were much louder and reacted more frequently than supporters. It seems there is no need for explanation or defense of the support for same-sex marriage, whereas the opposition to it caused a wide variety of responses, explanations, and argumentation. In Parliament, this very concretely manifested itself in the number of high-profiled politicians from the national-conservative party, who most strongly opposed the bill, that answered every time a spokesman from one of the other parties had made a statement. The consultation responses are likewise dominated by actors who are against the bill, including several private individuals, who expressed their dissatisfaction with the proposal, whereas only two supporting individuals submitted a response and most of the supporting consultation responses only stated support for the bills and had nothing further to add. This again could seem to point to a basic understanding of a morality that lies outside the church, a sort of nonreligious “people’s morality” in line with the core Danish values of equality and tolerance that therefore needs no further explanation.

5.5 Natural law

Natural law-arguments in this material are dominated by references to ‘the natural’, especially through references to biology and how it takes a man and a woman to conceive a child, which is “an elementary fact that anyone can experience and every child knows” (MP, The Danish People’s Party). These were sometimes supplemented by worries regarding the survival of the species, if same-sex marriage was implemented, since “society can survive without the homosexuals, but society cannot survive without the heterosexual relationships, and this should be respected in the legislation” (Lutheran Mission 2012). This is further an example of the zero-

sum perception of the marriage institution since it implies that the heterosexual relationship would not be 'respected' if the amendment of the *Marriage Act* was to be passed. Interestingly, compared to the other countries presented in this book, the natural law-arguments in the Danish material did not concern themselves with legal paradigm aspects of the notion but rather focused on 'the laws of nature' in a more strict biological sense.

The biological line of argumentation was sometimes supported by references to the Bible and God's commandment for people to "multiply", which again links with the perception of marriage as a sacred, everlasting, and unchanging institution. Likewise, creating a family foundation becomes essential for the justification of marriage. This made a few of the statements reflect upon the legality of heterosexual marriages that do not produce children, but they all concluded that they still count, because "even though you play 20 soccer matches and lose all of them, you are still, after all, playing soccer" (Lutheran Mission 2012). Thereby it becomes the potential of children that justifies a marriage, and same-sex marriage can therefore not be blessed in the churchly setting because they are "fundamentally childless" (Fellowship of Church Renewal 2012). This view was challenged by some of the supporting politicians, who argued that many heterosexual marriages were either childless or needed help to conceive and – implicitly – that same-sex couples who wanted to have children were to be seen as comparable to these:

> [in the marriage debate] there is a focus on the foundation of a family. You just have to be aware that in many cases the family foundation is not only between father and mother, but between father, mother and a doctor. In many cases, it may be a father, a mother and a man, we prefer not to talk about, because quite a few children do not have the father they think is their father. And in some cases, it ends up with no family formation taking place at all. (MP, The Liberal Alliance).

The argument that marriage was founded on the biological process of conceiving children was further challenged, as people "in a modern society" get romantically involved "for other reasons than the continuation of the family line" (MP, the Red-Green Alliance). An answer to this was a return to the argument of the "basic experience" of biology, and it being "an expression of reality; the order of things" (MP, The Danish People's Party, national conservatives). Here, as well as in the examples above, we see that arguments of the natural law type are clear examples of transitions as the religious commandment to multiply is rewritten to a biological argument and premise for the social construct that marriage is.

Another focal point for the opponents of the bill was gender polarity. These arguments came in three different forms . 1) The biological complementary argument and the ability to have children as demonstrated above. 2) The needs of children to have both masculine and feminine influences through childhood to evolve

naturally/normally, sometimes supplemented with the natural/God-given setting of the family as the best place to raise children. And 3) Religious argumentation of 'the way God intended it to be'/'the naturalness of God's creation', e.g., in argumentation along the lines of "had God intended for man and man and woman and woman to live together in matrimony it would have never been necessary for them to 'come out of the closet', because then it would have been the most natural way of living together" (PS, private individual 2012). Many of the natural law arguments completely disregard or try to disprove social constructionism, as most clearly expressed in the abovementioned quote. This further ties to the strong connection between the natural and the religious/the Creation that is seen in much of the material. This is of course related to the actors and their predominantly conservative Christian outlook, which is even more pronounced, when focusing on natural law arguments, which is exclusively used by opponents of same-sex marriages. This further underlines this as a clear example of the transition between the religious and the nonreligious.

The natural law arguments also took the shape of references to the essential/ unchanging/ foundational aspects of society: "The marriage between a man and a woman and the family has for thousands of years been the building blocks of society" (the Seventh Day Adventist Church of Denmark). Arguments of this type were primarily made in terms of the universality of heterosexual marriages and how it is "known in all cultures and at all times" to prove the naturalness of the institution, as we have seen in many of the other chapters throughout this volume. Simultaneously, this argument was used to disprove marriage as a social construct and to underline why the meaning of the term cannot be changed by politicians or the wishes of the majority, as it represents "something in the real world".

Another genre in the "foundational for society" argumentation was a notion that heterosexual marriages and establishing of families as a result hereof, is what makes society work, which of course has the derived consequence that same-sex marriages will lead to "more broken homes [...] more depressions, less diligence among men, who have no family to support, [...] and a birth rate that declines even more" (Evangelical-Lutheran Church of Augustana 2012). This argument, even though made by a conservative, Christian actor, is much more related to 'the common good' and the (negative) societal consequences of same-sex marriages than to the creation.

Another aspect of natural law arguments is references to "the obvious" or "the logical". Arguments regarding why same-sex marriage should not be implemented focused on the role of the state as one that must look after its citizens and rule in their best interest, even if it goes against "what they think they

want". It is exemplified in multiple of the consultation responses in analogies like the following:

> Danes are a tolerant people – I regard myself as one. But if all is tolerated then you do not say no in cases where it is necessary. Does a father love his child less because he sometimes says no to her? I do not think so. An example is if the child wants to have candy for breakfast. Here I think we can all see that the only right thing to do is to say no (PF, private individual).

This line of argument reduces what supporters of same-sex marriages would call a matter of equality to a matter of irrationality and childishness and a matter where the guardian state has to act.

Although the natural law arguments were used in both the consultation responses from conservative, Christian actors and – to a lesser degree – in the political debates they were absent from the court material. This might be a matter of the courts' stern focus on the adopted legislation and its lack of interpretations to push society in certain directions.

5.6 Discussion

It is a characteristic of the Nordic countries that the state is considered to be 'good', and the boundary between civil society and the state is blurred.

However, by proposing same-sex marriages both plaintiffs in the courts, opposing politicians, and many among the consultation respondents felt that the Ministry of Ecclesiastical Affairs, through the executive committee of the state church, had overstepped a line by interfering so directly in the 'inner' affairs of the church. By requiring the *Folkekirke* to produce a same-sex marriage ritual, the Ministry of Ecclesiastical Affairs decided politically which theology the Church should work according to, by imposing the new and for some rather controversial ritual without the Church (through the bishops) having asked for it first. Further, some felt that the *Folkekirke* was being discriminated against because no other religious community was forced to adopt the new ritual and thereby kept their autonomy in the matter.

Arguments regarding law and rights were primarily centered around references to the Danish constitution, with a divided emphasis on the Folkekirke's special status in the constitution and the individual's right to religious freedom. A considerable number of arguments also drew upon international law, such as the Human Rights Charter and the UN Convention on the Rights of the Child, particularly concerning children's right to know their biological parents. When the bill to amend the *Marriage Act* to include same-sex couples and simultaneously

repeal the separate *Registered Partnership Act* was introduced, it was accompanied by a proposal allowing pastors in the *Folkekirke* to conscientiously object to marrying same-sex couples. This proposal arose as a consequence of the state’s decision to implement a new ritual on behalf of the church. Notably, the political discourse primarily focused on the “conscience” of the individual pastor, rather than engaging in a broader discussion on religious freedom. This suggests that, at the political level, the issue is seen as primarily ethical in nature, akin to the right of other state employees to abstain from actions that may contradict their ethical beliefs[16]. This underscores the prevailing emphasis on individual choice norms and the increasing focus on rights, as it seeks to ensure the right of individual (state-employed) pastors to refuse participation in activities they perceive as unethical, while simultaneously safeguarding the right of individual citizens to access church services, including marriage.

5.6.1 Freedom of religion for pastors

Both in the political discussions and in the consultation responses, an understanding of pastors as something other and more than mere public servants are found. This is what the second bill is about, as it secures the right for individual pastors to deny wedding same-sex couples on the grounds of it being against their individual faith. Even though some same-sex marriage-opponents did not find the bill to be wide enough and wished for either more personnel included (for instance organ players), or the right to deny preforming weddings for same-sex couples elevated to a parish level if the church council agreed on this, the bill found very broad acceptance. Arguments for this are among the few that those in favor of same-sex marriage, are neutrals, and opposed to as an undisputed boon and in broadly the same terms. This points to a mutual understanding of the religiousness of pastors and their individual faith as something the state should not interfere in, and that pastors after all are something other than state employees or public servants.

This understanding has, however, recently changed. When a new pastor was appointed in southern Jutland in the spring of 2022, he announced that he would

16 Another example is medical personnel’s right to decline to perform abortions – even though it is stated explicitly in the law that this exemption is for “Doctors, nurses, midwives and medical assistants, for whom it is contrary to their ethical *or religious opinion* to carry out or participate in termination of pregnancy, must be exempted from this upon request” (emphasis added) (Law on termination of pregnancies, 11th of September 2002, https://www.retsinformation.dk/eli/lta/2002/762).

not marry same-sex couples or divorcees. This led to protests questioning the fairness of him being paid by the state, while not intending to "serve" all citizens, despite this being his right according to Danish law. A demonstration was arranged by LGBT+ Denmark, who a decade prior had given full support to the freedom of conscience of pastors. This highlights the nonreligious aspects of the profession of a pastor within the *Folkekirke* and points to a sort of slippery slope-effect where the state sanctioning of same-sex marriage in the *Folkekirke* has become such an integral part of the expression of Danish core values and self-image that it trumps the individual liberties of the priests in the public opinion that where seen as fundamental a decade earlier.

The existence of a dual track marriage system which recognizes both civil and religious marriages places marriages as a central nexus of religion-state relations (Vinding and Saggau 2016, 176). It also places the majority church in an ambiguous position. The *Folkekirke* is certainly in a privileged position vis-à-vis the state, but unlike the minority religions, the *Folkekirke* was not given a choice regarding the introduction of a ritual for same-sex marriages despite the fact that many within the church were reluctant (Saggau & Vinding 2016, 18). Despite the state enforcing religious rituals for same-sex marriages in the *Folkekirke*, there were no widespread protests against this government interference in the internal matters of the church. Rather, this enforcement helped legitimatize and naturalize support for same-sex marriages. As the support for same-sex marriages was on the increase in society, the adoption of same-sex marriages actually seems to have become a winner case for the church. The 'Citizenship survey' of 2021 (table 1) shows that a majority of respondents did not believe their valuation of the *Folkekirke* had decreased. Interestingly, many also found (table 2) that same-sex marriages should also be available in synagogues, mosques, etc. (Integrationsbarometer 2021). Thus, it seems that equality and tolerance including for homosexuals in spite of religion has grown to be a core 'Danish value'.

Table 5.1: How was your assessment of the Folkekirke been affected by the 2012-implementation of same-sex marriages? N= 4,693.

	Negatively	Neutral	Positively	Don't know/don't want to respond
Danish origin	5 %	32 %	58 %	5 %
MENAP[17] and Turkey 18 – 29 years	9 %	39 %	25 %	26 %

17 Middle Eastern and North African plus Pakistan. MENAP and Turkey (MENAPT) is a statistical category introduced in 2020 by the Danish Minister for Immigration and Integration and has

Table 5.1 *(Continued)*

	Negatively	Neutral	Positively	Don’t know/don’t want to respond
MENAP and Turkey +30 years	22 %	34 %	14 %	30 %
Additional non-western 18 – 29 years	11 %	30 %	42 %	17 %
Additional non-western 18 – 29 years	16 %	32 %	32 %	21 %

Integrationsbarometer 2021

Table 5.2: Do you think that same sex couples should be allowed to be wed in mosques, synagogues and similar? N= 4,693.

	To a high degree	To some or to a less degree	Not at all	Don’t know/don’t want to respond
Danish origin	51 %	16 %	6 %	27 %
MENAP and Turkey 18 – 29 years	16 %	17 %	23 %	44 %
MENAP and Turkey +30 years	11 %	14 %	32 %	43 %
Additional non-western 18 – 29 years	31 %	22 %	14 %	33 %
Additional non-western +30	26 %	17 %	16 %	41 %

Integrationsbarometer 2021

Like in the Canadian case, it is first and foremost the conservative, Christian opponents of same-sex marriages that argue using past preserving arguments. However, in the political debate, some of the same-sex marriage-defenders use ‘history as tradition’ as an argument for the dual track marriage system and thereby a way to disconnect the discussion on marriage from the religious debate. This places marriages, even when conducted within the *Folkekirke* in the realm of nonreligion. Unlike the Canadian case, the future forming aspects are almost exclusively

become widely used in Danish integration discussions (https://ec.europa.eu/migrant-integration/news/denmark-new-statistics-category-migrants-muslim-countries_en).

used by same-sex marriage-opponents, who paint a dystopic picture of the future and all the uncertainties the changes to the *Marriage Act* entail.

5.6.2 Different understandings of the church

The state-church relationship is fundamental in the discussion and has multiple levels bound to different understandings of the historic relationship between the two. The first understanding of the relationship is an expression of the 'history as past preserving' code and is mostly used by conservative (Christian) same-sex marriage-opponents. They think the government and the Minister of Ecclesiastical Affairs overstepped their mandate by imposing same-sex marriage in the *Folkekirke.* They further understand it as 'an attack on the autonomy of the *Folkekirke*' and 'meddles with the inner affairs of the church' that the state, historically, has stayed out of. This, they feared, would estrange a lot of the 'true' churchgoers and remake the *Folkekirke* into an organ of the state, thereby undermining its autonomy. This is evident in references to Article Four of the Danish Constitution and arguments that the *Folkekirke* will cease to be an Evangelical Lutheran Church if same-sex marriages are implemented in it, as this is seen as directly against the confessional foundation of the church.

On the supporting side, politicians perceive the relationship between the state and the *Folkekirke* as one where progress must be led by proactive politicians, since the Church does not initiate change on its own. Further, there was a discussion of who represents the *People's* Church of Denmark if not the representatives of the people in Parliament, which is closely linked with references to the letter of the constitution, wherein the *Folkekirke* is governed (supported) by the state. Further, there were references to a statement from the bishop of Copenhagen, who had supported the change and emphasis was added to the fact that the bishop of Copenhagen has traditionally been the consulting organ for the government in matters concerning the *Folkekirke* and its theology.

The courts sided with proponents of same-sex marriage and emphasized a broad scope for interpreting the theological foundation of the *Folkekirke.* Additionally, it was determined that the imposition of the same-sex marriage ritual on the *Folkekirke* did not violate individuals' right to religious freedom, as they remained free to practice their personal beliefs. However, it was acknowledged that individuals might need to exercise these beliefs "outside the *Folkekirke*" within a free church organization

Denmark, like other Nordic countries, prides itself on being tolerant and liberal. The high levels of trust and democratic values, which are believed to create exceptionally good societies, are widely recognized beyond the Nordic region. On

the basis of the values predominant in the Nordic countries, sociologist Ronald Inglehart coins the concept of Nordicization as the path from religious to individual-choice norms (Inglehart 2020, 104). Inglehart refers to the *Registered Partnership Act of 1989* as an example of the advance of individual-choice norms and legitimizes the use of the concept of Nordicization due to the top-ranking countries on the list of score on religiosity versus individual-choice factors are Sweden, Denmark, Norway, Iceland, and (with a slight gap) Finland[18]. Because Inglehart saw how the values and practices of the Nordic countries appear to be spreading, he used the concept of Nordicization to refer to changes on the global cultural maps and the religiosity/ individual choice scores which suggest that “the Nordic countries are at the cutting edge of cultural change” (Inglehart 2020, 104). Even though they would not consider it a positive development, the conservative Christian and national-conservatists in the presented material would probably agree with Inglehart’s argument on greater individualization at the expense of traditions and the historically conditioned cohesion with the church as a staunch defender of ‘what is right/natural’. However, the ruling from the High and Supreme Courts of Denmark and the results from the citizenship surveys seem to indicate that it is not so much a case of individualization and a break with tradition, but rather a case of the majority church shifting position altogether. The courts’ rulings that the plaintiffs claim of violation of their religious freedom is unsupported is exactly grounded in the view that they can freely practice their personal beliefs ‘outside the *Folkekirke*’, exactly the same as other people whose beliefs do not fall within the doctrinal framework of the majority church.

5.7 Conclusion

The close relations between church and state in Denmark are unusual for a modern society, but in most cases, the distinction between ‘inner’ and ‘outer’ affairs ensures boundaries between political and religious domains. The amendment of the *Marriage Act* is, however, an exception which shows that the distinctions are not carved in stone and may be transgressed in the name of a higher purpose. After examining the material from the civil-society actors, the political debates, and the court cases, a number of insights emerged. History and tradition are understood differently among supporters and opponents of same-sex marriage, as is

18 The Netherlands, which was the first country to legalize same-sex marriages (2001) is the only non-Scandinavian country in the top 5 of the list. Because the Netherlands consistently groups with the Nordic countries, Inglehart simply re-defines the concept of Nordic to include the Netherlands.

the very nature of marriage, and the essence of church-state relations, including the innate distinctions between religion and nonreligion it entails. Further the analysis shows that the courts are solely interested in upholding rights and the legality of a claim compared to the specific articles cited and that they are not interested in broader theological discussions or abstract discussions of loss of traditional meaning making.

We set out to answer three questions: What is the role of the Danish state in forming a new understanding of concepts like marriage, which has traditionally been constructed religiously? What voice do religious minority and majority representatives have in political debates? And which role does the specific Danish church, state, and general legal system play in preventing or promoting same-sex marriages? The Nordic welfare state with its focus on caring for all its citizens and making sure all have equal opportunities along with the 'Nordic exceptionalism' ideal created a strong incentive to allow for same-sex couples to get married in the *Folkekirke.* Among supporting politicians, it was understood as something "we ought to do", a way to let Denmark take its rightful place among progressive countries, which had been lost after not going further in supporting LGBTQI-rights after the introduction of the *Registered Partnership Act.* For others, it was a matter of (equal) rights, and the Danish self-image as a progressive, equality-driven, and liberal-minded state played a significant role throughout the supporting arguments. The dual track marriage system was crucial for the discussions as it forced the politicians to interfere in the 'inner affairs' of the church, crossing the tacit boundary between nonreligion and religion. This entailed engagement with the rights of pastors to refrain from being a part of the state with its obligations to deliver the same service as the city halls and its civil servants and remain (or return) into the religious domain and its associated freedom of religion.

The role of the *Folkekirke* as both part of the state and a separate religious community also meant that even as conservative Christians and other concerned citizens were given the chance to say their piece through the consultation responses, they were only represented in Parliament through the National Conservative Party and individual members of the Conservative and Liberal parties. As we have seen in other chapters (e. g. the Norwegian) the arguments from the religious actors were multi-layered. However, in the political debates they were reduced to matters of biological arguments of who could make a family 'naturally', and history and tradition as something that ought to be preserved because it was historical and traditional. These arguments were countered with references to the progressive state, fairness and equality were something politicians had to ensure. They were matters of equal rights for all citizens. with love and equality (rather than tradition) as the overriding consideration. A common theme is the perception of the state and consequently the public debate, as nonreligious. This was

most evident in the way explicitly religious arguments were largely overlooked. This is a result of the (perceived) separation of church (or at least religion) and state that meant that only the ‘rational’ (which was understood as not religious) arguments counted.

The specific church-state-relationship in Denmark has probably entailed a longer route to the introduction of same-sex marriages, as the *Registered Partnership Act* meant that the “LGBTQI-question” had been taken care of without politicians having to interfere with the church, which sparked strong reactions even when the question was relatively unproblematic in the population at large. However, the fact that the *Folkekirke* is subject to the Ministry of Ecclesiastical Affairs and has the government as its synod, meant that the change could be introduced relatively quickly once a political majority had been assembled. As the tables of perceptions of the *Folkekirke* displayed, the increased legitimization and naturalization that followed with the introduction of same-sex marriage rituals in the Danish People’s Church, has become a strong case for the *Folkekirke*, as an institution of tolerance and cemented it as an integral part of the ‘liberal and tolerant Danish state’.

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Legislation

Act on Registered Partnership Act (1989)

Danmarks Riges Grundlov, 5 June 1849, § 4, §6, § 67, § 69, § 70

Denmark. (1922, June 30). Lov nr. 276 om ægteskabs indgåelse og opløsning [Law No. 276 on the entering into and dissolution of marriage].

Ministry of Justice (1953) *Constitutional Act of Denmark*

Marriage Act (2012)

Timeline

1849: Denmark becomes a democracy
1850: Proposal for the Freedom of Religion Act is put forward
1851: Law of 13th is adopted, meaning that that civil marriage was a kind of ‘emergency marriage’ for couples where neither belonged to the *Folkekirke* or a recognized religious community
1910: Freedom of choice is offered between civil and religious marriages, as suggested by a joint Scandanavian commission
1915: Women gain the right to vote in elections
1915: The last part of Article 68 of the Constitution, “yet anyone who cannot document that he is a member of a recognized religious community is obliged to pay his dues to the Church of Denmark or to the school system”, is abolished
1922: Marriage bill of 30th of June 1922 gives freedom of choice between civil and church marriage
1948: Female ministry is enforced
1989: Registered Partnership Act was enacted, legalizing same-sez unions
2005: Official practice in six of the ten dioceses to allow pastors to bestow a blessing on same-sex couples following registration of partnerships thereby mirroring the practice of bestowing blessings following city hall marriages
2005: Same-sex marriage is introduced in the *Folkekirke*, but fails to pass
2006: Same-sex marriage is introduced in the *Folkekirke*, but fails to pass\
2007: Same-sex marriage is introduced in the *Folkekirke*, but fails to pass
2008: Same-sex marriage is introduced in the *Folkekirke*, but fails to pass
2010: Same-sex marriage is introduced in the *Folkekirke*, but fails to pass
2010: The Minister of Ecclesiastical Affairs appoints a working group formed by different-level representatives of the church
2010: Survey finds that many of the Danes wished for the Folkekirke to wed same-sex couples
2012: Same-sex marriage legalizes, amending the *Marriage Act*
2016: Ruling from the High Court on the constitutionality of the amendments of the Marriage Act that was the result of the bill passing through
2017: Ruling from the Supreme Court on the constitutionality of the amendments of the Marriage Act that was the result of the bill passing through
2017: Legislation is introduced for minority religions
2022: A new pastor is appointed in southern Jutland in the Spring of 2022; he announces that he would not marry same-sex couples or divorcees
2023: Voices within the *Folkekirke* protest against the way the government decided to regulate the holiday calendar of the church by abolishing the Great Prayer Day as a public holiday without due negotiation with the church

6 Rights, freedom, and nationhood: marriage equality in Australia

Vanessa Warren, Rebecca Banham

6.1 Introduction

In 2017, Australia became the 26th country worldwide to legalise same-sex marriage, through the Marriage Amendment (Definition and Religious Freedom) Act 2017, following a non-binding, non-compulsory, national postal survey. This unusual process, the political and social histories of marriage in Australia, and the attendant instrumentalisation of marriage in these histories, make for a somewhat peculiar lens through which to explore legal constructions of and engagements with nonreligion. In this chapter we examine the mobilisation of religion and nonreligion discourses within the broad temporal and natural themes that animated the 2017 marriage equality debate. We are particularly interested in the visions of nationhood and human rights – and threats to these visions – that are constructed throughout this debate. This includes the collapse and conflation of diverse moral worlds into implicitly (or sometimes explicitly) coded Christian norms, and the discursive and political dominance of these norms expressed through a language of ostensibly universal concerns for freedom. We explore the intertwining of marriage and (non)religion in the marriage equality debate as an embodiment of (and proxy for) the values of Australian society.

Australia, like other settler-invader societies, is curiously positioned in any discussion of national imaginaries. The relative youth of the country as a political nation-state is a common refrain in characterisations of national identity, yet it belies the ancient cultural history of the continent and its First Nations peoples. This dichotomy, and the failure thus far of the modern Australian nation to fully reckon with it, forms part of the underlying tension in the continual construction of nationhood and cultural hegemony (O'Dowd, 2011), particularly within constructions of nationhood that invoke natural law. This is illustrated in the arguments from some of the actors discussed below, who regularly collapse Australian history (and the role of marriage within it) into a colonial Anglo-Christian image, while simultaneously presenting the same as an unbeginning, undying constant through space and time. This is particularly problematic as right-wing extremism"elevate[s] an imagined white identity that is believed to be authentic and nativist to the Australian historical landscape [while] contemporary society

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[is often] considered degenerate, failing and in crisis [and] conservative sexual and gender concepts are idealised and desired" (Campion 2019, 223).

This ideological construction of Australia's 'Whiteness' persists despite – or because of – Australia's half-century of orientation towards multiculturalism and increasing ethnic and religious diversity. This diverse population is also increasingly nonreligious; as of 2021 38.9 % of the population described themselves as having "no religion," a higher proportion than any other individual denomination, with Catholicism the next highest at 20 % (Australian Bureau of Statistics 2022).[1] If individual denominations are collapsed, Christianity remains the greatest share of the population at 43.9 %, with non-Christian religions making up the remaining 10 % of the population. Similarly to Beaman's (2021) observations of the conflation of national culture, heritage, and religious symbols and practices in Canada, Christianity enjoys immense cultural and political privilege in Australia (Ezzy et al. 2020; Ezzy et al. 2023). This is often evident in Australian mainstream media and political discourse (Maddox 2005; Weng & Halafoff 2020; Banham 2022).

The debate surrounding marriage equality is a useful illustration of the often ambivalent position that religion holds in Australian culture, national identity, and public life. Many public institutions such as schools, hospitals, and community service providers are Christian-affiliated, and an influential current of religious conservatism pervades the political sphere. (Ezzy et al. 2020). Yet culturally, religion is often treated as a private matter in Australia, described by Bouma (2006) as a "shy hope in the heart". While most Prime Ministers have been openly Christian, being seen as 'too religious' can be detrimental to a politician's public image. As such, open references and claims to religiosity (or, more specifically, Christianity) tend to appeal largely to a particular conservative voter base. Coupled with a dramatic rise in the number of Australians identifying as nonreligious – from 12.9 % in 1991 to almost 40 % in 2021 (Australian Bureau of Statistics 2022) – we see religion often described in Australia as a matter of individual choice that should be irrelevant to public policy and political decision-making. This is reinforced by the popular notion that Australia is a secular country in which freedom of religion and freedom of speech should be protected, but religious convictions should not necessarily dictate law (Bouma 2007; see also Weng and Halafoff 2020). Australia is nonetheless a nation historically and currently influenced by the symbolic and symbiotic normativity and privileging of Christianity, Christian values, and Christian organisations (Sarre 2020; Ezzy et al. 2020; Ezzy et al. 2023).

1 This figure is probably a conservative estimate as the question about religious affiliation is not a compulsory question. This figure is also likely to rise in coming years as young people are more likely to self-identify as nonreligious.

As such, it is often taken for granted that references to religion are, in practice, references to Christianity. These assumptions are becoming increasingly unsettled by the growth of non-Christian religions such as Islam, Hinduism, and Sikhism, and increasing numbers of people describing themselves as having 'no religion'[1] (Australian Bureau of Statistics 2022). However – as this chapter explores – Christianity still enjoys a privileged position in Australia not only as shorthand for religious values, but as a source of 'Australian' values.

This conflation of religion with Christianity has several implications for understanding debates about marriage equality in Australia. Rising levels of religious disaffiliation, coupled with more widespread acceptance of LGBTIQ+ rights, has pushed some conservative Christian actors to view their freedom of religion and political privilege as under threat (see McLeay et al. 2023; Banham 2022; Ezzy et al 2021; Poulos 2019). This has led to a distinct persecution narrative, in which anti-marriage equality actors insisted that Christianity is under attack, impacting the mobilisation of conservative religious (in practice, Christian) voices in the Australian legal sphere. As it became increasingly evident that marriage equality was likely to be legalised, opponents became increasingly focused on defending religious rights, with a heavy focus in debates and legislation on religious freedom and exemptions. As such, rights in Australia have become increasingly constructed as a 'zero-sum game', where protecting one's right to be free of discrimination (e. g. having the right to marry regardless of sex/gender) is seen as infringing on the right to practice one's religion (e. g. opposing marriage equality).

The historical and discursive context of the path to marriage equality is explored in the following sections, broadly tracing the mobilisation of marriage and religion in the constructions of a formative colonial national identity, through to the period surrounding the marriage equality postal survey in 2017. It is beyond the scope of this chapter to provide a comprehensive account of marriage, law, and (non)religion in Australia, and our discussion is necessarily limited to that which provides critical context in understanding dimensions of (non)religion in the Australian socio-political imagination and the 'moment' of the legalisation of marriage equality in 2017. While we have attempted to ensure that we do not actively misrepresent or distort the social or legal dimensions of the histories presented here, we acknowledge that the highlighted themes, and significances within them, are selective rather than exhaustive. Following this historical and thematic contextualisation, we introduce the materials that have informed our analysis of how the marriage equality debate in Australia involved a complex intertwining of arguments about nationhood, freedom, and rights related to, and often in tension with, religious beliefs and identity.

6.1.1 A note on terminology

In Australia, same-sex marriage is often referred to as 'marriage equality'. This terminology serves two purposes. It functions to include and recognise people of sex and gender identities beyond a cis-gendered, heteronormative binary where 'same-sex marriage' potentially excludes or erases people who are intersex, transgendered, or otherwise identifying as nonbinary. 'Marriage equality' also foregrounds the key role that notions of rights and equality play in the discourse around same-sex marriage in Australia. It is not entirely clear when the lexiconic shift from 'same-sex marriage' to 'marriage equality' occurred in the popular or political imagination; a range of terminology has been used at different points in the debate[2] (both interchangeably, and with distinct semiotic intent and inference) with a broadly continuous, though not linear shift, away from rigid binaries and towards nuance and inclusion. This chapter mirrors this trajectory. Reflecting a softly diachronic approach, we use both 'same-sex marriage' and 'marriage equality' throughout this chapter in deliberate and specific ways. We use 'same-sex marriage' in discussing historical engagements with the issue where this was the term endemic to the literature and discourse of the period. We henceforth use 'marriage equality' as the preferred terminology in discussing the lead-up to and period of debate surrounding the Marriage Amendment (Definition and Religious Freedom) Act 2017, and in general discussion not relating to a specific time period. This reflects contemporary accepted (though not universal) conceptualisations and terminology, the importance of human rights within the debates, and the authors' own reflexive position of inclusion and recognition for a broad spectrum of sex identities and gender expressions.

6.2 Background

6.2.1 Marriage and religion in the construction of colonial Australia

Prior to invasion in 1788, the First Nations peoples of the lands now known as Australia are estimated to have spanned more than 500 nations, with over 200 distinct languages, diverse territories, and complex, though interrelated, customary laws and spiritual beliefs. The devastation of colonisation and the destruction of cultural practices and knowledge make it difficult today to authoritatively detail the di-

2 In terms of the legislative process, it first appears in the Marriage Equality Amendment Bill 2009.

verse customary beliefs, laws and practices surrounding marriage specific to each First Nations group prior to invasion. However, it is broadly agreed that across pre-invasion Aboriginal and Torres Strait Islander societies marriage (and/or its customary equivalents) functioned as an essential part of inter- and intra-group cohesion and continuity, governed by intricate kinship relationships and responsibilities, diverse engagements with gender, and interwoven with broader connections to clan, culture and Country. European invasion – specifically, British invasion – precipitated the violent dislocation of these connections through massacre, dispossession, and the disruption of complex cultural practices, including those surrounding kinship and marriage. This dislocation was deliberately and explicitly pursued under the auspices of *terra nullius*,[3] the legal fiction that the land "belonged to no one," which facilitated the unfettered importation and local adaptation of British law; first in the establishment of penal colonies, and then the development of free colonies, which eventually became States in the Commonwealth of Australia.

Famously described as "the most godless place under Heaven,"[4] the early colonies have at times been characterised as overtly, gleefully, even depravedly, irreligious. The veracity of this characterisation notwithstanding (certainly it is contested by more nuanced readings of the multifaceted roles religion played in the colonies), this element of the national mythology persists in contemporary Australia, where overt religiosity – particularly in the political sphere – is still frequently met with a cheeky irreverence, relaxed disregard, or casual disdain (Weng & Halafoff 2020). Conceptualisations of Australian lawmaking as inherently secular likewise persist in the popular imagination, though this picture is once again complicated by the well documented and undeniable enmeshment of religion in the formation of the nation-state. This secular imagining at once reinforces a mythologised social memory, while also working to obscure the Christian normativities deeply embedded in the Australian legal and social fabric from the moment of invasion (Possamai and Tittensor 2022).

Religion – primarily Protestant Christianity – played an essential role in both the legal and social control of the penal experiment, embedded within the governing structures of the colonies and in the lives of their inhabitants whether they wished for it or not. Indeed, while the Church provided degrees of solace and

3 It is debated whether *terra nullius* was explicitly wielded at the point of invasion or retroactively applied in the 19th century with Governor Burke's 1835 Proclamation; regardless it became the normative basis for the ongoing dispossession of First Nations peoples until the High Court's Mabo decision on land rights in 1992.

4 Generally attributed to Scottish Presbyterian theologian James Denney, see Breward (1988).

community for some convicts, there were also not-insignificant segments of both early settler and convict populations who were largely indifferent or hostile to the militarised church presence, which to some represented a continuation of, or collusion with, the oppressive establishment (Carey 1996).[5] The presence of the Church also acted as a response to the perceived moral depravity of the populace, including – not insignificantly – relatively open and widespread deviations from Church-sanctioned marriage in the erotic-affective domains, including informal cohabitation, interracial partnerships, multiple marriages, sex work, and widespread homosexual relationships and sexual practices.

Marriage under colonial law was intertwined with the Christian norms and practices embedded in English marriage law at the time, along with deep governmental control, depending on the social strata of the applicant. For example, while free settlers were able to marry without special permission, convict settlers wishing to marry required the permission of the colony Governor; this permission could be granted or withheld on the basis of character (among other criteria), instrumentalising marriage as a form of post-carceral discipline and social control. While traditional unions between Aboriginal people were not legally recognised as marriages under the "laws of Christendom," marriages between First Nations people and convicts or settlers were initially permitted, though again subject to special permissions and legal barriers.

As the penal colonies ended and the free colonies expanded, marriage was expressly encouraged among the settler population as a key force in forging a stable colonial society, domesticating the wildness of the frontier into respectability, and erasing the stain of convict transportation.[6] At the same time, the legal control of marriage for Aboriginal and Torres Strait Islander people intensified, coupled with the expansion of Christian missions, ostensibly under the auspices of protection. The stated aim of many of these missions was, at best, to 'improve' the lives of the First Nations populations through religious instruction and the inculcation of settler-invader laws, practices and norms. Some missions also colluded with colonial governments (and subsequent State and Territory governments) to facilitate the eradication of First Nations people by removing children from their families and culture with the express purpose of "breeding out" the Aboriginality of the populace (Wilson 1997). Marriage, as a site of biological and social reproduction, was strictly controlled for Aboriginal people in this period in further pursuit

5 While there are documented instances of clerical collusion with, and abuses in, the oppressive penal system, some members of the clergy and other religious actors were also instrumental in championing penal reform and the end of transportation, see Carey (2019).

6 Feminist historians point out that it was not marriage itself that performed this function but the labour of women as "God's Police" *within* marriages, see Summers (1975).

of this genocidal aim (Wilson 1997). In this response to the perceived incompatibility of First Nations people with emergent (White, Christian) Australian nationhood (Read 2006; Dunstan et al. 2019) we see the deliberate instrumentalisation of marriage as a tool of erasure and nation-building in the explicitly political construction of colonial Australian society. This political mobilisation of marriage in the construction of a racialised national imaginary continued well into the post-Federation era, with many of these protectionist policies persisting in one form or another into the 1960s.

In 1901 the existing colonies were united under a federal constitution in the Westminster common law tradition to establish the sovereign Commonwealth of Australia. By this time Christianity had, for more than a century, enjoyed a privileged position in the social and legal environment of the colonies. The architects of Federation did not attempt or intend to challenge the cultural patterning (Hodgson 1993) of a socially and legally embedded Christianity; they are, however, understood to have held considerable ambivalence about the inclusion of explicit references to religion in the Constitution. It is broadly held that the words "humbly relying on the blessings of Almighty God" were eventually included in the preamble as something of a compromise measure to appease the varying political factions and petitioners contributing to the process of uniting the colonies (Ely 1976; Cruickshank 2021). In an attempt to counterbalance, the framers also included Section 116, which precludes the Commonwealth of Australia from making laws for establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion. This section, popularly characterised as enshrining both the right to freedom *of* religion and freedom *from* religion, has largely been formally interpreted as preventing governmental interference – or privileging – of any particular faith, as opposed to a strict demarcation between church and state (Beck 2008). Rather than dwelling too heavily on the sacred in the substantive development of the Australian Constitution, this transcendental impulse was transferred to the cause of Federation itself; the pursuit and promotion of the post-Enlightenment "sacred ideal of nationhood" (Hirst 2000).

An explicit awareness of the active construction of the legal and political architecture of Federation, as opposed to a natural pre-existence (Chavura & Melleuish 2015, McGregor 2006), was openly inhabited by enthusiasm for the inherent British character of this construction: "British subjects – of a Protestant nation, recollect, and subjects of a Protestant Crown" (Henry Parkes 1867, p. 3). The ongoing construction of this essentially British character was made concrete by measures such as the Immigration Restriction Act 1901 (Cth) – notoriously known as the "White Australia Policy" – which tightly regulated non-British immigration in an active and explicit attempt to construct and maintain the emergent Commonwealth of Australia as White, Christian, and Anglo-centric. The White Aus-

tralia Policy responded to a perceived existential threat posed by (primarily) Chinese immigration, rooted in fears of a labour market flooded with cheap and/or indentured labour and the political complexities of a culturally heterogeneous population, along with eugenicist aspirations that included preventing interracial marriage and a resultant mixed-race population from challenging the racial and political imaginaries of the nascent Australian nation.[7] While Christianity was imbricated in the 'natural' superiority of the Anglo-centric national identity in justifying this policy, it was the ongoing pursuit and preservation of Australia's Whiteness, rather than Christianity itself, that constituted "a sacred trust" (Elkin 1945, p.7).

6.2.2 A federal definition of marriage and rising civil rights

From 1901 marriage sat within the newly formed constitutional powers of the Federal government under Section 51, however this power was not fully invoked for another 60 years, when the Commonwealth Marriage Act 1961 was introduced. The Act formally brought marriage under Federal control, in an attempt to resolve unwieldy interjurisdictional inconsistencies between the State and Territory marriage laws which had hitherto varied enough that marriages performed in one State would not necessarily be considered legally valid in another. The basic normative premise of marriage was not significantly challenged or adjusted in the introduction of the Marriage Act 1961 however, nor was marriage itself explicitly defined in the Act. In explaining in the second hearing of the Act, Senator John Grey Gorton stated:

> I am inclined to think that the reason why marriage has not been defined previously in legislation of this kind is because it is rather difficult to do so. Marriage, of course, can mean a number of things. For instance, it can mean a religious ceremony; it can mean a civil ceremony; and it can mean a form of living together. There are several meanings covered by the word 'marriage', which are quite different one from the other.
> Senator the Hon. John Grey Gorton, Senate Hansard, 18 April 1961, p. 544.

7 See also this comment from Henry Parkes, known as the "Father of Federation," advocating for a precursor to the Immigration Act 1901, the New South Wales *Chinese Restriction Bill (1888):* "I have maintained at all times that we should not encourage or admit amongst us any class or persons whatever whom we are not prepared to advance to all our franchises, to all our privileges as citizens, and all our social rights, including the right to marriage." (*New South Wales Parliamentary Debates, 16 May 1888).* Alongside the regulation of citizenship along racial lines, this statement also positions marriage as a social right of political citizenship, rather than a divine right.

Despite this curious openness about the normative slipperiness of marriage as a legal construct, the common law definition established in *Hyde v Hyde and Woodmansee* (1866) was nonetheless embedded in the Act, with Section 46 (dealing with the responsibilities of authorised celebrants), describing marriage as the "union of a man and woman to the exclusion of all others, voluntarily entered into for life." Although Senator Gorton again clarified that these words nonetheless "[did] not have the force of law to define a marriage," (Senate Hansard 18 April 1961, 544) they did set the parameters for a lawfully authorised marriage ceremony, defining legal marriage in *de facto* if not in *de jure*. Under the Act, marriages performed by either religious or civil officiants are considered equally valid in the eyes of the law so long as the officiant is duly authorised to perform the ceremony, meaning that marriage is a civil contract that can be entered into through a religious ceremony, but which is not inherently tied to one.

The religious constitution of Australia had, at this time, already begun to change. The relaxing of the White Australia Policy in the aftermath of World War II saw a conscious shift away from Britishness as the defining characteristic of nationhood, and with it, a slackening in the grasp of Protestant Christianity as the assumed national default. By 1973 the policy was formally abandoned, inviting both successive waves of diverse migrant and refugee intakes and a rising symbolic embrace of multiculturalism. From this period onward we see steady changes in the religious makeup of Australia, not only in the increasing diversity of recorded religion among the citizenry (from 0.8 % reporting non-Christian religion in 1971 to 10 % in 2021), but also in reported rates of no religion (increasing every census from 6.7 % in 1971, when the census first included the instruction "If no religion write none," to 38.9 % in the 2021) (Australian Bureau of Statistics 2022). This period also saw substantial steps towards First Nations civil and land rights,[8] an increasing engagement with Asia-Pacific regionalism and economic globalism in both policy and outlook, and the enfolding of diversity and tolerance into the existing national mythology of egalitarianism (Moran 2011; Pakulski 2014). In this period of intense change and deliberate breaking away from 'Mother England,' ques-

8 Following a national referendum in 1967 the Constitution was changed to ensure that Aboriginal and Torres Strait Islander peoples would be counted among the Australian population and subject to Federal law; until this point Aboriginal and Torres Strait Islander people were subject to variable and often oppressive State and Territory laws, including residual barriers and controls of marriage and family. While this change did not directly involve change to the Marriage Act 1961 (Cth) itself, it does represent a distinct change in the legal control over who may marry, and under what circumstances, into a wholly Federal domain. This reinforces once again the continuum of political construction of marriage under Australian law.

tions about the intrinsic identity of Australia became a "national obsession" (White 1981) that has not yet waned.

As highlighted in other national contexts in this volume, the gains of second-wave feminism heralded both a material and symbolic shift in marriage as a social and civil institution in Australia. The establishment of no-fault divorce by the passing of the Family Law Act 1975 (Cth) saw a cultural shift away from a restricted, punitive model for divorce, based on explicit and implicit religious norms, towards a model reflecting broader cultural and legal orientations towards individual rights and liberties. It is during this same period that Australia also began to introduce anti-discrimination laws, beginning with the Racial Discrimination Act 1975, and saw the rise of coordinated LGBTIQ+ activism, particularly around the decriminalisation of sex between adult men which took place across the different States and Territories between 1975 (South Australia) to 1997 (Tasmania). In this last instance the state of Tasmania actively resisted decriminalisation, arguing to retain the laws largely on public health and moral grounds.[9] However, the UNHRC and Federal government decided in favor of decriminalisation largely on the basis of individual rights and jurisdictional consistency, two themes that will recur in later discussions.

6.2.3 Towards marriage equality: from tipping points to inevitability?

Just six years after decriminalising sex between men, Tasmania was the first Australian State to legislate the formal recognition of same-sex relationships through the Relationships Act 2003 (TAS). From this time legal recognitions of and rights for same-sex partnerships grew incrementally at State/Territory and Federal levels, while Federal parliament simultaneously dismissed or actively resisted repeated attempts to pass same-sex marriage into law. During this period, there was a steady shift in rhetoric away from the explicitly homophobic and/or moralistic arguments of the decriminalisation period to the subtler discourses of *protection* (of the heteronormative family) and *difference* (i. e. marriage as exceptional, an intangible something 'more' than a civil partnership that must be preserved and privileged). Although same-sex de-facto and civil union rights were relatively comprehensive and progressive compared with many jurisdictions (Rundle 2014), this symbolic function of marriage – its intangible 'moreness' – also formed a key part of marriage equality advocacy over the coming years. While the movement for marriage equality grew steadily in momentum over this period – between

9 See Toonen v Australia 1994; Croome v Tasmania 1997.

2004 and 2017 there were 20 separate attempts to introduce and pass bills relating to marriage equality in Federal parliament – we would like to briefly highlight two catalytic legal responses to same-sex marriage. We then turn our attention to the specific period in 2017 when marriage equality passed into law.

6.2.3.1 Marriage Amendment Bill 2004

In 2004 the first major legislative moment explicitly addressing same-sex marriage in Australia came as a pre-emptive attempt to *exclude* marriage equality from law: specifically, to prevent same-sex marriage from undergoing judicial scrutiny. In direct reaction to same-sex marriage legislation emerging in some international jurisdictions (such as Canada), the Marriage Amendment Bill 2004 aimed to preclude same-sex marriages performed overseas from achieving domestic validity by amending the Marriage Act 1961 (Cth) – which previously did not include a positive definition of marriage – to explicitly define marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life." This amendment passed with bipartisan support, achieving its aim to definitively prohibit same-sex marriage in Australia. Then Prime Minister John Howard explained his government's motivation:

> What we didn't want to happen in 2004 was for the courts to start adjudicating on the definition of marriage because that was a real threat in 2004 because some people who had contracted same sex marriages in another country had the capacity to bring their issues before courts in Australia.
> (quoted in Riordan 2017, n.p)

This extraordinary statement introduces a narrative of threat; not only in the prospect of same-sex marriage, but in the potential legal scrutiny of marriage, which is positioned as a threat in and of itself. This pre-emptive silencing of the judiciary attempts to set the parameters of marriage as untouchable, sitting outside common law, and ensured the subsequent marriage equality debate would be primarily prosecuted in the political arena rather than the courts. However, it also highlighted the ease with which the legal definition of marriage could change to a more inclusive model: it was simply a matter of parliament choosing to do so. LGBTIQ+ activists now turned their attention – previously directed largely at expanding civil relationship rights – squarely to marriage equality.

6.2.3.2 Marriage Equality (same-sex) Act 2013 (ACT)

Nearly a decade later, the short-lived Marriage Equality (Same Sex) Act 2013 (ACT), originating in the Australia Capital Territory (ACT), was the first instance of same-sex marriage successfully passing into legislature in any Australian parliament. It

was struck down by a subsequent High Court challenge filed almost immediately by the Federal Government,[10] which is the first (and only) time that marriage equality legislation has been directly and explicitly tested in the courts in Australia. The High Court ruled that the 2013 Act was inconsistent with the Marriage Act 1961 (Cth) and therefore "of no effect," invalidating the 31 same-sex marriages performed in the ACT in 2013. Despite a noted enthusiasm among the judiciary regarding equality arguments (Rundle 2014), the substance of the challenge, and thus the judgment, was not the moral or normative validity of marriage equality. Rather, this ruling focused on the jurisdictional consistency between the States/Territories and the Commonwealth. Crucially, the ruling found that despite the incompatibility (and consequently, the invalidity) of State/Territory marriage law with Federal legislation, there was also no constitutional impediment to introducing same-sex marriage federally, and that the power to legislate this change rested wholly in the hands of Federal Parliament. From 2012 onwards multiple bills to amend the Marriage Act 1961 were introduced to Federal parliament each year, including five separate attempts in 2016 alone, as marriage equality reached boiling point as a key electoral issue.

As marriage equality passed into law in other international jurisdictions, supporters of marriage equality pointed to a palpable sense of 'lagging behind' that was counter to Australia's egalitarian national self-image (Bongiorno 2017; Fullilove 2017). At this time, closely aligned cultural contemporaries – such as Canada, the United Kingdom, and New Zealand – were legislating for marriage equality, as were other countries perceived to be more explicitly religious and/or more conservative than Australia (for example, Argentina, Ireland, and the United States). This sense of being out of step – or out of time – with other jurisdictions sat alongside the growing sense that parliamentary withholding of marriage equality was increasingly at odds with the views and values of the broad populace, who were becoming increasingly nonreligious (as described above) and increasingly pro-marriage equality (Carson et al 2018).[11] In contrast to the Argentinian case study for example, which debated the "capability" of society to cope with the introduction of same-sex marriage, we see much of the popular discourse around marriage equality in Australia as focusing on the failure of marriage law to keep up with the accepted norms already prevalent among broad sections of the populace. In this way, by 2017 marriage equality advocacy was arguably based less in a *future-forming* discourse (Beaman 2020), aimed at constructing new or as-yet unre-

10 Commonwealth v Australian Capital Territory [2013] HCA 55 (12 December 2013).

11 Marriage equality had reached and held majority support among the Australia population in polling since 2007, with support steadily increasing between 2007–2017.

alised futures, and more in a *course-correction* discourse, centered on updating laws perceived to be based in outdated and contested historical norms, values, and precedents. That is, of bringing the Australian legal landscape up to where it *ought to have already been.*

The collective weight of public demand, increasing support within sections of parliament, and international precedent lent a growing sense of inevitability to the marriage equality movement in Australia (Poulos 2020). We see the impact of this sense of inevitability in our analyzed materials, where a surprising proportion of the discourses presented lean less on prosecuting *if* marriage equality should be legislated, and more on *how.* Despite the technical simplicity of legislating for marriage equality, this *how* proved incredibly difficult in an especially volatile and combative period of Australian politics in which marriage equality served first as a wedge, then a lever, within broader ideological and inter-/intrafactional agendas.

6.2.4 2017: Australian Marriage Law Postal Survey

Unlike other jurisdictions discussed in this volume, marriage equality ultimately passed into law in Australia not through judicial determination, nor the straightforward parliamentary process of the 2004 Marriage Amendment Bill. Rather, it followed an unprecedented and vociferously contested voluntary postal survey. The incumbent neo-conservative Liberal-National Coalition took the introduction of a compulsory but non-binding plebiscite on marriage equality to the 2016 federal election as a campaign promise. The proposed bill to enable the plebiscite was (twice) rejected by the Senate, and the comparatively progressive then-Prime Minister Malcolm Turnbull faced a powerful and hostile conservative faction within his own party. In light of this, in 2017 Turnbull instructed the Australian Bureau of Statistics to conduct a voluntary, non-binding, national postal survey, committing his government to introducing a free vote on a private Members bill for marriage equality in the event of a majority "Yes" response. The survey asked only one question: "Should the law be changed to allow same-sex couples to marry?" With 79.5 % of the voting population completing the survey, a 61.1 % majority returned a "Yes" response, along with 133 out of 150 electorates each returning a majority "Yes" result.

The overall majority "Yes" response across the country meant that a clear mandate for marriage equality was achieved, and the protracted parliamentary resistance was largely neutralised. The survey carried an intrinsic and extrinsic normative weight that parliamentarians would respect their claim to representative democracy by voting according to the wishes of their constituents regardless

of their personal position, or prior campaigning, on the issue. It also allowed actors whose opposition to marriage equality had been based in political expediency in inter-factional and cross-party jostling a somewhat face-saving opportunity to realign themselves with the popular majority (Carson et al. 2018). While much of the parliamentary opposition to marriage equality was thus broadly neutralised it was not erased: ten MPs abstained from the vote and four chose to vote against the bill. With 52 members of parliament voting in its favor, marriage equality was written into law with the Marriage Amendment (Definition and Religious Freedoms) Act 2017.

Still contentious today, the deployment of this survey was without legal or political precedent. It has been regarded variously as a pragmatic path to marriage equality through repeated political stalemates; as a deflection of the moral and legal responsibilities of parliament into something of a Habermasian fever dream in which legislation is determined by public poll; and/or as a cruel and degrading exercise in political cynicism, unnecessarily putting the legitimacy of LGBTIQ+ lives and relationships up for popular debate. Alarmingly but not surprisingly, the process exposed the LGBTIQ+ community to increased stigma and violence (Anderson et al. 2020; Flaherty and Wilkinson 2020) and psychological distress (Ecker at al 2019; Verrelli et al 2019).

Not only was this approach unprecedented in terms of parliamentary procedure, it also shifted an enormous proportion of the marriage equality debate and agenda-setting out of the legislative and judicial contexts and into the public sphere. Widespread campaigning was deeply polarised along a 'Yes'/'No' binary, from the grass-roots level through to coordinated national media campaigns. This dichotomous framing arguably worked to embolden actors on both sides of the debate, constructing and entrenching a divide between religious and non-religious actors. Because of this, our focus here on a specific range of materials can therefore tell only one part of the story and cannot capture the full nature of discourse informing the process around marriage equality in Australia.

6.3 Selected materials

Our analysis focuses on the period immediately prior to and during the development of marriage equality legislation in 2017. It also extends to the immediate aftermath of the "Yes" majority survey result, particularly in regard to persistent pivots towards 'religious freedom', which occurred concurrent to (and within) the marriage equality debate as well as in the period following the debate.

The long and protracted process leading to the postal survey – along with the vast swathes of debate that took place in the media and public spheres as a result

– generated a wealth of potential material for examination. Previous research has looked at aspects of the public debate and "Yes" and "No" media campaigns surrounding the 2017 marriage equality survey (eg. Hegarty et al 2018; Richardson-Self 2018; Chen, 2019; Thomas et al. 2019). For this chapter, we have chosen to focus on analysing debates and responses to and within specific pieces of legislation relating to marriage equality, selecting legislative and parliamentary material to examine through discourse analysis. These included:

a. **Senate Select Committee Report on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill 2017** (henceforth "Senate Select Committee Report").

   This report was established by the Senate to hear evidence and examine submissions in response to the 2016 Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill. Senate Select Committees are temporary (as opposed to a Standing Committee), established by the Senate in response to issues of public policy or governmental scrutiny that are not already subject to an existing committee. The Committee is comprised of Senators from across a range of political parties, while the evidence and submissions considered by the committee come from a range of actors and sources. The report sought to identify and examine the substantive legal considerations inherent in the development of marriage equality legislation, and to develop Committee recommendations. Framed as avoiding any prediction of – or predisposition towards – a specific outcome, this report (and many of the responses within it) nonetheless produces an inherently future-forming orientation as it considers the direction of any eventual legislation. Over 400 formal submissions were received by the Committee; our analysis focuses on the submission summaries and exemplars provided in the Report as this was the material actively used to frame the formulation of marriage equality legislation.

b. **Excerpts from the 2016–2017 Hansard records of speeches by federal Members of Parliament (MPs) and Senators in the period spanning prior to, during and immediately following the 2017 marriage equality debate.**

   This body of excerpts was compiled by a Research Assistant at the University of Tasmania (Joseph Haddon), who codified the extensive body of Parliamentary debates relating to marriage equality in Australia. We then conducted our analysis of the excerpts, and following the identification of themes from this preliminary coding narrowed our focus to speeches that invoked religion, temporality, and/or human rights themes. Some of the excerpts are from the period prior to the postal vote (should marriage equality happen?) and some from afterwards (what do we do now marriage equality has hap-

pened?), and this distinction links directly with our discussions above and below about future-forming/past-preserving discourses.

c. Following the work of Poulos (2019; 2020), which identifies a direct and concrete link between the marriage equality debate and subsequent attempts to (re)ignite debate about religious freedom, we also chose to code the **Religious Freedom Review: Report of the Expert Panel** (henceforth "Expert Panel Review"), and the **Australian Government response to the Religious Freedom Review** (henceforth "Government Response").
   The Expert Panel Review was commissioned by the Australian Government in 2017 to investigate the status of religious freedom and contains 20 recommendations to the Government. The enthusiastic revival and extension of this otherwise largely dormant issue in direct response to the critical moment of the 2017 marriage equality debate underscores the transformative symbolic power of this moment in challenging the ontological security of (Christian) religious normativities in the Australian political imagination (see McLeay et al. 2023).

The materials chosen – and, by extension, the actors involved – highlight the political nature of this debate in Australia. The process of legislating marriage equality, and its location in the public and political sphere, shapes the parameters of the debate and the arguments prosecuted within it, necessarily shaping the following analysis. In the practical exclusion of the judiciary from this process, it was parliamentarians who largely held responsibility for enacting this legal change in Australia and as such, most of the actors we reference in this chapter are political actors, rather than judicial actors. This in turn shapes the extent to which we identify actors and arguments as 'religious' or 'nonreligious'; for example, some politicians identify themselves as personally religious, but do not necessarily advocate for their positions from a religious standpoint. Similarly, a Government document such as the Response to the Religious Freedom Review can be understood as being authored from a 'nonreligious' (secular, Government-approved) standpoint, but is clearly written in dialogue with the possible concerns of religious actors.

6.4 Discussion

In keeping with the thematic framework of this volume our analysis explores discourses that engaged with constructions of and within themes of temporality and the 'natural'; in this instance, universality, transcendence, national identity, rights and freedoms. In the following sections we focus on the mobilisation of these dis-

courses in constructing the past, present, and future imaginaries of national identity (and thus of power and privilege) animating this debate.

6.4.1 Constructing the universal: sublimating religion through transcendent nationhood

In the sources we analyzed, a central framing discourse in debate around marriage equality was the inherent value and importance of marriage, which was presented as a social fact and uncontested by actors both for and against marriage equality. However, the shared recognition of the value of marriage was mobilised very differently in arguments for and against marriage equality.

In arguments against marriage equality, the construction of marriage as both important and foundational was used to support the idea that marriage is fixed in meaning, and therefore in law. When considered through the lens of historical narratives, this argument is largely dominated by essentialist contentions that position heteronormative marriage as transcending time, place, and culture to form the foundational unit of families and societies, and which must therefore be protected from changes that would dilute or erode its value, and its fundamental role in society:

> Marriage is and has been a fundamental cornerstone of society. Its pre-existence of the nation state, international treaties, and supreme courts places it in a unique and important social position. It reflects, and upholds the biological and sociological realities of the family unit, and as such is the best and most effective system of raising, protecting and socializing our next generation. For that it deserves to be treated by society with the utmost respect, and should continue to enjoy, as it has, the protection of law.
> *Senator Eric Abetz* in Senate Select Committee Report 2017

> The government can regulate marriage, but this natural institution existed long before there were any governments and cannot be changed at will.
> *Senator Jacquie Lambie*, Cth, 2016, 2024

These arguments avoid invoking an explicitly stated religious tradition as an underlying or contextualising authority, seeking instead to sublimate an implied divinity through a fixed conception of marriage that exists outside political, legal, and cultural constructs. This approach positions (heterosexual) marriage as transcendent, universal, and unassailable under natural law; marriage equality is then positioned as a destabilising force sitting outside this natural continuum. In this argument the socio-cultural underpinning of the 'universal' construction of marriage usually remains subtextual. At times, however, this is complicated by actors

who do explicitly reference Christianity as an inherent in both marriage and Australian cultural identity:

> Safeguarding our intangible heritage includes the protection of our cultural identities—in this regard, the cultural identity of humanity…. Heterosexual marriage shapes our cultural heritage, particularly as we see and experience it in the Christian tradition of Australia.
> *Senator Brian Burston*, Cth, 2017, 8932

This creates a circular thematic paradox in which Australian society and marriage are positioned as both universal *and* as essentially Christian; that this Christian conception of society, and of marriage, *is* universal. This collapse of difference and conflation of belief(s) is a discursive tactic we see recurring in other arguments, which we return to later in this chapter. At this point however, it is important to point out that this tactic not only marginalises the diversity of (non)religious identification – conflating Australian cultural heritage with Christianity alone – but it also collapses diversity *across* different Christian traditions, and diversity *within* these traditions. This discounts those Christian actors who view marriage equality as compatible with, or even essential to, their religious identity:

> As somebody who subscribes to the Christian faith, I feel totally comfortable with the idea that two people who love each other, respect each other and want to spend the rest of their lives together should be able to do that.
> *Senator Sarah Hanson-Young*, Cth, 2016, 1907

> …we want the Senate to be fully aware that the majority of Catholic Christians in Australia support marriage equality. We do so because of our religious faith and teachings of social justice, which promote the dignity and equality of all people…Catholic family members especially believe that this will strengthen their families
> *Benjamin Oh*, Chair of Advisory Board, Australian Catholics for Equality quoted in Senate Select Committee Report 2017

The invocation of 'universal Christianity' was not generally used to argue that marriage law should uphold religious norms because of an explicitly theological moral imperative. Indeed, actors largely avoid making a directly theological case for opposition to marriage equality (echoing the argument above about religion's relatively 'quiet' place in Australian culture). Rather, these political actors argue for the importance of (implicitly Christian) marriage as a universal tradition that is the 'bedrock' of Australian society and the source of (naturally) fixed social values. If we situate this transcendental, universal vision of 'Christian' marriage alongside the historicity of marriage as a legal construct, we can then place the contemporary same-sex marriage debate within the ongoing continuum of colonial nation-building in a White, Christian image. In this continuum, we see a shift from the social and legal control of marriage, deliberately deployed over

the internal threat of existing First Nations societies (Haebich 2000) as part of the construction of the colonial Australian imaginary, to reframing this explicitly transposed social and legal system as a universal, natural order that requires protection from the external threat of destabilising cultural and legal changes such as marriage equality.

This threat discourse, introduced earlier in this chapter with the threat of judicial scrutiny motivating the pre-emptive legislative prohibition of marriage equality in 2004, remains threaded throughout many of the arguments opposing marriage equality.[12] This discourse serves to position anti-marriage equality actors as protectors – not of faith, but of a universal conceptualisation of marriage (implicitly constructed through a Christian lens) and, through marriage, of Australian families and society as a whole. This discourse of threat and protection sits within broader ideological narratives in the Christian Right neo-conservatism that rose to prominence in the Howard era, and which has shaped Australia politics throughout the early twenty first century (McLeay et al. 2023).

By contrast, pro-marriage equality actors reject the argument that marriage equality threatens the stability and transcendent value of marriage in Australian society, arguing instead that definitions of marriage must be expanded *because* marriage is so important and foundational to our society. These actors argue that the value and centrality of marriage as an essential institution would be affirmed and strengthened by the recognition of same-sex relationships. For example:

> The recognition of the marriage of two people regardless of sex or gender will contribute to the protection of human dignity, the promotion and attainment of equality and the removal of historical prejudicial hurdles … It also respects the importance of the institution of marriage and the desire of many Australians to marry who are prevented from doing so by terms of the current Marriage Act.
> *President of the Law Council of Australia, Fiona McLeod SC* in Senate Select Committee Report 2017

While such arguments share the same fundamental assessment of the value and importance of marriage, this importance is grounded not in the maintenance of an established ('natural') social order but in the role of marriage in ensuring in-

12 The antecedents of this threat-protection discourse appear back further still, for example in the decriminalisation debates of the 1970s-1990s, where homosexuality was constructed as a moral threat to society. The 2017 marriage equality debate largely avoided a direct engagement with sexual morality in the materials analysed here, although this aspect did appear in the broader popular debate (see Law, B., 2017, *Moral Panic 101*, Quarterly Essay 67, Melbourne: Black Inc.)

dividual liberty and political equality. In such arguments marriage does not define society but is defined *by* society, functioning as a reflection of evolving social norms and ethics. Within such arguments, the value of marriage transcends the sexual identities of its participants to uphold the 'higher' powers of freedom, equality and dignity. In this transcendence marriage is again conferred an essential, universal importance:

> ...for couples marriage is a rite of passage. It is a pivotal and an emotional milestone in a couple's lives...
> *Coalition of Celebrant Associations*, in Senate Select Committee Report 2017

> I want us to make sure that the bill we pass through this parliament achieves the simple aim of giving to loving Australians the equality that they deserve, regardless of their sexuality; the simple aim of ensuring it does so in a manner consistent with all of us who already enjoy the right to marriage...
> *Senator Simon Birmingham*, Cth, 2017, 8631

In this uncontested acceptance of the inherent value of marriage lies another pattern of collapse and conflation; in this case, the affirmation of transcendent marriage leverages a past-preserving conservatism that does not fundamentally disrupt the legal construction of marriage beyond the sex of participants. In this way, as numerous feminist and queer scholars have pointed out, the inherent heteronormativity and oppressive structures of marriage remain unchallenged (see Dreher 2016; Thomas et al 2020; Richardson-Self et al. 2020). This discursive strategy, while aiming for inclusion, operates within a limited heteronormative erotic-affective imaginary that collapses the richness and diversity of queer relationships that sit outside this hegemonic paradigm into a universal rhetoric of sameness. This mobilisation of a universal, transcendent marriage positions marriage equality not as a rupture but an extension of existing norms and values in both the legal and social imaginaries, granting the LGBTIQ+ community access to (one aspect) of heteronormative privilege rather than a radical dismantling of this privilege.

Other advocates for marriage equality further argued for expanding the legal definition of marriage as an important step in protecting Australia's ostensibly secular legal system – that marriage, as part of the legal and social fabric of the nation, should embody and uphold this conceptualisation of the nation accordingly:

> Opposition to marriage equality is often expressed using the language of religion. I respect people of faith, but I do not support the proposition that the state – the secular state – should impose the theology embraced by some on all.
> *Senator Penny Wong*, Cth, 2016, 1883

> All that we ask is that they do not impose their religious beliefs upon the rest of us. We live in a secular society. We do not have state-sanctioned religion. Legislating for marriage equality is a matter of live and let live.
> *Senator Janet Rice*, Cth, 2016, 1888

In these arguments, opposition to marriage equality is constructed as inherently religious and against the essential nature of Australian society, which is characterised here as inherently secular. Support for marriage equality is therefore positioned as both inherently *not* religious and the national default. This is particularly underscored by the latter quote, in which the constructions of "we" and "they" clearly position anti-marriage equality actors as a minority other. Opposition to marriage equality, characterised here as the imposition of a religious agenda on "the secular state" and "a secular society" is positioned as a threat to the essential nature of Australia. The conflation of opposition/support for marriage equality along a simple religious/not religious binary and the collapse of who "we" are as a nation allows this argument to connect to the national mythology of egalitarianism ("live and let live") and irreligion discussed earlier in this chapter.

This conflation also potentially invites a tendency towards homonationalism (Puar 2007), in the ideological arbitration of national belonging and civic legitimacy based on the acceptance of LGBTIQ+ rights and freedoms. This tendency is evident in instances of racist backlash and ethnoreligious stereotyping in the aftermath of the 2017 postal survey, largely centered on constituents of Western Sydney. One of the most ethnically and religiously diverse regions in Australia, Western Sydney is also home to 12 of the 17 electorates across Australia to return a majority "No" result in the postal survey, leading to a spate of implicit and explicit media narratives that "those Sydney suburbs most closely associated with large ethnic, migrant and refugee populations were unequivocally homophobic" (Wallace et al. 2021, 261). Where opposition to marriage equality is constructed as antithetical to the national character it can become conflated with race in uncomfortable ways, sitting along the same colonial continuum of who counts in the construction and reconstruction of Australia's national identity; in this case entrenching a "White, not religious" identity in contrast to the "White, Christian" positioning of the earlier arguments.

The construction of an inherently nonreligious nation further challenges both the "universal Christian" constructions explored in the earlier discussion, and the structural privilege Christian norms hold in the Australian legal and social worlds. The competitive framing of these arguments – advocating for the significance and universality of (largely implicit) religious values on one hand and insisting on the significance and universality of secularity on the other – arguably reinforces and

reflects the experiences of ontological insecurity and existential stress of the Australian Christian Right (McLeay et al. 2023). This sees some conservative actors in Australia argue from a sense of perceived persecution that marriage equality contributes to a discriminatory minoritisation that undermines religious freedom. As such, the marriage equality debate in Australia was leveraged by some opponents to pivot to religious freedom, mobilised both as an argument against marriage equality and as an ongoing agenda to pursue in the face of marriage equality's apparent inevitability (Poulos 2019).

6.4.2 Freedom and protection: from what, and for whom?

Uniquely among Western democracies, Australia does not have a domestic charter of rights. While freedom of religion enjoys some degree of constitutional protection through Section 116 (discussed above), many other human rights are subject to an awkward patchwork of social normativities, common law principles, State and Federal anti-discrimination legislation and Australia's commitments as a signatory to international human rights treaties, protocols, and declarations. Human rights nonetheless remain a potent reference point in national political discourse. Human rights likewise served as a central thread in many of our analyzed documents, both in specific arguments for and against marriage equality, and as an explicit framing device, for example in the Senate Select Committee Report exploring the possibility of legislative change for marriage equality:

> Evidence demonstrated that there are substantial matters of law and individual human rights to be dealt with that extend well beyond the Marriage Act itself. I note that if Australia is to remain a plural, tolerant society where different views are valued and legal, legislators must recognise that this change will require careful, simultaneous consideration of a wide range of specialist areas of law as opposed to the common perception that it involves just a few words in one act of parliament.
> Chair's foreword, Senate Select Committee Report 2017

> It is however clear that should legislation be enacted to change the definition of marriage, careful attention is required to understand and deliver a balanced outcome that respects the human rights of all Australians if the nation is to continue to be a tolerant and plural society where a diversity of views is not only legal but valued.
> Senate Select Committee Report p.xi 2017

While actors in our selected materials referred to international human rights obligations and precedents in reference to marriage equality, as illustrated above, human rights were also linked both to values such as diversity, pluralism and tolerance, and the need to protect and reflect these values not just as a legal obligation but as an essential part of Australia's national character. Situated in a super-

structure of human rights, these values are positioned as sitting both outside and above religious constructions of marriage by advocates for marriage equality:

> We simply can't have a society that holds up an institution like marriage as being a bedrock to its values but then say we're only going to make it available to some and not all. We simply can't half do human rights.
> *Senator Richard Di Natale*, Cth, 2017, 8769

Given the earlier conflation of human rights and national values, in these arguments marriage must therefore be legally constructed in deference to a transcendental framework of human rights in order to retain its legitimacy as foundational to Australian society. This appeal to legitimacy is underscored by the normative weight of the postal survey (i. e. the presumption that politicians should vote to uphold democracy, regardless of their own religious/political orientations), blurring the religion/nonreligion and anti-/pro-marriage equality binaries that the postal vote had previously bolstered:

> Clearly, my Catholic faith and upbringing have a strong influence on the way I see the world – what I see as important and how our society should operate… However, it does not dictate to me everything that I do as an MP. And nor should it, because I have a responsibility as a parliamentarian to everyone in Burt, the electorate I represent, which voted 57 per cent in favour of same-sex marriage, as well as the nation as a whole, which voted 61 per cent in favour of same-sex marriage. I also have a responsibility to those who voted no or who didn't respond at all.
> *MP Matt Keogh*, Cth, 2017, 12702

> This bill, however, is a bill about a civil institution, and it's about extending civil rights. It's a bill aimed at updating the law to meet contemporary community values, and it's a bill about ending discrimination. It's not about religion. In fact, I am suspicious of laws that seek to regulate religion. The strong yes vote in the survey showed that people are not swayed by the scaremongers who have tried to present this issue about same-sex marriage as a threat to the freedom of religion, or, as they have sought to do, as an attack on family life. I think the Australian people understand that it is about neither of those things.
> *Senator Kim Carr*, Cth, 2017, 8724

However, a wide spectrum of actors throughout the marriage equality debate did share a common consensus that careful attention to religious freedom would be necessary in the development of marriage equality legislation. The Senate Select Committee Report 2017 explicitly recommended the development of positive protections for religious freedom, and many pro-marriage equality actors promoted such protections as a necessary prerequisite to the fair and balanced introduction of marriage equality. For example:

> …I have done everything I can to protect the freedoms of all Australians and this will allow me to do something that I have always hoped that I could—to vote for a bill to extend a free-

> dom to gay couples that they should have enjoyed years ago: the freedom to marry.
> *Senator James Paterson, Cth, 2017, 8878*

However a number of anti-marriage equality actors argued that marriage equality was in and of itself inherently hostile to religious freedom. This approach adopted the earlier rhetoric of human rights as an unassailable 'higher power' to first argue in opposition to marriage equality, and then to expand debate into a wider review of religious freedom in Australia.[13] In doing so, anti-marriage equality actors construct a distinct narrative of persecution and threat, positioning human rights as a zero-sum game in which an equal right to marriage for the LGBTIQ+ community fundamentally erodes the rights of religious actors, whose protection must therefore be prioritised:

> Australia has a proud history of upholding Western democratic freedoms at home and abroad. Australia assisted in the drafting of the Universal Declaration of Human Rights … The challenge we face in this place is to ensure the almost five million people who voted no are not marginalised because of their traditional view of marriage they hold dear. We need to ensure that there exists adequate protections for freedom of religion and freedom of speech in this country.
> *Senator Helen Polley*, Cth, 2017, 8889–8890

> The Australian people did not vote to restrict people's freedom of speech. The Australian people did not vote to restrict people's conscientious beliefs. The Australian people did not vote to restrict people's freedom of religion. All of those, might I add, are fundamental freedoms guaranteed under international law. They are written into treaties and covenants and signed off around the world. They are human rights that now have been diminished by the establishment of a new right, which is to allow people of the same sex to marry and for people of variations of gender to marry as well…
> *Senator Eric Abetz*, Cth, 2017, 9185

Through the preponderant construction of an anti-marriage equality stance as inherently religious, outlined earlier in this chapter, the majority "Yes" survey result meant that a (Christian) religious construction of marriage now sat demonstrably and quantifiably outside the popular majority. The concurrent construction of a "universal Christian" national identity was likewise challenged. In the construction of persecution narratives, the inherent threat therefore resides not only within marriage equality itself, but in the symbolic defeat of a (Christian) religious social and legal hegemony that the majority "Yes" vote represented.

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13 Prior to this, the most recent inquiry into religious freedom (released in 2011) was undertaken by the Australian Human Rights Commission at the request of the Federal Government; its recommendations were actively opposed by conservative Christian actors.

This narrative sits within a particular brand of conservative populism that portrays the perceived loss of power and/or hegemony as synonymous with persecution (see also McLeay et al. 2023). A direct line can be drawn from these discourses of threat to the 2017 Religious Freedom Review and attempts to introduce legislation such as the Religious Discrimination Bill 2019. As Poulos (2020) argues, as a response to this instance of explicit decentring of Christianity, the construction of marginalisation and threat between marriage equality and religious freedom is not coincidental. As such, the framework of human rights, invoked as a nonreligious national ideal in defence of a persecuted minority, in fact serves a much wider and ongoing agenda to re-centre and re-entrench conservative Christian cultural, social, and political power in Australia, with marriage equality constructed as a catalytic threat to this hegemony.

6.5 Conclusion

In this chapter we explored the tensions between (non)religion, national identity, rights, and freedom in the Australian marriage equality debate. The reduction of marriage equality to competing campaigns of 'Yes' and 'No' worked to construct and reinforce perceived boundaries between religious/nonreligious, conservative/progressive, and Christian/non-Christian Australians. In this context, where 'religion' is conflated with conservative Christianity, 'nonreligion' becomes discursively synonymous with non-conservatism and non-Christianity. In this polarising framework, both opponents and proponents of marriage equality engaged in discursive patterns of collapse and conflation, entrenching oppositional perceptions of how marriage and rights 'should' work in Australia. These constructed binaries included Australia's national character and heritage as inherently secular or inherently (Christian) religious; direct antagonism and competition between rights to equality or rights to religious freedom; and opposition to marriage equality as inherently religious and support for marriage equality as inherently nonreligious.

The marriage equality debate threw into sharp relief competing discourses about the nature of Australia as a place of diversity, democracy, tolerance, secularity, and/or Christian heritage. Narratives were mobilised within competing constructions of Australian national identity on both sides of the marriage equality debate and leveraged to support both religious and nonreligious agendas. Throughout these arguments, there is a sense of locating Australia within an international context of human rights. Sometimes this was presented through a sense of the country 'catching up' to its inherent nature as a progressive, nonreligious nation that upholds human rights to be free from discrimination; other

times this enacted was through appeals to human rights, positioning marriage equality as a threat to religious freedom and national identity, demanding the protection – and re-centring – of a particular vision of Australia's cultural and political identity in the face of this threat. Nonreligion manifested implicitly in the debates through a deliberate de-centring of religion by many actors, including advocates for traditional (religious) marriage who deliberately avoided theological arguments in favor of a transcendent universality tied to Australian values and identity within an overarching framework of human rights. In this way,

The mobilisation by actors both for and against marriage equality demonstrates the ongoing salience of these views and values in Australia, as a largely nonreligious movement became a catalyst for a much wider and ongoing debate about religious freedoms and privileges. This highlights not only the tensions of the moral discourses that have shaped and been shaped by the marriage equality debate, but the clear and ongoing ambiguity and uncertainty embedded in the relationships between religion, nonreligion and Australian law.

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Timeline

1788: European invasion of the First Nations peoples
1835: Governor Burke's Proclamation of 1825 becomes the normative basis for the ongoing dispossession of First Nations peoples
1866: Hyde v Hyde and Woodmansee establishes marriage as a legal construct
1888: the New South Wales Chinese Restriction Bill is enacted
1901: Existing colonies are united under a federal constitution in the Westminster common law tradition to establish
1901: The Immigration Restriction Act, known as the "White Australia Policy" is enacted.
1960s: Protectionist policies around marriage persist throughout the 1960s.
1961: Commonwealth Marriage Act is introduced and brings marriage under Federal control
1967: A national referendum to the Constitution ensures that Aboriginal and Torres Strait Islander peoples would be counted among the Australian population and subject to Federal law;
1970 – 90s: Threat-protection discourse begins in decriminalization debates
1973: The White Australia Policy is abandoned, inviting successive waves of multiculturalism and steady changes in the nation's religious makeup
1975: Racial Discrimination Law is enacted, followed by various other anti-discrimination laws across different states and territories
1992: Governor Burke's 1835 Proclamation is overturned by the High Court's Mabo decision on land rights
1994: *Toonen v Australia* results in the last of Australia's sodomy laws being repealed
1997: *Croome v Tasmania* rules that Tasmanian laws criminalizing homosexual conduct were inconsistent with Commonwealth's Human Rights (Sexual Conduct) Act 1994
1997: Racial discrimination laws enacted in Tasmania
1997: Sex between men is decriminalized
2003: Tasmania recognizes same-sex relationships through the *Relationships Act* 2003 (TAS)
2004: The *Marriage Amendment Bill 2004* aims to preclude same-sex marriages performed overseas from achieving domestic validity by amending the *Marriage Act 1961*
2007: Marriage Equality survey is issued, 79.5% of the voting population completes the survey, a 61.1% majority returned a "Yes" response, along with 133 out of 150 electorates each returning a majority "Yes" result.

2009: *Marriage Equality Bill* amends the *Marriage Act 1961* and removes all discriminatory references based on sexual orientation and gender identity
2012: Beginning in 2012, multiple bills to amend the *Marriage Act 1961* were introduced to Federal parliament each year
2013: Marriage Equality (Same Sex) Act 2013 (ACT), originating in the Australian Capital Territory (ACT), is the first instance of same-sex marriage successfully passing into legislation in any Australian parliament. A subsequent High Court challenge struck it down, filed almost immediately by the Federal government (*Commonwealth v Australian Capital Territory*)
2016: Five separate attempts are made to amend the *Marriage Act 1961*
2017: Australia legalizes same-sex marriage through the *Marriage Amendment (Definition and Religious Freedom) Act*

7 "The Land of the Free": freedom and same-sex marriage in the *Obergefell* United States Supreme Court decision

Maximiliano Campana, Juan Marco Vaggione

7.1 Introduction

On June 26, 2015 the Supreme Court of the United States (SCOTUS) decided the case *Obergefell*, ruling that "The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty".[1] This connection between marriage and freedom is part of a long historical process in which marriage, as a state-regulated civil institution, has been gradually democratized to ultimately include same-sex couples. The decision ruled that four different states (Ohio, Tennessee, Michigan, and Kentucky) had to recognize the validity of the marriage of sixteen same-sex couples that had gotten married out-of-state, ending a litigation campaign for same-sex marriage that had started in the 1990s. By 2014, 35 of the 50 states had recognized same sex-marriage through litigation or state legislatures. This way, the Supreme Court brought uniformity to the regulation of same-sex marriages, legalizing them all over the country and redefining the meaning of marriage.[2]

The right to same-sex marriage was the result of long disputes that were promoted by feminist and LGBT+ movements, transforming the understanding and regulation of sexuality and kinship. These movements expanded the autonomy and freedom in all decisions related to sexuality and reproduction and to get married became one of them. In doing so, they propelled different imaginaries about love, desire, and family that had an impact on citizen opinions, moral frame-

1 Despite the important reaction of some religious and political conservative sectors, the *Obergefell* case was decided when more than half of the American population was in favor of same-sex marriage (57% of United States citizens, according to Pew Research Center of 2015), supporting the idea that the SCOTUS rarely decides against the majority public opinion (Friedman, 2010).

2 A legal tradition that started in the 19th century when the Supreme Court decided the case *Maynard v. Hill* of 1888 is considered the first case where the Supreme Court ruled about the meaning and scope of "marriage" in the United States (Hopkins, 2004).

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works, and religious beliefs. These impacts have also reshaped the ways in which religious identity is understood. Specifically, as highlighted in the introduction to this book, sexual diversity plays a crucial role in understanding the processes by which individuals distance themselves from traditional religions (Cragun & Smith, 2024).

One of the principal obstacles to the recognition of the right to same-sex marriage, as well as to broader sexual freedoms, has been, and continues to be, the defense of religious freedom. As various scholars have argued from different perspectives, the defense of religious freedom is shaped by the influence of Christianity as the dominant religious tradition (Asad, 2003; Sullivan, 2018). In this context, religious liberty often entails the promotion of a sexual morality aligned with Christian principles. It is thus unsurprising that the defense of religious freedom, or at least certain interpretations of it, also entails the advocacy of family values that are in direct opposition to sexual freedom. Consequently, the rhetoric surrounding religious freedom frequently reinforces traditional family structures by opposing legal reforms that seek to separate civil and religious conceptions of marriage. From this viewpoint, religious freedom and sexual freedom are understood as oppositional freedoms, rather than “conjoined projects” (Jakobsen and Pellegrini 2004, p. 16).

Obergefell is the latest in a series of public controversies that have strained the nature of marriage and widened the gap between state regulation and Christian heritage. This case allows us to understand the main socio-legal tensions and the process of denaturalization that characterize the decentering of Christianity as a giver of universal meanings at the moment of regulating sexual choices and identities. This decentering entails, among other aspects, an increasing diversification of political and ethical frameworks that seek to shape the construction and interpretation of the law.

Obergefell was situated at the intersection of two rights claims in the United States: the right to marry regardless of gender or sexual orientation and the right to religious liberty (Coker, 2018). This intersection highlights the intricate relationship between marriage as a state-regulated contract and religious beliefs in the US context. Although the debate focuses on civil marriage, religious freedom plays a significant role in various ways in shaping the resolution of the controversy. Some scholars contend that *Obergefell* imposed a new definition of marriage on unwilling religious institutions, thereby limiting their religious freedoms (Anderson, 2013). Others counter that granting marriage equality does not limit the freedom of clergy to decide which marriages to consecrate or compel anyone to violate their religious beliefs (Laycock, Picarello & Wilson, 2015). Beyond these disputes, the court case is part of a complex social and political process that debates con-

cepts such as freedom, autonomy, and the role of religion in the face of growing material and symbolic diversity.

As analyzed in this chapter, the *Obergefell* decision was a dispute about the meaning of marriage, the scope of liberties/freedoms recognized by the United States Constitution, and the connections between these two dimensions. On the one hand, the debate involved the nature of marriage as a legal, political, and moral institution that organizes kinship and reproduction. Same-sex marriage brings into focus the question of what can and cannot be changed about this institution. Furthermore, it is possible to identify different ways in which history is constructed to answer the question of what marriage is and what it can become. These historical narratives either emphasize continuity, portraying marriage as a stable and enduring institution that has maintained certain core principles or, on the contrary, frame marriage as a dynamic institution that has undergone significant transformations.

On the other hand, this judicial case also brings the articulations between sexual and religious freedoms into the discussion. In modern societies, both religious beliefs and sexual practices are important sources of identification, and they have become central to understanding contemporary politics. Though both freedoms are usually built in tension – that is, the advancement of sexual and (non) reproductive liberties of certain groups often implies the violation of religious freedom – there are alternative ways of articulating them.

To consider these issues, the chapter delves, at the beginning, into the legal battles and campaigns that led to the eventual recognition of same-sex marriage in the United States. By analyzing the process toward *Obergefell*, we can gain a better understanding of the factors that shaped the decision and the role of different actors, both for and against the recognition of same-sex marriage. It also addresses the *Obergefell* case taking into consideration the majority and minority opinions and analyzing the implications that these opinions have in the understanding of three main issues: what is changeable and what is not within a marital regime, the autonomy/heteronomy dimensions of marriage, and the different articulations between religious freedom and the freedom to marriage. Rather than conducting a technical analysis of the Supreme Court decision, our objective is to examine both the majority and dissenting opinions to identify the predominant narratives and underlying meanings that emerge when debating whether same-sex couples have the right to marry.

7.2 Same-sex marriage in the United States. The road to *Obergefell*

The history of marriage in the United States is a complex one and reflects, in many ways, the changing social, legal, and cultural landscape of this nation. From its origins in the establishment of the thirteen colonies to the present day, marriage has served as a multifaceted institution with political, social, economic, legal, and personal significance (Cott, 2000). However, its history has also been marked by exclusion, particularly for historically disadvantaged groups. Marriage has served not only to regulate the sexual order but also to subordinate certain social sectors by denying them access to this legal institution. These types of exclusions have made marriage one of the most important institutions for social control, shaping the lives of individuals and communities across the country.

In this sense, the history of marriage as a state-regulated institution exposes various forms of exclusion and discrimination. On one hand, marriage hierarchizes, structures, and disciplines sexuality by distinguishing between sexual acts deemed “good, normal, and natural” from those considered “bad, unnatural, and abnormal” (Rubin, 1984). At the top of this hierarchy is reproductive and affectionate sexuality within marriage. On the other hand, the regulation of marriage has been shaped by broader exclusionary systems. Not all groups have been granted equal access to marriage by the state, reinforcing multiple forms of inequality and domination.

Thus, in most countries, marriage has been a focal point for various barriers and exclusions. The freedom to marry has evolved through a historical process of challenging and dismantling legal and extralegal restrictions that have limited access to this institution. In the United States, several Supreme Court rulings have played a pivotal role in redefining the scope and limits of marriage, thereby advancing its democratization. One of the clearest examples of exclusion was the existence of laws that enforced racial segregation in marriage and intimate relationships that existed until the 1960s. Defenders of anti-miscegenation laws, laws that prohibited interracial marriage, insisted, among other arguments, that “permitting cross-racial couples to marry would fatally degrade the institution of marriage, for marriages across the color line were against nature, and against the Divine plan” (AHA, 2015, p. 21). On the other hand, according to Grossberg (1985, p. 127) even for these states that did not enforce anti-miscegenation laws, they “relied on public disapproval to discourage interracial marriage as well”. References to the natural world and/or the divine have long played a significant role in the arguments put forth by those who opposed marriage reform at various points throughout history.

By the 1960s, civil rights organizations were helping interracial couples who were being penalized for their relationships to take their cases to the Supreme Court: in 1964, the SCOTUS ruled in *McLaughlin v. Florida* that the state law which prohibited cohabitation between whites and non-whites was unconstitutional and in 1967, in *Loving v. Virginia* ruled against all anti-miscegenation laws, overturning *Pace v. Alabama:* in this landmark decision the SCOTUS ruled that marriage is a fundamental liberty transcending race.[3] Although at the time only 20 % of citizens agreed with inter-racial marriages (Newport, 2013), the *Loving* decision marked an important change in the SCOTUS' understanding of marriage that started to expand its meaning, allowing interracial couples to enter legitimate marriages, and strengthening the idea that freedom to marry must prevail over moral or ideological sentiments of individuals who could find such marriages offensive or wrong.[4]

After removing racial restrictions, the SCOTUS removed socioeconomic restrictions for access to marriage in the case of *Zablocki v. Redhail* (1978). At the time, under Wisconsin's laws, one's economic status determined eligibility to enter a lawful marriage, and the state of Wisconsin would not grant a marriage license to Mr. Redhail since he was in arrears on his child support. For this case, the SCOTUS held that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness". Another example of the role played by SCOTUS was the removal of gender-based marriage access restrictions. It prohibited asymmetrical treatment of husbands and wives under Social Security and veterans' benefits laws in *Califano v. Yamasaki,* and it held that unequal treatment of spouses in divorce proceedings – a law requiring husbands, but not wives, to pay alimony – could not withstand constitutional scrutiny in *Orr v. Orr* (both cases from 1979).

In this way, by gradually eliminating barriers to marriage based on factors such as race, class, and gender, the SCOTUS was instrumental in advancing social progress in the United States, and it would become the main arena for the expansion of marriage equality to same-sex couples as a way of confronting discrimination against part of the population.[5]

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3 Virginia's anti-miscegenation statute violated different constitutional provisions.

4 At the time *Loving* was decided, there were 16 states which prohibited and punished marriages based on racial classifications.

5 Lesbian, gay, bisexual, transgender, and queer (LGBT+) people have experienced a long history of discrimination in the United States, including their criminalization and classification as mentally ill, being targeted by hate crimes and institutional violence, and excluded from employment, housing, public spaces, and social services (Cervini, 2020). The regulation of sexuality in the United States dates to the colonial period and according to Jonathan Katz (1983: p. 74), when

7.2.1 Same-sex marriage litigation. From *Baker* (1972) to *Obergefell* (2015)

The recognition of same-sex couples' right to marry was preceded by decades of social activism and legal debates. Lillian Faderman (1991) and William Eskridge (1999) recount how throughout the 20th century, several same-sex couples obtained marriage licenses after "masquerading" as heterosexual couples. As time passed, and particularly after the Stonewall riots, there was a growing call for legal recognition of same-sex couples. The first same-sex legal case that reached the SCOTUS in the 1970s was *Baker v. Nelson* (1972). In this case, Jack Baker and Mike McConnel sued the Minnesota county public official who had refused to grant them a marriage license. The couple argued that the state's refusal violated their rights to due process and equal protection: "Five years earlier, the U.S. Supreme Court had guaranteed a fundamental right to marry when it struck down state laws banning miscegenation in *Loving v. Virginia.* Sexual orientation should be treated like race, Baker's appeal argued, subject to the same constitutional protection against discrimination in state law" (Issemberg, 2021, p. 49). The Minnesota State Supreme Court ruled that the right to marry did not apply to same-sex unions because, by definition, marriage could only be between a man and a woman, and the SCOTUS considered that there was no federal issue at stake and refused to review the decision (Murdoch & Price, 2001; Pinello, 2003).[6]

The next case was *Baehr v. Lewin* which began in 1991, when three same-sex couples went to court after their requests for marriage licenses were denied, they argued that they had a fundamental right to marry under the Hawaiian Constitution. The Hawaii State Supreme Court considered that the prohibition on same-sex couples to get married constituted a type of discrimination contrary to the state

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Plymouth became the first settlement to codify a set of rules, four of the eight most serious crimes, and with capital punishment, had to do with sexual behaviors: sodomy, bestiality, rape, and adultery. Forty-nine of the fifty states criminalized acts of sodomy, although criminal prosecution was directed almost exclusively against homosexual men (Cain, 1993). These anti-sodomy laws were heavily influenced by moral and religious opposition to non-procreative sexual behaviors, influenced by colonial Puritan theology, which condemned sodomy as sinful and treated it as a moral crime against divine and natural laws. As American jurisprudence developed post-independence, these religious and legal precedents maintained support for banning consensual sodomy as a means to promote public morality, becoming an effective method to discipline divergent sexualities.

6 According to Mills, "When they were profiled in *Look* magazine in 1971, they revealed that, despite their activism, they did not expect that the government would grant them the right to marry. Their main goal was merely to give the LGBT+ movement some much-needed visibility" (Mills, 2016, p. 26). Other similar lawsuits that would be also filed in the 1970s with the same results were *Jones v. Hallahan* in Kentucky, and *Singer v. Hara* in Washington.

constitution. However, the Supreme Court did not order the state to begin issuing marriage licenses immediately but instead ordered the state to justify its discriminatory attitude. As a consequence, the state legislature modified the marriage laws, defining that marriage could only be between a man and a woman, and passing later a constitutional amendment in 1998, which banned the possibility of same-sex marriage in Hawaii (Murdoch & Price, 2001; Pinello, 2003; Andersen, 2004; Rosemberg, 2008).

The *Baehr* case served as a kickoff to promote same-sex marriage litigation throughout the country (Eskridge, 1999). However, the reaction to this litigation was swift, and conservative groups and religious coalitions (particularly Catholic, Evangelical, and Mormon) established strategies not only to prevent these types of lawsuits but also to reinforce the idea that marriage could only be understood as the union between a man and a woman. Organizations like the Christian Coalition, Family Research Council, and Alliance Defense Fund (now called "Alliance Defending Freedom") led efforts to preemptively ban same-sex marriage in other states (Issemberg, 2021). They were joined by groups like the Southern Baptist Convention (SBC) and the Catholic Conference of Bishops in voicing opposition and advocating for the Defense of Marriage Act on the national level (Whitehead, 2010). Major leaders involved included Baptist minister and broadcaster Pat Robertson, Christian psychologist James Dobson, and conservative activist and politician Ralph Reed worked in tandem with Republican lawmakers (Stone, 2012).

These conservative groups preferred to avoid litigation, and instead, they successfully lobbied state legislatures and congressmen at the national level, as well as government agencies to counteract the impact of Baehr (Rosemberg, 2008; Brown, 2012): by 1999 thirty-four states had passed laws limiting or prohibiting same-sex marriages in their territories, while at the federal level, the United States Congress passed the DOMA (Defense of Marriage Act) which exempted states from recognizing same-sex marriages celebrated in other states and defined marriage only as a union between a man and a woman at the federal level.

For their part, LGBT+ groups saw the judicial branch as a possible ally making it more difficult to achieve legislative victories on such a controversial social issue, due to entrenched social norms and the political power of conservative groups. Thus, the judicial branch offered the possibility of bypassing political obstacles and provided a pathway for the protection of LGBT+ rights (Issemberg, 2021).

Despite the enormous backlash that the *Baehr* decision meant to same-sex marriage advocates, the state of Vermont became the first state to offer some legal protection to same-sex couples when in 1999 the Vermont Supreme Court ruled unanimously in *Baker v. State of Vermont* that differential treatment between same-sex and opposite-sex couples violated the common benefits clause

of the state constitution, and consequently ordered the state legislature to amend this situation.

A few years later, on May 17, 2004 the state of Massachusetts became the first one to allow same-sex marriage in the United States. The *Goodridge v. Dept. of Public Health* (2004) case became the first major legal victory for same-sex marriage, a trend that completed in 2015 in *Obergefell.* The State Supreme Court considered that marriage should be understood as the voluntary union of two persons as spouses, with access to all protections and responsibilities under state law. With this decision, Massachusetts was the first state in the country where same-sex marriage permits began to be issued. The reaction of conservative religious groups in the rest of the United States was swift and very successful in the short term: two years after *Goodridge* was resolved, twenty states were able to amend their constitutions to limit marriage to heterosexual couples. However, *Goodridge* triggered same-sex marriage lawsuits across the country, and a growing number of LGBT+ organizations used litigation to push the same-sex marriage agenda.

The litigation campaign in Vermont and Massachusetts was led by the Gay & Lesbian Advocates & Defenders (GLAD). This organization was founded in 1978 in response to growing discrimination against the LGBTQ+ community in Boston, and it used litigation as the main tool for the advancement of LGBT+ rights. GLAD became the first organization to challenge the Defense of Marriage Act (DOMA) in federal court. GLAD represented the case of *DeBoer* from Michigan, which would eventually be consolidated in *Obergefell* (Wolf, 2015). According to Garrow (2004), the *Goodridge* decision had a very powerful inspirational effect on sexual diversity[7] and Andersen (2004) considered that *Goodridge* illustrates the value that litigation has as a tool to bring about social change.

A few years after Goodridge, other state supreme courts and state legislatures decided to legalize same-sex marriage for their states: California (2008), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2009), New York (2011), Washington (2012), Maryland (2012), and Maine (2012). On June 26, 2013 the SCOTUS ruled that the Defense of Marriage Act (DOMA) was unconstitutional in the case *United States v. Windsor*, which forced the Federal Government to recognize same-sex marriages legally performed in any state. This decision was a significant victory for same-sex marriage. It paved the way for the eventual nationwide legalization of same-sex marriage in the *Obergefell* decision in 2015. Moreover, the *Windsor* decision highlighted the importance of equal protection for all individuals, regardless of their sexual orientation. It challenged the notion that marriage is

7 In the same way that the *Brown* case had had it in the black community years before.

exclusively between one man and one woman and recognized that the state has a legitimate interest in supporting and protecting same-sex couples' right to marry, without acknowledging the constitutional right to same-sex marriage. For conservative religious groups, the *Windsor* decision represented a decisive defeat since it signaled that the definition of marriage, based on conservative religious and moral beliefs, no longer served as a basis for denying equal rights and protections to same-sex couples (Issemberg, 2021).

After *Windsor*, the trend of legalizing same-sex marriages continued in different states, through their legislatures (Rhode Island, Delaware, Minnesota, Hawaii, and Illinois), or their courts (California, New Jersey, New Mexico, Oregon, Pennsylvania, Virginia, Indiana, Wisconsin, Oklahoma, and Utah, amongst others). The same-sex marriage ban in four states, Ohio, Michigan, Kentucky, and Tennessee, was also challenged by groups of same-sex couples. Each of the plaintiffs in these cases argued that the marriage bans unconstitutionally violated the Equal Protection Clause and Due Process Clause. "In all of the cases, the trial court found in their favor, but then the U.S. Court of Appeals for the Sixth Circuit reversed the decision" (Mills, 2016, p. 23). The case eventually made its way up to the Supreme Court under the name *Obergefell v. Hodges*.

7.3 *Obergefell v. Hodges* (2015)

In 2015 the Supreme Court of the United States finally decided the issue of the legality of same-sex marriage through the decision *Obergefell v. Hodges*. In this decision, the Supreme Court ruled that the right to marry is guaranteed to all couples by the Due Process Clause and the Equal Protection Clause of the Constitution's Fourteenth Amendment. The 5–4 decision forced all fifty states and American territories to grant marriage licenses and recognize the marriages of same-sex couples on the same terms and conditions as heterosexual marriages.

The plaintiffs were not only represented by private civil rights attorneys, but also by organizations such as the American Civil Liberties Union (ACLU), the Gay & Lesbian Advocates & Defenders, and the National Center for Lesbian Rights (NCLR). Other LGBT and civil rights organizations were involved in several cases of same-sex marriage, such as the Human Rights Campaign and Lambda Legal, they provided crucial legal and political advocacy in the courts, in the press, and state legislatures. The ACLU was the first organization to engage in judicial activities that challenged regulations affecting LGBT+ rights. The ACLU is a nonprofit civil rights organization that still operates nationwide and focuses on promoting and defending freedom of speech and association, freedom of religion,

gender, and racial equality.[8] Behind the scenes, these organizations provided financial support for the plaintiffs and legal assistance to their attorneys. They also aimed to impact public opinion in order to gain more support for same-sex marriage cases and to build momentum for a favorable outcome (Issemberg, 2021).

Before delving into the analysis of the judicial case, we would like to comment on the submitted *Amicus* briefs. These *Amicus* briefs[9] were presented in this case, allowing different individuals, civil society organizations, and government entities of different levels[10] to express themselves and give their opinion on the issue, expanding and democratizing the legal debate around same-sex marriage. The presentation of 148 *Amicus* curiae was the highest in SCOTUS history (Totemberg, 2015) including 76 supporting the Petitioners (that is, in favor of same-sex marriage) and 67 supporting the Respondents – that is, against same-sex marriage. Five briefs did not support either position. The organizations that filed *Amicus* briefs included professional associations, educational centers, non-profit organizations, and religious organizations. The high number of *Amicus curiae* reflected the social and political significance of same-sex marriage as a public controversy.

Churches and religious organizations played a prominent role in the public debates, actively participating through the submission of *Amicus* briefs. In general, they opposed the recognition of same-sex marriages. For instance, the United States Conference of Catholic Bishops argued that heterosexual marriage has a unique procreative capacity and provides the optimal environment for raising children, and the National Coalition of Black Pastors and Christian Leaders stated that same-sex marriage undermines the biblical definition of marriage as between a man and a woman. These religious organizations also used nonreligious arguments in their briefs, including discussions about constitutional rights and discrimination, and about tradition and social norms, and they even appealed to so-

8 To do so, they have engaged in activities such as public education, litigation, lobbying for legislation, and grassroots activism (Walker, 1999). Initially established in 1920, the ACLU has become one of the most prominent civil rights organizations in the United States, and the first national organization that supported claims for same-sex marriage.

9 These are briefs filed by parties that are not directly involved in a case but want to give their opinion. Under the current US judicial system, *Amicus* briefs are "increasingly being submitted by interested parties in support of the petitioners or the respondents. In this way, elites can express their arguments in support of a particular course of action and potentially impact the Court's ultimate decision" (Mills, 2016, p. 3).

10 On the local level, the County of Cuyahoga, Ohio; on the state level, Hawaii, Virginia, Massachusetts, and Minnesota (in favor of the petitioners), and South Carolina and Louisiana (in favor of the respondents) and on the national level, the government of the United States and Members of Congress.

ciological data and scientific evidence on issues like procreation and child welfare. Thus, religious organizations involved in the judicial process offered arguments that were not grounded in their doctrinal positions, but in legal or scientific reasoning, highlighting the transitional zones between the religious and the nonreligious.

Though religious organizations tended to oppose to same-sex marriage, there were exceptions revealing the complex and heterogeneous roles that religious leaders and beliefs have in relation to gender and sexuality. For example, the most prominent religious organization that supported the same-sex marriage cause was the California Council of Churches which argued that marriage has an important place in the religious lives of faith communities. They stated that each faith should be free to celebrate marriage on its own terms. The Council also acknowledged the secular nature of marriage, free from religious limitations. They argued that both secular and religious marriage should be open to same-sex couples.

As in other countries, the debate over sexual rights extends beyond a simple confrontation between religious and nonreligious sectors. Instead, as demonstrated by these *Amicus* briefs, the religious sphere itself is characterized by significant internal disputes over the state's role in regulating marriage. Mills (2016) analyzed some of these *Amicus* briefs, concluding that both those who are for and against same-sex marriage "on a fundamental level, seem to agree on what's at stake: the sanctity of marriage, the well-being and protection of adults and children, and the inviolability of the Constitution. However, they disagree on how they are to preserve them" (Mills, 2016, p. 107).

The *Obergefell* decision sparked a significant debate around the meaning of marriage, ultimately legalizing same-sex marriage in the United States. But beneath this outcome, the 5–4 decision reflected a profound philosophical divide among the Justices over a more fundamental question: what is marriage? The dueling opinions revealed contrasting visions of what can or cannot be modified, the distinction between civil and religious marriage and the tension between same-sex marriage and religious freedom (among other topics). In the next sections, we present three important dimensions that emerge from the *Obergefell* decision: change and continuity, marriage as a civil institution, and the clashes between religious and sexual freedom.

7.3.1 History: change and/or continuity

History, at least history as part of a national imaginary, is an important aspect when debating same-sex marriage. Modifying this legal institution means, in dif-

ferent ways, to retell the history of marriage to justify either its inalterability or, on the contrary, its openness to legal reforms and changes. Precisely, a key feature of the debates on same-sex marriage is the tension between those who defend a historical definition of the institution (from this point of view, marriage can only be understood as a legal union between a man and a woman) and those who consider the need to take into account the political and social reality where it is immersed and regulate it accordingly, that is, a vision of marriage as a "continuity" of the past, as an institution that is immutable and cannot change in its essential components (such as the union of two opposite sexes), and marriage as change, that is, as an always alterable institution, which varies in space and time regulating social realities.

Instead of choosing any of these two options, the majority of the Justices opted to state that marriage must be understood as continuity and change at the same time, overcoming the dichotomy, when they mentioned that:

> The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time (*Obergefell, p. 6*).

They recognized that "the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential" (*Obergefell*, p. 6). With this phrase, the Justices recognized that from the Old English Law until now, the idea of marriage (and its structure) has changed deeply, but its social importance remains, and its meaning and significance must be updated. In this sense, for them, the extension of marriage to same-sex couples is part of an ever-changing social institution, as they declared that "Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations" (*Obergefell*, p.7). For these justices, part of these "changed understandings" referred to the growing acceptance that gay and lesbian couples have in the United States, a fact that needs to be recognized and legally protected by the state through constitutional interpretation. In this sense, they declared that:

> In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by quite an extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts (*Obergefell,* p. 8).

To deepen these ideas, the Justices of the majority opinion considered that the US Constitution is a living document, and the "liberty to marry" has special constitutional protection, they declared that:

> it is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our era (*Obergefell*, p. 19).

The majority also decided to cite previous decisions to show how the definition and understanding of marriage had changed and expanded its scope over the 20th century. By walking through these cases chronologically, they reconstructed marriage as an evolving, flexible institution that has adapted to the times – rather than as a static or fixed entity. Through these examples, the majority opinion portrayed the essence of constitutional marriage as separate from reproduction, instead concerned with free personal choice of spouse guided by affection. Through various examples and judicial cases, the majority vote highlighted how requirements once considered essential were dismantled from the law. Starting with *Loving v. Virginia* (1967), the Court struck down bans on interracial marriage, which had longstanding traditions prohibiting it. The majority implied that if prohibitions against interracial unions – once considered integral to marriage – could be eliminated, so too can limiting marriage by gender and sexual orientation. They also cited *Zablocki v. Redhail* (1978), recalling that the SCOTUS declined to condition marriage on one's ability to satisfy child support debts, further severing wedlock from reproductive requirements. Continuing this theme, *Turner v. Safley* (1987) mandated prisoners retain the right to marry despite incarceration preventing procreation.

In this reconstruction of the past, references are also made to the various reforms that have expanded the rights of the LGBT community, for example, *Lawrence v. Texas* (2003) overturning sodomy bans and *Windsor v. United States* (2013) which required federal recognition of lawful same-sex marriages. Situating same-sex marriage within this wider arc shows SCOTUS's role in defining which groups and relationships receive protection. Ultimately, the majority's opinion recognized that marriage used to be defined as a union between a man and a woman, acknowledging that this has been the traditional definition of marriage, but they pointed out that this definition had also evolved. In fact, they mentioned "changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential" (*Obergefell*, p. 6) as examples of how the way marriage is understood has changed over time.

On the opposite side, this is not how the dissenting Justices understood marriage. These Justices conceived the essence of marriage as fundamentally oriented around regulating sexual ecology, reproduction and dual biological parenting roles within an enduring male-female union; they criticized the majority for allegedly separating marriage from this child-centric reproductive function. For them, marriage is a union "between one man and one woman" (p. 5 of Roberts dissenting vote), and its "critical purpose" is to regulate "sexual relationships between men and women" and link "children to their biological parents" (p. 4 of Alito dissenting vote).

Justice Roberts emphasized that there is a "universal definition" of marriage that emerges from nature, and it only includes the union of one man and one woman and their children when he stated that:

> This universal definition of marriage as the union of a man and a woman is no historical coincidence. The marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship (p. 5 of Roberts dissenting vote).

In this excerpt, "the nature of things" seems to refer to the fundamental characteristics of marriage that, according to Justice Roberts, have existed since the beginning of human societies. He argued that the historical understanding of marriage as the union of a man and a woman is not a mere convention or arbitrary construct but is rooted in the idea of providing a framework for the responsible procreation and rearing of children, which is necessary for the continuation of society.

Furthermore, according to Roberts, this is a type of definition that does not even need to be articulated:

> The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways (p. 5 of Roberts dissenting vote).

Marriage cannot and should not be changed by any judicial court, or any other political institution, since "the core structure of marriage" must be understood "as the union between a man and a woman" (p. 5 of Roberts dissenting vote). For him, this definition is not only based on the natural world and natural law (the reproduction and protection of children) but it is also based on historical ev-

idence not only of the United States but of all civilizations. That was the definition that the Founding Fathers had in mind when they imagined and built the country (and the constitution), and that is deeply rooted in the US institutions and their people.

Also, Justice Roberts' opinion used historical references to argue that marriage has always been understood as a union between a man and a woman. He noted that the traditional definition of marriage has been unchanged and that "the understanding of marriage as the union of man and woman is so deeply rooted in human experience that it is among the most basic of truths". For him, marriage (as a union of a man and a woman) is a social institution so old that it has been the same "for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs" (p. 3 of Roberts dissenting vote). Because of this, Roberts accused the majority Justices of wanting to change a millennial social institution in "an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent" (p. 3 of Roberts dissenting vote). For him it does not matter if the attitudes to gays and lesbians have shifted in the last years, since "If you had asked a person on the street how marriage was defined, no one would ever have said 'Marriage is the union of a man and a woman, where the woman is subject to coverture.' The majority may be right that the history of marriage is one of both continuity and change" (p. 8, of Roberts dissenting vote) but the core meaning of marriage has endured (and that meaning is that man and woman are immutable prerequisites).

This position (marriage as continuity) is also supported by Justice Alito who considers that "For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate" (p. 4 of Alito dissenting vote); Justice Scalia when he mentions that same-sex marriage is a new invention of "15 years ago" (p. 7 of Scalia dissenting vote); and Justice Thomas when he mentions that a "traditional definition of marriage has prevailed in every society that has recognized marriage throughout history" (p. 12 of Thomas dissenting vote). For these Justices, marriage is essentially continuity, where some changes are accepted, as long as they do not affect the core: the union of a man and a woman with the mission of procreating and raising their children in a stable and protected union.[11]

11 They even cited previous SCOTUS decisions to support their views, like *Baker v. Nelson* (1972), a decision which upheld the state ban on same-sex marriage, *Washington v. Glucksberg* (1997), to argue that careful analysis of history and tradition is required, and *DeShaney v. Winnebago County* (1989), to reiteratethat there is no affirmative due process duty to protect against private violence, and the due process clause only protects against government infringement of liberty.

The past is introduced into the debate as a relevant imaginary in justifying both the acceptance and the rejection of marriage for same-sex couples. The vote of the majority constructed the past as marked by the various changes and adaptations of marriage, with same-sex couples being one more link in the chain of reforms. In this imaginary, history is presented through the existence of multiple inequalities and discriminations, including those based on race and/or sexual orientation. Marriage is understood as both continuity and change, evolving and adapting to different historical contexts. For the minority, on the other hand, history is presented as proof of the universal and therefore unchangeable nature of marriage as a union between a man and a woman. This historical permanence is not accidental, but indicative of the very nature of the institution, which is linked to biological reproduction as a precondition for the existence of the species.

7.3.2 The civil and/or religious marriage

Both criminal and civil law have hierarchized sexuality as a means of reinforcing certain religious and moral values. Marriage, in particular, has been one of the most important institutions in this respect, and its regulation has both reflected and reinforced certain (supposed) moral consensuses. However, the decentering of Christianity (see Introduction), together with the growing legitimization of diversity in sexual practices and identities, disrupted these consensuses and revealed the complex composition of contemporary societies. In this context, the debate about same-sex marriage is also a debate about the role of the state in heterogeneous and plural societies.

For the majoritarian opinion of the Court, marriage must be understood as a civil contract,[12] which formally recognizes and establishes legal rights and responsibilities between two individuals in a nonreligious way. Overall, marriage as a civil contract provides a nonreligious way of formalizing affective ties between individuals, with legal rights and responsibilities recognized by the government. The majority does not deny the existence of religious and nonreligious beliefs against

12 Marriage represents a legal agreement between two consenting adults who enter freely into a committed relationship with each other. This contract allows them to obtain legal benefits and protections, such as tax benefits, inheritance rights, and the ability to make medical decisions for their spouses, and while marriage may have religious significance for some individuals, the civil contract aspect emphasizes the legal and practical implications of this institution, rather than its religious or sacramental aspects.

this possibility; however, it opposes the role of the state in legislating upon these beliefs.

> "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right" (*Obergefell,* p. 18–19).

Not only is the majority decision based on the belief that marriage needs to be treated as a voluntary contract, but also that religious, moral, or ideological principles cannot be used as a valid argument to limit, block, or deny the right to marriage of any couple since these arguments would be contrary to constitutional principles. This position makes evident that the limits between religious beliefs and state norms are still under debate in the US. They declared that marriage has been historically understood as a civil contract since the country was born and it was never tied to moral or religious principles when they expressed that "Marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding, it was understood to be a voluntary contract between a man and a woman" (*Obergefell,* p. 6).

From the reading of this excerpt, the majority opinion strengthened the idea that the Constitution protects the right to marry, that marriage must be treated as a civil contract, and that the government cannot deny this right to any couple using moral or religious principles because that would be contrary to the Constitution. It is important to note that when they expressed that it has always been "a voluntary contract" between two free parties, the majoritarian decision implies that, according to US tradition, marriage cannot be understood as a religious institution. This "consent-based" vision of marriage is a vision that primarily defines marriage as the solemnization of mutual commitment – marked by strong emotional attachment and sexual attraction – between two persons (Baron, 2013).[13]

One important element to note is the connection between marriage and moral values that reinforce the centrality of autonomy. To sustain that marriage

13 This idea of the "contract" as a nonreligious, civil institution was first mentioned by the SCOTUS in 1888 in the case *Maynard* v. *Hill* However, the idea of marriage being completely devoid of ideological, moral, or religious features has been deepened more recently, especially since the *Loving* decision.

is a civil contract, that religious or moral worldviews cannot be imposed through law, does not mean demoralizing marriage. On the contrary, although considered a contract, marriage is associated with values such as love, intimacy, and even spirituality. For the majority, the "nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation" (*Obergefell*, p.13). Also, for them, marriage confers personal "autonomy" to make choices about the relationship, provides stability, and serves personal goals of "nobility and dignity" and "happiness" to the married couple (*Obergefell*, p. 3).

Marriage, then, must be understood as a voluntary union of two committed individuals with a common project: to improve their lives and be able to express their intimacy and spirituality freely. It is interesting to note that, in this perspective, the idea of freedom is at the center of the institution, a topic we return to later. This is not only because marriage would fulfill the couple's desire to be free in an institution where, as previously said, "two persons together can find other freedoms" (*Obergefell*, p.13), but also because only free people can enter it, establishing a direct relation between race and sexuality:

> the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause [...]. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make (*Obergefell*, p.13)

This way, any limitation to the freedom to marry that contradicts the Court's definition, simply violates the constitution. There are no other elements or characteristics (such as race, gender, or sexual orientation) that constitute the essence of marriage, and therefore if they ever existed, they must be discarded, or in the words of SCOTUS, "the limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest" (*Obergefell*, p. 17).

On the other hand, the dissenting Justices argued that marriage is fundamentally a religious and social institution, not merely a civil contract regulated by law, stating that "In our society, marriage is not simply a governmental institution; it is a religious institution as well" (p. 15 of Thomas dissent vote), and adding that "when the Framers proclaimed in the Declaration of Independence that 'all men are created equal' and 'endowed by their Creator with certain unalienable Rights,' they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth" (p. 17 of Thomas dissent vote). From this perspective, recognizing the separation between church and

state does not mean denying the role of religious beliefs (or certain religious beliefs) in shaping the regulation and recognition of marriage. It is these values and principles that transcend the will of the parties that the state must consider in regulating marriage.

This religious understanding of marriage as a sacred, divinely ordained union between a man and woman is said to have prevailed in the United States of America from its foundation through recent times. It should be noted that Justice Thomas argued that marriage must be understood as a historical and religious institution consisting of the union between a man and a woman and that recognizing same-sex marriage would interfere with the religious beliefs of many Americans.

Additionally, the dissenting voices argued that the majority's concept of marriage as primarily aimed at satisfying adults' desires and pursuit of happiness distorts the institution's traditional central purposes: to create and support a stable family structure for child-rearing (p. 4 of Alito dissent vote). By separating the inherent connection they see between marriage, procreation, and child welfare, they considered that the majority's redefinition jeopardizes religious liberty and the recognition that dignity rights flow from God rather than government. Rather than expanding protections for one group, it may erode sacred protections for the freedoms of thought, belief, and religious practices.

Both positions reflect, in some way, the tension between autonomous and heteronomous ways of regulating sexuality. The majority constructed marriage as a contract, emphasizing values such as intimate expression, spiritual connection, and personal autonomy. This position states that marriage should be understood as a voluntary union centered on individual growth and happiness. The dissenting view, on the other hand, considered values such as procreation, childcare, or even religious tradition as relevant for the legal regulation of marriage. In contrast to the other position, the emphasis is on the social, moral, or religious function that marriage has, or should have, to exclude same-sex couples.

7.3.3 Clashes of freedoms

One of the issues that was being debated is whether the legal and political system in the United States allowed for the claim that there is a constitutional freedom that should guarantee access to marriage for same-sex couples, or, formulated in a different way, whether the US Constitution provides positive rights, since *Loving v. Virginia* (1967) treats "freedom of marriage as a Constitutional right necessary to protect personhood rights such as liberty and autonomy" (Washburn, 2015, p. 87). At the same time, the scope of religious freedom is also under con-

sideration. The question is how much religious freedom is compromised when civil marriage is moved away from traditional religious values.

Freedom, therefore, emerges as another contested imaginary in the judicial case under analysis. Beyond the legal reasoning, we identify two conflicting interpretations of how the right to marriage intersects with freedom: whether the constitution should safeguard the liberty of same-sex couples to marry, or protect certain citizens' freedom from being compelled to recognize as marriage relationships that conflict with their moral or religious beliefs (religious freedom).[14]

According to the majority, the freedom to define one's identity by marrying whom you choose is at the very heart of the liberty that the constitution safeguards. The majority's opinion held that denying same-sex couples this fundamental freedom solely on the basis of their sexual orientation deprives them of the full promise of liberty and subjects them to stigma, violating due process guarantees. In mandating states to both license marriages for same-sex couples and recognize such marriages legally performed out-of-state, the ruling made freedom to marry in this comprehensive sense regardless of gender or sexual orientation a new federally protected civil right. The majority maintained that this interpretation of the scope of liberty under the Fourteenth Amendment is supported by the interrelated principles of equal protection and substantive due process.[15]

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14 Since 1803, when the Supreme Court ruled in *Marbury v. Madison* that the Judiciary has the power of reviewing the constitutionality of any type of government regulation, its main function has been judicial review, that is, the ability of the courts (and ultimately, the Supreme Court of the United States) to declare any Legislative or Executive act null if it violates the liberties and principles established in the US Constitution. This can be explained by the nature of the United States Constitution, or what is called "negative constitutional rights" theory, that is, the US Constitution "does not contain any express assurances that the federal government will provide anything to the American people. Instead, the Constitution carefully limits the government's authority by itemizing several things the government cannot do to people and take from people" (Bajrami, 2013, p. 8), or according to Justice Thomas in *Obergefell*, "Our Constitution – like the Declaration of Independence before it – was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from – not provided by – the State" (p. 17, dissenting vote, Justice Thomas).

15 According to Washburn (2015, p. 104–5), "Under a strict negative rights theory, the federal government does not have a duty to affirmatively protect a right to same-sex marriage unless it is acknowledged as a fundamental constitutional right. Therefore, Obergefell's acknowledgement of same-sex marriage as a fundamental constitutional right ensures active protection by the federal government", and "After Windsor, it was not clear whether same-sex marriage was a negative or positive right. The federal government was prohibited from placing constraints on any acknowledged same-sex right to marriage—effectively treating it as a negative right. However, this right only existed legally if an individual state chose to acknowledge the dignity and personhood

In other words, the *Obergefell* decision established that the government has a duty to refrain from imposing constraints or barriers that infringe the freedom to marry, that it must actively protect the freedom to marry from constraint by third parties like state governments, and that it must not enact laws or policies that prohibit or limit same-sex couples' ability to exercise their right to marry. Therefore, it is not enough for the federal government to simply not interfere; it must also make sure states do not deny marriage rights or fail to recognize same-sex marriages performed legally out-of-state.

The majoritarian position not only considered the existence of a freedom to marriage but also that recognizing same-sex couples' right to marriage does not violate other freedoms, religious or not. This position claims to defend the religious freedom of both those who agreed and those who disagreed. As can be read in the following paragraph, the controversy is not between religious and nonreligious positions, but between those who agree with reforming the marriage system and those who do not. Therefore, religious freedom must be guaranteed to the entire population and not only to those who oppose same-sex marriage on the basis of their religious convictions. According to this imaginary, religious freedom encompasses not only those who, based on their beliefs, oppose the legal recognition of same-sex marriage but also those who support it.

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex (*Obergefell*, p. 27).

The minority, on the contrary, denied the fact that the constitution includes a "right" or a "freedom of marriage". In this sense, Justice Roberts considered that "The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with '[t]he whole subject of the domestic relations of husband and wife'". Justice Scalia goes a little further and considered that the Constitution does not only not include a right or "liberty to marry", but also any

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of a same-sex couple's relationship. Obergefell's acknowledgement of a fundamental right to same-sex marriage resolved this confusion, making it both a positive and negative right".

contrary interpretation would constitute a deliberative action (a robbery) that violates the popular sovereignty and goes against the spirit and ideals that the "Founding Fathers" had when establishing the nation when he expresses that:

> The opinion in these cases is the furthest extension in fact – and the furthest extension one can even imagine – of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves (p. 2 of Scalia dissenting vote).

This way, for Justice Scalia, when the majoritarian decision extended the benefits of marriage to same-sex couples, it is fabricating new liberties, overstepping his political power, and consequently violating one of the most important US freedoms: the freedom to self-government, which makes it particularly serious for the United States national imaginary.

It is important to note that the dissenting Justices do not deny the fact that marriages deserve constitutional protection. They oppose the fact that a majority of Justices can create new freedoms beyond the constitution. For all of them, the constitution does not create such rights or liberties, and the right to marry can be only created and regulated by each state legislature, following the democratic process, as part of the "reserved powers" that the states have kept for themselves (10th amendment). It is argued that, according to federalism, it is the states that should decide based on the predominant positions among the populations "who have traditional ideas". That is what Justice Alito means when he states that:

> The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, some States would likely recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to the protection of conscience rights. The majority today makes that impossible. By imposing its views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas (p. 7 of Alito dissenting vote).

This position goes one step further because it considers that same-sex marriage recognition would negatively affect the freedom of religion protected by the 1st amendment, thus damaging religious freedom. In this position, marriage, liberty, and religion are very interconnected imaginaries in the United States sociolegal culture, despite the persistent decline of married couples (from 67% in 1990 to 53% in 2019) (Pew Research Center, 2021a) and religiosity in the country (Pew Research, 2021b).

In this sense, an opposition is constructed between the recognition of same-sex marriage and religious freedom, the latter being a moral and legal value *par excellence* in the United States. Justice Roberts affirmed that religious freedom is being directly violated because the court decision does not provide tools or accommodations that can protect the beliefs of these United States citizens that oppose same-sex marriage for religious reasons. In this sense, Roberts argued that:

> Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is – unlike the right imagined by the majority – spelled out in the Constitution. Amdt. 1 (p. 8 of Roberts dissenting vote)

Roberts concluded that the 1st amendment is being violated, and "people of faith can take no comfort in the treatment they receive from the majority today" (p 28 of Roberts dissenting vote). He also proposed a series of examples on how the majoritarian position is damaging the freedom to exercise religion:

> The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses. Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage – when, for example, a religious college provides married student housing only to opposite-sex married couples or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage (p. 28 of Roberts dissenting vote).

Justice Thomas also considered that the constitution explicitly protects the liberty of religion (and not the "freedom to marry" as the majority exposed), and the SCOTUS should protect individuals and churches from the government imposition of a type of marriage that goes against their beliefs and principles. He considered that:

> In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples (p. 15 of Thomas dissenting vote).

For Thomas, the majority had a "misunderstanding of religious liberty" in the US tradition. Religious liberty is "about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice" (p. 15 of Thomas dissenting vote). This way the ma-

jority not only illegitimately created new liberty but also opposed the principle of religious freedom that is explicit in the constitution and that the SCOTUS should protect. In other words, what the Constitution protects is the religious freedom of individuals and churches from these ideas that violate their beliefs and principles that other groups want to impose on them, not the freedom of same-sex couples to marry.

7.4 Closing remarks

Marriage regulations in the United States, as in other countries, ignite debates over the distinction and intersection of marriage as both a state and religious institution. In this context, the recognition of same-sex marriage challenged a historically perceived “universal” purpose of marriage: biological reproduction and the complementarity of men and women. By doing so, it disrupted implicit understandings of marriage and the role of Christian heritage in its regulation.

The *Obergefell* decision, analyzed in this chapter, highlights various – at times conflicting – tensions and imaginaries that have shaped debates over sexuality, religion, and the law. One such imaginary, as reflected in the majority opinion, envisions marriage as an evolving civil contract centered on emotional fulfillment and intimacy between consenting adults. A central premise of this perspective is the rejection of imposing “religious or philosophical premises” through legal regulation, reinforcing the idea that marriage is fundamentally a state institution, distinct from religious doctrine. History is portrayed as both tradition (continuity) and constant evolution (change), emphasizing marriage’s adaptability in response to shifting societal values regarding gender roles, property relations, and personal autonomy. Within this framework, the legal battle for same-sex marriage paralleled earlier struggles against bans on interracial marriage.

Freedom – its definition and scope – played a crucial role in this perspective. It asserts that the freedom to marry is embedded in constitutional principles, as same-sex couples hold the same liberty interest in marriage as opposite-sex couples. Moreover, it contends that this freedom does not infringe upon religious liberty; rather, it ensures the rights of both those who support and those who oppose same-sex marriage. From this perspective, Christian heritage is portrayed as dynamic and diverse; therefore, the defense of religious freedom extends beyond those who oppose same-sex marriage based on their beliefs.

In contrast, the opposing imaginary recognized marriage as not only a state institution but also a religious one. From this perspective, marriage has profound historical, religious, and moral significance – one that extends beyond the will of individuals and is inherently linked to procreation and childrearing. Here, history

and tradition reinforce the belief that certain fundamental aspects of marriage are immutable and beyond legal modification. In this view, legal and Christian heritage form an interlocked foundation that defines the essence and function of marriage.

Proponents of this perspective argue that the recognition of same-sex marriage contradicts the historical and legal traditions of the United States and infringes upon the religious beliefs of many Americans. They contend that it not only threatens religious liberty but also undermines marriage as a religious institution, eroding its significance. From this perspective, the state regulation of marriage does not imply its disconnection from Christian heritage – a heritage often constructed as stable and homogeneous.

These competing imaginaries continue to shape contemporary debates over gender and sexuality regulation in the United States. Controversies surrounding abortion and gender identity, much like the debate over same-sex marriage, extend beyond legal disputes to broader questions about the role of Christian values in shaping the moral and regulatory foundations of the state. Disputes in which the role of religion – and even the very definition of what constitutes the religious and what does not – remain open and contested.

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U.S. Const. Amend. XIV § 1
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Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993)
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Turner v. Safley, 482 U.S. 78 (1987)
United States v. Windsor, 570 U.S. 744 (2013)
Washington v. Glucksberg, 521 U.S. 702 (1997)
Zablocki v. Redhail, 434 U.S. 374 (1978)

Timeline

1803: The Supreme Court rules in *Marbury v. Madison* that the Judiciary has the power of reviewing the constitutionality of any type of government regulation
1888: *Maynard v. Hill* decides the meaning and scope of marriage in the United States
1960s: Laws that enforce racial segregation in marriage and intimate relationships are overturned
1964: *McLaughlin v. Florida* rules that the state law, which prohibited cohabitation between whites and non-whites, was unconstitutional
1967: *Loving v. Virginia* rules against all anti-miscegenation laws, overturning *Pace v. Alabama.* At this time, 16 states prohibited and punished marriages based on racial classifications
1972: In *Baker v. Nelson*, the Minnesota State Supreme Court rules that the right to marry does not apply to same-sex unions because, by definition, marriage could only be between a man and a woman, and the SCOTUS considered that there is no federal issue at stake and refuses to review the decision
1973: In *Jones v. Hallahan*, the Kentucky Court of Appeals upholds a denial of a marriage license to a same-sex couple
1974: In *Singer v. Hara*, the Washington State Court of Appeals upholds a denial of a marriage license to a same-sex couple
1978: *Zablocki v. Redhail* removes socioeconomic restrictions for access to marriage
1978: The litigation campaign, Gay & Lesbian Advocates & Defenders, is founded in Vermont and Massachusetts
1979: *Califano v. Yamasaki* rules that asymmetrical treatment of husbands and wives under Social Security and veterans’ benefits Laws could not state constitutional scrutiny
1979: *Orr v. Orr* holds that unequal treatment of spouses in divorce proceedings – a law requiring husbands, but not wives, to pay alimony – could not withstand constitutional scrutiny
1987: *Turner v. Safley* mandated prisoners retain the right to marry despite incarceration, preventing procreation.
1989: *DeShaney v. Winnebago County* cites the union of a man and woman with the mission of procreating and raising their children in a stable and protected union
1990s: Litigation campaign for same-sex marriage begins
1991: In *Baehr v. Lewin*, the Hawaii State Supreme Court considers that the prohibition on same-sex couples to get married constituted a type of discrimination contrary to the State Constitution. However, the Supreme Court did not order the state to begin issuing marriage licenses immediately but instead ordered the state to justify its discriminatory attitude. As a consequence, the State Legislature modified the marriage laws, defining that marriage could only be between a man and a woman, and passing later a constitutional amendment in 1998, banning the possibility of same-sex marriage in Hawaii
1997: *Washington v. Glucksberg* cites the union of man and woman with the mission of procreating and raising their children in a stable and protected union
1999: In *Baker v. Vermont*, the Vermont Supreme Court rules unanimously hat differential treatment between same-sex and opposite-sex couples violated the common benefits clause of the State Constitution, and consequently ordered the State Legislature to amend this situation
2003: *Lawrence v. Texas* (2003) overturns sodomy bans
2004: In *Goodridge v. Dept. of Public Health*, the Massachusetts Supreme Court rules that marriage should be understood as the voluntary union of two persons as spouses, with access to all protections and responsibilities under state law

2008: California and Connecticut legalize same-sex marriage
2009: New Hampshire legalizes same-sex marriage
2011: New York legalizes same-sex marriage
2012: Washington, Maryland, and Maine legalize same-sex marriage
2013: The SCOTUS rules that the Defense of Marriage Act (DOMA) was unconstitutional in the case *United States v. Windsor*, forcing the Federal Government to recognize same-sex marriages legally performed in any state
2014: 35 of the 50 States have recognized same sex-marriage through litigation or State legislatures.
2015: Obergefell v. Hodges rules that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty"

8 From christendom to pluralism in Canada: narratives of the past, imaging the future

Lori G. Beaman, Cory Steele

In 2004 the Supreme Court of Canada ruled on the constitutionality of same-sex marriage in *Reference Re Same-Sex Marriage* (hereinafter the *Reference).*[1] The case came before the Court as a reference, a somewhat uncommon process where the Court considers questions brought before it by the federal government of Canada, primarily concerning the constitutionality of federal or provincial legislation.[2] In the *Reference*, the Court considered legislation that proposed to extend the right to civil marriage to same-sex couples.[3] Section 1 of the proposed act was the crux of the matter: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." (*Civil Marriage Act*, S.C. 2005, c. 33) The section effectively opened marriage to same-sex couples. In its decision, the extension was affirmed by the Supreme Court as a matter of equality, which is protected under the *Canadian Charter of Rights and Freedoms.*[4] The proposed legislation and the Court were clear that religious officials would not be forced to perform marriages that were not in accordance with their religious beliefs. Religious groups themselves could decide whether they would marry same-sex couples. But the court was unequivocal – it was 'marriage', not 'civil *union*' that was

1 Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79. Hereinafter "*Reference*".

2 Section 53 of the *Supreme Court Act* allows the federal government of Canada to refer questions concerning constitutional or other matters to the Supreme Court of Canada. Section 53(1) of the *Supreme Court Act* reads:

(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

(a) the interpretation of the Constitution Acts;

(b) the constitutionality or interpretation of any federal or provincial legislation;

(c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

3 This eventually became the *Civil Marriage Act (2005).* For more on the *Civil Marriage Act*, see https://laws-lois.justice.gc.ca/eng/acts/c-31.5/page-1.html.

4 For more on the *Charter,* see https://laws-lois.justice.gc.ca/eng/const/page-12.html.

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under discussion, despite the efforts of some social actors to cordon off marriage as a sacred space accessible only to religion. Canada was perhaps unique in that religion was explicitly part of the discussion.

A number of issues became the focus of public debate and discussion during this period, including whether to call same-sex marriage 'marriage' (or, for example, civil union) and the impact on religious groups who did not want to perform same-sex marriage (specifically whether clergy would be compelled to perform same-sex marriages). The public controversy over same-sex marriage maps on to broader shifts in the Canadian social imaginary about the nature of Canada, moving from Canada as Christendom to Canada as multicultural and diverse nation.[5] The latter imaginary reveals the shape of the complex future to come, with collaboration between diverse social actors and a vision of an inclusive society. It represents a partial de-imbrication of religion and state, although this is a process that is still ongoing. For example, there were interveners in the Reference case as well as political and social actors in public debates and Parliament who defended an exclusive vision of marriage rooted in natural law, religious institutions, historical convention and that positioned values and morals as the unique territory of religion. Over the course of the controversy, however, a different vision, or social imaginary, became more visible. This alternative social imaginary was one rooted in equality, inclusion, and diversity, including multiple moral frameworks. This vision is important not only for same-sex marriage: it contributes to a foundation for the resolution of future contests, especially those that involve attempts to impose a particular morality on the general population. Both approaches were situated in notions of the common good, which were sometimes explicitly articulated.

In this chapter we give a brief overview of the history of marriage in Canada. A linked discussion is the shift in laws on divorce. We consider the social context in which these histories unfold, particularly in relation to religious affiliation. We then turn to what we refer to as past-preserving and future forming narratives found in the legal debates about same-sex marriage. Although there is some correlation between social actors who self-identified as religious and past-preserving narratives, this was not always the case. The importance of our analysis lies, we think, in our close consideration of the deployment of logics of justification that reference transcendent orders and natural laws, biology and science, justice, diversity and inclusion. These do not always divide along religious/nonreligious affiliations and it is this complexity to which we wish to draw attention. Ultimately, we argue that debates over same- sex marriage offer a prism through which we

5 For a discussion of the ways that Christendom was policed and institutionally embedded see, Hanowski's (2023) discussion of unbelief in interwar Canada.

are able to explore the re-negotiation of forms of conjugality that are only possible because of the shift from Christendom to a diverse society in which a multiplicity of religious and nonreligious actors and social imaginaries exist.

8.1 Marriage, divorce and the social context

In 1867 Confederation solidified the dominant story as one in which Protestantism and Catholicism were constitutionally recognized, though not established, by the state[6]. This imbrication of church and state was both legal and *de facto.*[7] Canada was thought to be part of 'Christendom', a fact recognized by British Judge Lord Penzance in his famous statement on the nature of marriage in Hyde v. Hyde (1866)[8]:

6 David Martin (2000, 26) writes: "In Canada [...] there remain shadow establishments [...] there are identifiable, though modest, hegemonies that have a link to distinct institutional churches rather than to an overall Protestant tone." Peter Beyer (2000, 193) summarizes Martin's notion of 'shadow establishments' as referring to "either denominations that have or have had some of the features of establishment, or in the sense of established churches that have lost their erstwhile power but still retain a shadow of that influence". David Lyon (2000, 4) writes: "In Canada, most 'church-and-state' issues, such as who should control educational institutions, still reflect the unique history of this country with its twin 'shadow establishments' – Protestant and Roman Catholic – despite the emerging influence of other faith traditions and political commitments to multiculturalism." See Beaman and Sullivan (2013) for a discussion of Canada and the United States in comparison *vis à vis* establishment.

7 Section 2(a) of the *Charter* protects "freedom of conscience and religion". Section 15(1) states "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Mention constitution clauses dealing with religion." Section 29 reads "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." The Canadian state also collaborated with church to attempt the genocide of Indigenous cultures through the residential school system, see (source).

8 *Hyde v. Hyde and Woodmansee* [L.R.] 1 P. & D. 130 (1866). *Hyde v. Hyde and Woodmansee* was heard by the Courts of Probate and Divorce in England on March 20, 1866. The case concerned an Englishman in Utah who had become a Mormon and later married a Mormon woman. The man eventually returned to England without his wife who remained in Utah, where she married a second husband. While in England, the Englishman wished to divorce his wife, but the English court would not grant the divorce because it did not recognize the Mormon contract of marriage that the man had entered into with his wife in Utah.

> What, then, is the nature of this institution [marriage] as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must need (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. (at pg. 133)[9]

This 'fact' of Canada as part of Christendom and the Christian character of Canada was also acknowledged by the Supreme Court of Canada in 1953 in the *Saumur* decision in which Justice Rand ruled:

> The Christian religion, its practices and profession, exhibiting in Europe and America an organic continuity, stands in the first rank of social, political and juristic importance. [...] and although we have nothing in the nature of an established church, that the untrammeled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable. (pg. 328)

The narrative of a Christian Canada was largely undisputed by much of Canadian society, despite the presence, both pre- and post-Confederation, of other religious groups and the fact that the nation was built on the territory of Indigenous peoples, who had their own systems of knowledge, forms of kinship and lifeways. Part of the colonial project was to regulate the intimate relationships of Indigenous peoples, who had their own system of laws related to marriage (Morse 1980; Carter 2005). Christianity had considerable influence on the nature of marriage and the circumstances of divorce and so the history of marriage and divorce is intertwined with the history of religion in Canada. This influence is why marriage is an important site of investigation for thinking about nonreligion. More broadly, though, Christianity has maintained a privileged political and social position in Canada which is entangled in social institutions. Roger O'Toole succinctly points out that

> Canadian churches and denominations exerted a vigorous reciprocal influence [...] they succeed in making social, economic, political, and constitutional concerns a part of their spiritual project to an extent that ensured that a depiction of Canada as a 'fundamentally religious nation' was a sober and exact sociological assessment (2000, 41).[10]

9 As Paula Montero observed about this definition, it defines marriage by three conditions: consent, time and gender. Same-sex marriage challenges only the third.

10 See also Clark (1968) who notes that Christianity was of vital importance to the social development of Canada.

In short, Canada is "residually Christian" (Seljak 2012, 10).[11] What is "allowable, reasonable, desirable or extreme" in Canadian society was shaped by Christian morals and values (Seljak 2012, 10).

Despite the recency of the Supreme Court's *Reference* and the ensuing *Civil Marriage Act* (2005), there exists a very long, complex history of civil marriage in Canada. From the very beginning of Canada's colonial history, marriage was controlled by the state and a select few religious organizations.[12] Marriages were first recognized only if solemnized by a member of the clergy of the Church of England. By the end of 19th century, however, the state had extended the ability to solemnize marriage to other clergy members of 'established' and 'long recognized' religious groups, eventually to other smaller groups like the Quakers, Jewish community and Salvation Army (Ogilvie 2017, 383; Riddell 1921). However, civil marriage emerged as a matter of pragmatics even before Confederation: given the large size of the territory that eventually became known as Canada and the remoteness of some communities, very often there was no clergyperson available to solemnize a wedding. Thus, the officiant could be someone in the community (a merchant, for example),[13] although a subsequent clergy blessing was often expected and required when it became possible. From the outset, though, civil marriage was marriage and should not be confused with the notion of a 'civil union'.

Under the British North America Act 1867, which was the legal confederation of three territories to create Canada, legislative responsibility for marriage and divorce was divided between the provinces and the federal government under sections 91 and 92. The federal government was given jurisdiction over marriage and divorce under s. 91(26). The provinces were given jurisdiction over 'the solemnization of marriage' under section 92(12). But clergy still largely retained control over

11 Seljak posits that Canada is a "residually Christian society" as it "bears the imprints of its Christian past, and consequently has not addressed Christian privilege sufficiently" (2012, 10).
12 English law has historically formed the basis for Canadian marriage and divorce law (Bala 2005, 21).
13 In the absence of ecclesiastical courts, Johnson argues that in Newfoundland "the celebration of marriage had been regulated by local custom, and in the absence of clergy, marriages continued to be solemnized by anyone who could read the service. Church of England clergy in Newfoundland performed the marriage ceremony, and the right of Roman Catholic priests was not questioned by governors. Some Congregational and Methodist clergy conducted marriage services for their own members but usually in areas where there was no resident Church of England clergyman. Often, couples simply declared their desire to be married and a leading community member, usually a merchant, performed the ceremony. The service would be repeated when a clergyman arrived in the harbour. This customary practice, well established by the beginning of the nineteenth century, continued in remote areas even after marriage laws were enacted" (2003, 285).

the solemnization of marriage, although gradually the courts and judges, and eventually court clerks, were extended this authority. This was an uneven process across Canada because of the constitutional division of powers mentioned above.[14]

At a more abstract level, marriage continued to be understood as a matter that fell under the authority of religion. For example, the chairperson of a Standing Committee for a proposed 1984 Bill that dealt with adoptive/step relatives marrying wrote to the major denominations in Canada "inviting comment on related moral and religious issues" (Stevenson 1997, 4). Notwithstanding a relatively well-established regime of civil marriage in Canada by the late 20th century, religion and religious social actors maintained a *de facto*, if not legal, authority over the entire domain of marriage, both civil and religious.[15] We argue that same-sex marriage was one issue that put this authority to the test. But it was not the only one: the gradual increased availability of divorce also challenged religion's legal and moral authority.

As with marriage, divorce was not enacted uniformly across the country. Divorce laws across much of Canada prior to 1968 were governed by pre-Confederation and English statutes (Abernathy and Arcus 1977, 410; Owen and Bumsted 1993, 4). Divorce laws in Nova Scotia, New Brunswick, and Prince Edward Island, for example, were based on pre-Confederation statutes which permitted judicial divorces (Abernathy and Arcus 1977, 410). Likewise, divorce laws in British Columbia, Alberta, Saskatchewan, Manitoba, the Northwest Territories, and the Yukon were based on English statutes, which also permitted judicial divorces (Abernathy and Arcus 1977, 410–11). Prior to 1930 for Ontario and 1968 for Quebec and Newfoundland, however, judicial divorces were not permitted. In these provinces, the "*only* method of obtaining a divorce was by a private Act of the federal Parliament" (Abernathy and Arcus 1977, 411). [16] In 1930, the *Divorce Act (Ontario)* al-

14 British Columbia was one of the first to allow civil marriage, in keeping with the early loosening of church control in that province (see Marks 2017). Ontario, Canada's most populated province, seems to be one of the last with the passage of the 1950 Marriage Act. Civil marriage was sanctioned in Quebec in 1968, a development that coincided with the Quiet Revolution (ref).

15 Stevenson's observation that between 1974 and 1990 Parliament is concerned, 'not with biblical or religious overtones, but with making laws to fit the pluralistic society of the time' is interesting given the consultation he mentions above and what is to come in the reference, i. e. the extensive participation of religious groups. Given that nothing really radical in relation to marriage occurs until the challenge to 'one man, one woman' it is also difficult to assess this.

16 "Divorce bills originated in the Senate and were heard by a special Divorce Committee before being considered by both Houses. The substantive law of the Divorce Committee was apparently its own, rather than English statute. But the law was based on the English one, with adultery virtually the only ground. Only the petitioner was granted the right to remarry, however, which

lowed for judicial divorces in Ontario and the federal *Divorce Act* (1968) allowed for judicial divorces in Quebec and Newfoundland (Abernathy and Arcus 1977, 411). The *Divorce Act* not only standardized divorce law across Canada, but it also allowed spouses to apply for divorce together, rather than separately, for the sole reason of the "breakdown of their marriage". The first federal *Divorce Act* was enacted in 1968, with a second major revision occurring in 1985. The very possibility of divorce and its increased availability combined with its location in law rather than religion were important precursors to the de-imbrication of religion and state and the shift from Christendom. They were also linked to a rethinking of marriage.

The developments related to marriage and divorce we outline did not happen in a social vacuum. They are linked to broader social processes and contexts. The 1960s brought a massive shift to the social order that is still underway (Brown 2012). The relative calm of the post-WWII period gave way to the civil rights movement, student protests, the environmental movement, second wave feminism, anti-war protests, and the beginning of a decline, almost statistically imperceptible at first, of participation in and affiliation with institutional religion.[17] Canada implemented multiculturalism[18] as a policy and the seeds were sown for a national imaginary that embraces diversity as a cornerstone of national identity.[19] From the 1960s onwards, there was a shift in social attitudes and values concerning gender, sexuality, reproductive rights, human rights, religion, marriage/divorce[20], and healthcare among many other social domains. These changing values, we argue, contributed to a changing social imaginary: one that promotes inclusivity, equal-

certainly established a nice distinction between guilty and innocent party" (Owen & Brumsted, 1993, p. 8).

17 For a discussion of these movements, protests, and social phenomena and their relationship with the shift away from religion see Callum Brown (2017, 2012).

18 This shift was implemented in a number of ways: through changes in language from assimilation to integration; from social cohesion to diversity; and through legal recognition of multiculturalism, such as in the Canadian Charter of Rights and Freedoms. Section 27 of the *Charter* reads: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

19 For critics of multiculturalism, see Phil Ryan (2016, 2019). Some argue Canada's commitment to multiculturalism is flawed. For more on Canada's immigration policies and how these have shaped Canada's multicultural landscape, see Knowles (2016).

20 Overall, the importance of marriage as a social institution has declined: in 1961 92% of Canadian families were headed by married couples, a percentage that fell to 67% in the 2011 census (Statistics Canada 2011). According to the most recent 2021 Canadian census, approximately 64% of Canadian family households are married couples (Statistics Canada 2021). https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&SearchText=canada&DGUIDlist=2021A000011124&GENDERlist=1,2,3&STATISTIClist=1&HEADERlist=0.

ity, and difference—all of which impact marriage in both form and frequency. Statistics Canada has tracked the decline in marriage rates, with, for example, 8.1 marriages per 1000 population in 1921 compared to 2.6 per 1000 in 2020. Further, those living together without marrying have increased significantly, from 6 % in 1981 to 23 % in 2021 (Statistics Canada, 2022).

By the 1980s there was another major development in Canadian society, specifically in Canadian law, with the enactment of the *Charter of Rights and Freedoms* (*Charter*). The *Charter* is another plank in a national imaginary that highlights a broadened approach to multiculturalism captured by the notion of diversity. The *Charter* reflects the social and political shift ignited in the 1960s with its guarantees of equality and other fundamental or human rights. But the *Charter* is, to appropriate Seljak's words from above, 'residually Christian': it retains a Christian narrative with its mention of 'the supremacy of God and rule of law' in its preamble.[21] The significance of the recognition of the supremacy of God in the preamble has been the subject of some debate.[22]

In related legal developments, the gap in legal equality for gays and lesbians, which were made more visible in part by the HIV-Aids epidemic, was challenged and remedied with the support of the Canadian *Charter* and other provincial human rights acts that protect similar rights and what have become known as Charter values. A series of cases challenged pension, social program, and spousal support inequities. Although sexual orientation was not included in the initial list of protected characteristics in the *Charter* (religion was), it was read in by the Supreme Court (in the *Egan*[23] decision in 1995) as an analogous ground for equality

21 The preamble states: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". See: https://laws-lois.justice.gc.ca/eng/const/index.html.
22 Bruce Ryder (2005) suggests that preamble should be understood as reflecting the Canadian state's commitment to neutrality. Ryder argues that: The supremacy of God clause is perhaps best understood as a reminder of the state's role in not just respecting the autonomy of faith communities, but also in nurturing and supporting them, as long as it does so in an even-handed manner [...] The preamble represents a kind of secular humility, a recognition that there are other truths, other sources of competing world-views, of normative and authoritative communities that are profound sources of meaning in people's lives that ought to be nurtured as counterbalance to state authority" (2005, 176–177). In other words, the Charter's preamble reinforces Canada's commitment to multiculturalism and diversity through the reconciliation of the "secular" nature of the Canadian state (i. e., law) and the religious beliefs and practices of those who inhabit it (Ryder 2005, 177).
23 See *Egan v. Canada*, [1995] 2 SCR 513.

claims. Same-sex marriage, however, remained a gap that had yet to be closed until the *Reference Re Same Sex Marriage.*[24]

The history of marriage and divorce occurs within a broader context of social change that also included religious change. Historically, a large percentage of Canadians identified as belonging to a religious tradition. In 1871, shortly after confederation, over 99 % of the population identified as religious (Statistics Canada 1971). Fifty years later (1921), over 95 % of Canadians identified as belonging to a Christian denomination (Dominion Bureau of Statistics 1921, 568) and in 1961 this number had remained unchanged (Statistics Canada 1971). However, although almost indiscernible at first, by the late 1960s there was an increasing number of people who not only stopped participating in institutional Christianity, but who also disaffiliated from it (Brown 2017; Clarke and Macdonald 2019; Thiessen and Wilkins-Laflamme 2020). The 1971 census reveals that 98.7 % of Canadians identified as religious (93 % were Christian); in 1981 92 % of the Canadian population identified as religious (90 % were Christian); and in 1991 this figure went down to 88 % of the Canadian population identified as religious (83 % were Christian) (Statistics Canada 1991). According to the most recent Statistics Canada data from 2011, 76 % of Canadians identified as religious (67 % of Canadians identified as Christian) (Statistics Canada 2011).[25] The newest census data reports that 65 % of Canadians identify as religious and only 53 % of Canadians identify as Christian (Statistics Canada 2022). Despite this decline, Christianity remains embedded in Canadian culture, as we have noted above.

A correlate of declining Christian affiliation is an increase in the number of individuals who identify as having no religious affiliation. In 1961, less than 1 % of the total Canadian population identified as having no religion (Clarke and Macdonald 2019, 163). Those who distanced themselves from religion increased quite substantially during the following decade, with a rise to 4 % of the total Canadian population in 1971 (Clarke and Macdonald 2019, 163). By 2011, approximately 24 % of Canadians identified as having no religious affiliation (Statistics Canada 2011) and in the most recent census (2021) the number had increased to 37 % (Statistics

24 The issue of the desirability of marriage was not completely without controversy in the gay and lesbian community. During the same-sex marriage debates some gays and lesbians argued that participating in the state marriage regime would only bring same-sex couples more fully within the control of the state (Miriam Smith 1999).

25 https://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=0&PID=105399&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=95&VID=0.

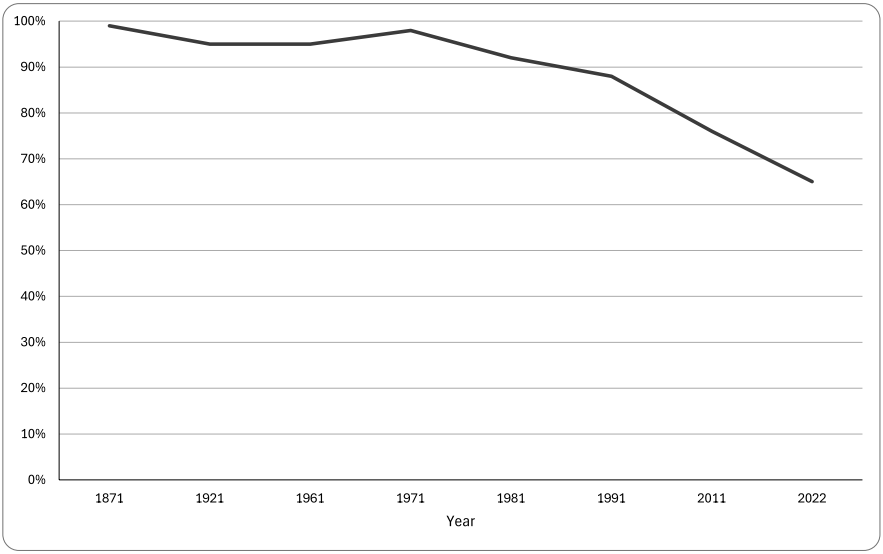

Figure 8.1: Percentage of Canadians who identify as religious. Source: Authors' own calculation based on Dominion Bureau of Statistics (1921) and Statistics Canada (1971, 1991, 2011).

Canada 2022).[26] The increase in the nonreligious has been so great that "those who have No religion [now] outnumber the country's largest Protestant denomination, the United Church of Canada, by a factor of almost 3.8" (Clarke and Macdonald 2019, 163).[27]

In their important history of the decline of Christianity in Canada, *Leaving Christianity: Changing Allegiances in Canada since 1945* (2019), Brian Clarke and Stuart Macdonald observe that the decrease in religious affiliation, particularly with the historically dominant churches/religions in Canada, does not equate to an increase in affiliation with the smaller, less established churches. Canadians are not switching between religious groups (Thiessen 2015), but simply becoming less inclined to affiliate with religion (Clarke and Macdonald 2019, 5). Second, "the trend of religious decline is broad and deep" and here to stay (Clarke and Macdon-

26 https://www12.statcan.gc.ca/census-recensement/2021/dp-pd/prof/details/page.cfm?Lang=E&SearchText=canada&DGUIDlist=2021A000011124&GENDERlist=1,2,3&STATISTIClist=1&HEADERlist=0.

27 There are a variety of reasons given to account for the declining rates of religious affiliation and increase in the number of individuals who identify as having no religion. See Clarke and Macdonald (2019), Thiessen (2015), Thiessen and Wilkins-Laflamme (2020); Zuckerman et al. (2016).

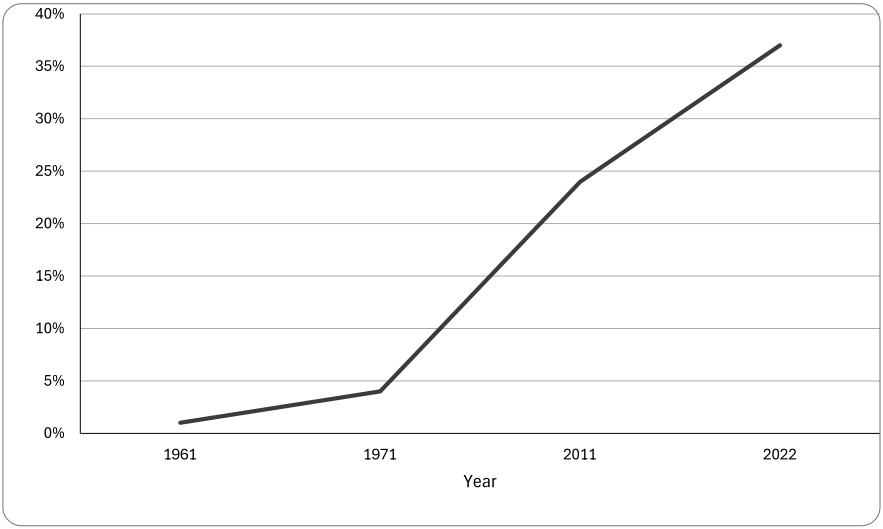

Figure 8.2: Percentage of Canadians who identify as having no religious affiliation. Source: Own calculations based on Clarke and Macdonald (2019) and Statistics Canada (2011, 2022).

ald 2019, 5): The nonreligious now "represent the second largest 'religion' in Canada" (Clarke and Macdonald 2019, 6). Finally, there now exists a generation of people who "very likely have never been exposed to even diffusive forms of Christian belief and practice" (Clarke and Macdonald 2019, 237). In sum, there is an ever-increasing number of Canadians who are either (1) turning away from religion; or (2) were never religious to begin with. Contemporary Canadian society is thus more at ease with the fact that for a relatively large portion of the population religion is not of significant importance (Clarke and Macdonald 2019). However, it is worth noting that Canada remains a nation whose social institutions are very much entangled with Christianity. Just as Christian values, practices, and beliefs were themselves pervasive throughout much of Canadian society, so too was the expectation that an individual affiliated with a religion (Clarke and Macdonald 2019; Marks 2017; Block 2016). But affiliation and participation are often very different, and so measures of affiliation often miss the degree to which a person might be actively involved in a religious community.

The religious landscape of Canada is also undergoing change with respect to non-Christian religions, primarily due to migration. Higher levels of transnational migration have contributed to a changing religious landscape through much of the Western world (Burchardt 2017; Vertovec 2007). In the Canadian context, 4.9 % of the population now identifies as Muslim; 2.3 % as Hindu; 2.1 % as Sikh; and 1.0 % as Buddhist (Statistics Canada 2021). In comparison, in 2001 1.9 % of the Canadian

population identified as Muslim; 1.0 % as Hindu; 0.9 % as Sikh; and 1.0 % as Buddhist (Statistics Canada 2001b). Despite the increasing religious diversity in Canada, overall rates of religious affiliation are declining.

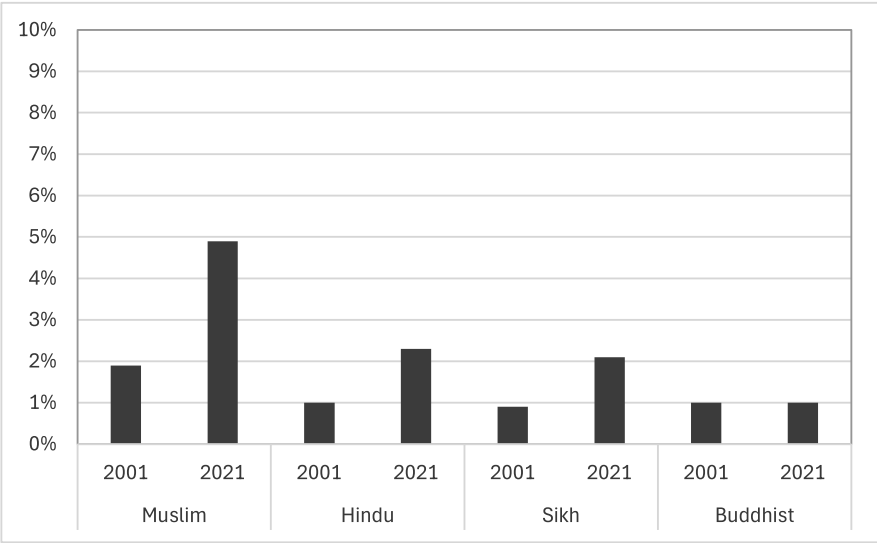

Figure 8.3: Increase of non-Christian religions in Canada between 2001 and 2021. Source: own calculations based on Statistics Canada (2001b, 2021).

Combined, Beaman (2017) refers to this changing religious landscape – the decrease in religious affiliation; increase in nonreligious affiliation; and increasing religious diversity – as the "new diversity".[28] This new diversity has "the potential to create increased conflict, platforms for exclusion and feelings of voicelessness in the public sphere. The primary consequence of this is the need to re-negotiate old arrangements if we are to achieve inclusion and the goal of living well together in a complex future" (Beaman 2017, 19). The seemingly small increase in the nonreligious in the 1971 census has continued to grow. The social impact of this is still not entirely evident, but certainly, there are tensions and anxieties within religious communities associated with the move of Christianity from majority status to a less dominant position in the overall religious landscape.[29] We

28 The new diversity also includes a focus on Indigenous spiritualties. See Beaman (2017).
29 Interestingly, "92.0 % of the population aged 15 and older agreed that ethnic or cultural diversity is a Canadian value. Everyone plays a fundamental role: you, your parents, your

suggest that same-sex marriage offers a lens through which to explore how broader social changes that began in the 1960s and this new diversity, one characterized by an increase religious *disaffiliation*, have prompted a re-negotiation of old arrangements concerning the institution of marriage that were based in a Christian understanding of that institution. Further, our discussion reveals something of the productive power of nonreligion through the multiplication of new forms of conjugality, and the justifications of the ties that unite people.

In what follows, we argue that the Supreme Court's decision in *Reference Re Same Sex Marriage* was the culmination of decades of social change that evidenced a shift from a past-preserving approach to the institution of marriage, which was entangled in Christian majoritarianism and Christian values and beliefs, to an approach that is future forming, diverse and egalitarian in nature and reflective of a new imaginary of what it means to be Canadian. Legal decisions can be expressions of social change. But they are also producers of change and new institutional materialities through their ways of naming, hierarchicalizing, classifying and justifying.

It is important to note that a key social actor in this process was the Metropolitan Community Church of Toronto (MCC).[30] It was the MCC that performed the marriages of Kevin Bourassa to Joe Varnell, and Elaine Vautour to Anne Vautour on January 14, 2001 – these were the first same-sex marriages in the world (Factum of the Intervener, MCC, at paras. 1, 7).[31] The legality of these same-sex marriages and those that followed shortly thereafter was challenged, which resulted in the 2003 *Halpern* decision[32] in which the Court of Appeal for Ontario found "that the common law definition of marriage [... violated same-sex couples'...] equality rights under s. 15(1) of the Charter" (*Halpern*, at para. 142). This is all to say that not all religious social actors were opposed to same-sex marriage. Those who were did not emphasize equality and embraced the future forming narrative that highlighted diversity, inclusion, and equality values.

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grandparents and your ancestors all contribute to shape the diverse landscape of the country." See https://www150.statcan.gc.ca/n1/daily-quotidien/221026/dq221026b-eng.htm.

30 The MCC advertises itself as "A Vibrant, Inclusive, and Progressive Spiritual Community and a Renowned Human Rights Centre." See https://www.mcctoronto.com/. The MCC belongs to the Universal Fellowship of Metropolitan Community Churches.

31 MCCT "learned that the ancient Christian tradition of publishing the banns of marriage has always been a lawful alternative under the laws of Ontario to a marriage license issued by municipal authorities. It decided to embrace this Christian practice, which allowed it to marry in accordance with its own religious beliefs without needing the cooperation of the municipal authorities" (MCC, at para. 7).

32 *Halpern v Canada* (AG), [2003] O.J. No. 2268.

8.2 Methods

Tracing the ways that social actors frame their positions does not produce a definitive record or truth. Rather such efforts are always partial, and shaped by the exigencies of the context in which they are produced. With this reality in mind, we use discourse analysis to explore the ways in which same-sex marriage is constructed by the various state and non-state actors involved in the Supreme Court's *Reference.* We pay particular attention to the intersection of law, religion, and interventions that are not explicitly religious. We see law, religion, and these interventions as contributing to the social construction of same-sex marriage. In this light, we use discourse analysis in its broadest sense to refer to the exploration of the ways in which (1) discourses construct our social world; and (2) how discourses themselves are socially constructed (Taira 2013; Hjelm 2011). Discourse here is productive: it produces and is itself produced. We are not so concerned with the specificities of language (although particular words cue us to discursive constructions), but are instead more generally concerned with how power/knowledge constructs and legitimizes a certain rendering of the social world—in this case same-sex marriage.

We draw on four sources for our analysis: the Supreme Court of Canada's written decision in the *Reference* case (the context and circumstances for which we have discussed above); intervener factums; Parliamentary debates about same-sex marriage; and a sample of media articles. Supreme Court decisions are usually exhaustive in their analysis and may include the opinions of judges who concur or dissent. The *Reference* decision was written by 'the Court', meaning that there was no difference in opinion among the judges. The decisions usually contain an introduction to the issue; the facts of the case; any previous judicial history concerning the case and/or issue; an analysis of the issue; and remedies. Written decisions provide a fruitful way to explore the ways in which the justices themselves, along with law more generally, perceive and construct the social issues brought before the Court.

Interveners are persons or organizations who are third parties to the case. They are social actors "not originally a party to judicial review proceedings who by order of the court is given status to participate in the proceedings either as a full party or with more limited rights" (Mullan 2001, 544). Anyone can apply as an intervener to a Supreme Court of Canada case, but not all those who apply are granted leave to make a submission. Interveners make written submissions, or factums, to the Court which outline their position concerning the issue before the Court. These submissions, while still confined to the parameters of law, provide an opportunity to explore the ways in which non-state social actors frame and construct the issue at hand – in this case, same-sex marriage. In the *Reference Re*

Same Sex Marriage the 29 intervener factums give us evidence of how religion, for example, is used by various social actors to frame same-sex marriage and how it is used as a discursive framework for an alternative imaginary.

A third set of data are the debates from Parliament – the House of Commons and Senate – concerning same-sex marriage. Records of these debates are kept in the form of transcripts, known as the "Hansard index" (hereinafter Hansard transcripts) and are full transcripts of what is said in the House of Commons and the Senate. In total, we coded 51 transcripts. The transcripts, much like the intervener factums, reveal the ways in which both state and non-state actors draw on religion and other life stances in their opposition to, or support of, same-sex marriage.

Combined, the Court's written decision, the intervener factums, and the Hansard transcripts represent arguments that take place within highly regulated institutional spaces (see Sullivan 1994; Smart 1989). This regulation means that the debates we draw on present a black and white, two-dimensional picture of same-sex marriage. In the case of Parliament, the debates are highly politicized. There is thus some nuance that is simply not possible because of the nature of the social location of the debates.

We also reviewed media sources, primarily newspaper articles, around the time of the federal same-sex marriage debates and the passing of Bill C-38 (2002–5). Unlike the legal sources of the interveners, Court, and Parliament, the media sources represent what we refer to as an unregulated social space. This unregulated social space adds nuance to our analysis as the arguments presented by social actors in newspapers are not bound by the same strict parameters of law. These actors can say what they want and how they want. The media lets us see how the everyday public framed the same issues being discussed in the formal regulated social sphere of law.

All legal sources were obtained from the Supreme Court of Canada and the Parliament of Canada's LEGISinfo service, which provides information about all legislation before Parliament. Media sources were gathered via a media search using certain keywords and between a date range from 2002–5. Once all sources had been gathered, we completed a preliminary read to identity codes and themes. A more detailed coding process was then commenced by hand using a combination of Adobe Reader and Microsoft Word. New codes were added to maximize our coverage of the data. In total, we coded over 700 pages of data.

We identified several dominant themes including: history, natural law, discrimination, persecution, and the nature of society. Our coding process and the codes identified during this process are not unique – all countries in this volume share common codes. But, our reading of these codes and what they represent, or their substance, *is* unique. All countries, for example, identified history as a common theme in their data. The history code we identified, however, is shaped by

Canada's unique history. The substantive uniqueness of the codes produced a specific reading of our data. For example, history, natural law, and multiculturalism allowed us to develop our ideas of past-preserving and future forming to frame our argument. With this in mind, it is to the *Reference* and the Parliamentary debates we now turn.

8.3 Discussion

The public controversy over same-sex marriage and the *Reference re Same Sex Marriage* involved a contest not only over marriage, but over the social imaginary of Canada as a nation and, ultimately, its link to transcendent and immanent authority. It was not only the nation that was at stake, but competing moralities. Implicit in the debates was a power struggle over what we have categorized 'past preserving' and 'future forming' narratives (see Beaman, 2020). The past preserving narrative sought to maintain social cohesion through a shared set of values with an emphasis on the longevity of the present order, which is derived from a pre or supra human natural order, originating in a transcendent source. This narrative references natural law as something that humans have not created, is not under their control and should not be interfered with by them. Earthly law, therefore, can affirm the transcendent order, but should not change it. Law in this narrative is a handmaiden of God (although God is not always explicitly referenced, the language cues to theological or religious references). Thus, we include in this notion of the past preserving narrative an historical order or essence that references the transcendent, and a historical narrative which seeks to affirm the 'rightness' or truth of a model that is traceable in a particular version of human history but originates in the transcendent. This vertical model of the social order implicitly recognizes particular groups as morally entrusted to guard the social institution of marriage. This order is presented as the 'truth'.

The future forming narrative draws on the national imaginary of multiculturalism which expands to a broader vision of a diverse and inclusive Canada not explicitly related to ethnicity, but to a wide range of intersecting identities (see Bahkt 2008). This is in turn linked to a more horizontal social order in which no one group or ideology or set of values dominates. Thus, religious groups could choose to refuse to perform marriages for same-sex couples; they could also choose, as did the Metropolitan Community Church (and, subsequently, a number of other Canadian religious groups) to perform same-sex marriages; and civil marriage was open to all. For the future forming narrative, law was called upon to facilitate equality, fairness, and justice. Unlike the past preserving narrative, the law was expected to change and grow in conjunction with the

changes occurring in Canadian society, and to support the diversity that is integral to the national imaginary. We now turn below to the past preserving and future forming approaches in more detail.

8.3.1 Preserving the past: the natural order of things, transcendent authority and the consequences of change

Perhaps unsurprisingly, the past-preserving narrative used by the social actors who generally opposed a reconfiguring of marriage sought to preserve a particular historical narrative of marriage. This narrative was often grounded in arguments that drew on natural law, transcendental authority, and played into fears about what would become of society if one of its most 'fundamental' institutions were to change. The narratives used by those opposed to same-sex marriage are replete with temporal references.

8.3.1.1 Histories

To many of those involved in the *Reference* and the parliamentary debates, marriage was understood as, and to remain as, "an opposite-sex construct" representing the "union of a man and a woman" (*Attorney General of Alberta,* at para. 16). The 'fact' that this definition of marriage was legally recognized for centuries meant that it would have been unacceptable to alter what had supposedly stood the test of time, particularly given that the proposed changes to marriage would violate the intentions of the framers of the Canadian constitution (*Attorney General of Alberta, at paras. 27–36*). This understanding of marriage "has been consistently reflected in the common law and in statute" and therefore should not be changed (*Attorney General of Alberta,* at para. 53). The Attorney General of Alberta explicitly argued that, given the long-standing nature of the traditional definition of marriage, the Supreme Court's "reluctance to effect major changes in the common law should be engaged here with *extra force and meaning*" (at para. 71; emphasis added).

We find similar sentiments expressed by other interveners and actors involved in the parliamentary debates. For the Seventh Day Adventists, for example, the traditional definition of marriage provided a way for Canadians to understand and relate to the world in which they live (pg. 1). To reconfigure marriage would mean to reformulate who Canadians are as people (pg. 1). To these interveners, "a redefinition of marriage is nothing less than a socio-cultural revolution. It is a paradigm shift" (pg. 2). Likewise, former Prime Minister Stephen Harper aligned himself with the characterization of same-sex marriage as a redefinition of mar-

riage, arguing that "my position [on marriage], and that of most of the members of my party, is based on a very solid foundation and *time-tested values* [...] I believe this definition of marriage has served society well, has stood the test of time and is in fact a foundational institution of society" (Parliament Second Reading, Sitting 58, 3578–9). To many of those opposed to the inclusion of same-sex couples for eligibility for civil marriage, the past-preserving narrative they drew on relied on the weight of history and tradition to oppose change: if marriage had been understood (from time immemorial) as the union between one man and one woman, why should it suddenly change?

Another version of this historical 'truth' invoked legal history explicitly: the original intentions of the drafters of the Constitution, what would be referred to in the United States as 'framers' intentions' whereas raised as a possible consideration. The Attorney General of Alberta suggested that since Confederation "marriage [...] has consistently referred to opposite-sex relationships only" (at para. 30) and that "at the time of Confederation, jurisdiction in relation to marriage was intended to relate to heterosexual unions only. A.G. Canada [they are here referencing the submission of the Attorney General of Canada] appears to concede that the framers did not conceive that marriage could embrace same-sex relationships" (at para. 35). According to the Attorney General of Alberta, the framers of Canada viewed marriage as only referring to "male-female unions" (at para. 36). The *Reference* decision not only rejected the natural law argument presented above, but also the 'framers' arguments. Unlike the United States, in Canada the 'framer's' intentions' does not have significant weight, perhaps because of the 'living tree' approach to the Constitution, which supports interpretive flexibility in response to social change.

Opposition to the reconfiguration of marriage is complicated by the fact that this does not translate simply into 'religion' versus 'state' arguments, as we can see in the following statement made by the government of the province of Alberta, whose opposition to same-sex marriage drew on ideas of historical truth and transcendent notions:

> Marriage is first and foremost a social construct. It has been "recognized" by the common law but it was not created by the common law. The historical meaning of marriage in the Western world, beginning with its roots in Greek and Roman civilizations, through to the Christian era, is a special kind of monogamous opposite-sex union with spiritual, social, economic and contractual dimensions. (at para. 19)

Though subtle, this state intervention sees the law as merely recognizing a pre-existing phenomenon. Less subtle is the intervention by the Interfaith Coalition on Marriage and Family[33]:

> Marriage, a foundational social and religious institution in Canadian society, was not created by law. It is a societal and, primarily, religious institution which has existed for millennia. It pre-existed the law [... it] confers the status of husband and wife, and has been recognized by all major religious faiths and societal groups as existing uniquely between one man and one woman. (at paras. 1–2)

Natural law arguments, however, need not explicitly reference religion, God, or some other transcendent being: sometimes that reference was much more subtle, such as the allusion to government not creating marriage (where then did it come from?) or its status as being as 'old as time'. For example, Member of Parliament Rose-Marie Ur, argued that "across societies, marriage has institutionalized and symbolized the inherently procreative relationship between a man and a woman [...] the government did not create the heterosexual institution of marriage but it did recognize it as such and gave it status in law" (Sitting 71, 4344–4345). Another Member of Parliament said that "Marriage is a relationship that is as old as time itself. It existed prior to our laws and is a core building block" (Parliament Second Reading – Sitting 71–4379).

The intervention of Conservative Party of Canada Member of Parliament Stockwell Day exemplifies the natural law argument:

> some people accept a divine creator, God, behind these laws of nature. Others still accept natural law and common law but without acknowledging a divine intelligence behind them. The fact still remains that until a very few short years ago, neither group felt intellectually, philosophically or religiously compelled to alter a millennia old definition that actually predates governments and even predates the church, synagogue and mosque (Parliament Second Reading – Sitting 74, 4590)

Whether accepting a divine creator (God is the only option offered by Day) or not, marriage is still something that predates governments and religions, according to this account of it. Words like "time immemorial", "primordial", "pre-existing" "fundamental" characterize these interventions. The weight of natural law and its 'truth' as an historical narrative was invoked to remove the 'issue' of same-sex marriage from the jurisdiction of the court and Parliament. Member of Parliament Paul Steckle said, for example, that "marriage is a relationship that is as old

33 The Interfaith Coalition on Marriage and Family is composed of the Islamic Society of North America, the Catholic Civil Rights League and the Evangelical Fellowship of Canada.

as time itself" (Parliament Second Reading – 71, 4379). The Alberta Justice Minister Ron Stevens likewise said that the "government of Alberta has continually defended the traditional definition of marriage, believing that marriage is *deeply rooted in history, culture and religion and is a special bond between a man and a woman*" (CBC News – Ottawa won't have referendum, 2004; emphasis added).

Religious marriage was never under threat in the proposed legislation, although the fact that the Metropolitan Community Church was implicated in the case may have caused concern among other religious social actors. In fact, the proposed Act very explicitly preserved an exemption for religious groups: "Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs." A particular configuration of marriage – both civil and religious – is folded into the past preserving narrative, which rests on an understanding of marriage that is conceptualized as both reflecting a particular moral order and a sacred institution. The fact that the MCC is a Christian church with a clear statement of its moral position is in some ways overridden in the very loud voices of opposition that seem to erase the alignment of Christianity as it is interpreted by the MCC with support for same-sex marriage.

8.3.1.2 Transcendence

In addition to the historical emphasis discussed above, a related discursive strategy invoked a God-given order that cannot, or should not, be interfered with by humans. This narrative framed marriage as something created by an other-worldly being – it was not up to humans to change the nature of marriage. The most that humans can (and should) do is recognize this order in worldly laws. The Interfaith Coalition on Marriage and Family, for example, argued that "in Catholicism, marriage is a sacrament of the Church, and not a purely human institution despite the many variations it may have undergone through centuries. The institution is '… prior to any recognition by public authority, which has an obligation to recognize it.'" (Interfaith Coalition on Marriage and Family, at para. 10). This intervener also points out that the Jewish tradition "teaches that marriage is a natural institution that religious traditions have elevated to the level of the sacramental without changing its earlier pre-religious character (at para. 17). Marriage was something "ordained by God" (at para. 22) and something sacred (Seventh-day Adventist Church, at pg. 15). The interveners' choice of language works to support a construction of marriage as something outside the sphere of human intervention. Whether created by a transcendent being, or simply beyond the reach of law, marriage is cast as something that is not, and should not, be something humans interfere with. An immanent/transcendent binary pervades these interventions:

> As I close, let me say that for me there is a higher truth and a greater judge than any we will find in the courts of Canada or any earthly court. Our courts do not have a monopoly on truth. Our charter, though important, is not sacrosanct. The government, pushed by the courts, is making a very serious mistake in a reckless and headlong rush to redefine marriage to the point that in Canada the word could become virtually meaningless. (Member of Parliament Pat O'Brien, Parliament Second Reading – Sitting 61–3762)
>
> To me marriage is a religious ceremony. Marriage is, has been and always will be a religious act. I was married in a church. I believe that all married couples that I know at least feel strongly about the sanctity of marriage and the ability to swear their vows to their loved ones in a church.... To me marriage is a religious act. That is just my feeling. To me it is a very personal, a very heartfelt, and a very moral approach that I take to this equation. To me marriage and religion go hand in hand. For those who do not agree with that position, I respect their opinion, but I cannot agree with it. (Member of Parliament Tom Lukiwski, Parliament Second Reading – 61, 3786)

Here we see the need to define marriage as a religious institution, even when what is under debate is civil marriage. These religious actors cannot imagine marriage outside of religious authority. What is at stake, then, is the imbrication, or the entanglement of marriage and religion. We also see morality positioned as only within the religious framework. It is inherently rooted in the transcendent:

> Marriage is a natural institution as it predates all recorded, formally structured, social, legal, political and religious systems. (Canadian Conference of Catholic Bishops, at para. 8)
>
> Marriage in Canada is a religious institution that was adopted by our common law. (Seventh-day Adventist Church, at pg. 14)
>
> Simply put, this is the belief that certain facts of the nature of the universe, including human nature itself are so obvious that they are deemed to be self-evident. Therefore, by extension, human laws were drawn up to be in harmony with the self-evident laws of human nature and the universe around us. (Member of Parliament Stockwell Day, Parliament Second Reading – Sitting 74, 4590)

Historical and transcendent arguments were often combined. Reference to God, religion, or the pre-social nature of marriage was invoked in the parliamentary debates. One member of Parliament said, for example, that "to me marriage is a religious act [...] to me marriage and religion go hand in hand) (Member of Parliament Tom Lukiwski, Parliament Second Reading – 61, 3786). Similarly, another MP noted that:

> Historically, marriage was recognized by the common man to be the cornerstone of existence itself [...] religion embraced marriage and the family unit as a significant sign of God's blessing for the world as a unique individual gift (Member of Parliament Peter Goldring, Parliament Second Reading – Sitting 71, 4402).

Similarly, religion, God, and even theology were employed by the broader public. Reverend Dave Manely of the Church of God in Consul said that same-sex marriage "goes against the teachings of the Bible" (CBC News 2004, Minister refuses to marry same-sex couples). More pointedly, Manely argued that:

> The issue is theology for me [...] It's not just about protecting my rights, and I think that's one of the difficult things to understand... but God's word is clear to me and it is as I understand it, and as I preach it, any given Sunday. (CBC News, Minister refuses to marry same-sex couples, 2004)

And, finally, Elsie Wayne, a former Conservative Party Member of Parliament, said that "gays shouldn't have the right to marry, and that they "choose" to live that lifestyle [...] 'God does not endorse that and we do not [...] You have to straighten people out'" (CBC News – Wayne, 2006).

8.3.1.3 Biology and gender complementarity

The transcendental element was also linked to a biological order that deployed a particular version of scientific evidence, ignoring the existence of the multiple forms of relationships in 'nature'. The transcendent was used to justify, and further legitimize, the past-preserving idea that marriage was between a man and a woman. The Association for Marriage and the Family in Ontario, for example, indirectly draws on the biological nature of marriage, arguing that:

> Society's need to promote marriage – the one unique union that complements nature with culture for the sake of the intergenerational cycle – has not changed. (The Association for Marriage and the Family in Ontario, at para. 23)

The Association for Marriage and the Family in Ontario argued that:

> It is a truism that any society requires the regeneration of its population to survive and flourish. Canada is no different: such a need exists today just as it has throughout the history of Canada. Marriage has served as the cultural institution dedicated to creating the conditions in which Canadian society is perpetuated. (at para. 32)

These interveners infer that a social order complements a biological order (nature) that must remain unchanged to ensure future generations of Canadians are born. These interveners present what we might call a slippery slope argument here (something we return to below): if the legal definition of marriage were to change, Canadians may have fewer children, thus putting at risk the perpetuation of the "intergenerational cycle" and the family unit. Even more than that, according to this view the very future of Canadian society is at risk if marriage is altered.

Another Member of Parliament drew more explicitly on the idea of a biological element of marriage by quoting Justice La Forest in the *Egan* decision, arguing that

> Suffice it to say that marriage has from time immemorial been firmly grounded in our legal traditions, one that is itself a reflection of longstanding philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the ***biological and social realities that heterosexual couples have the unique ability to procreate***, [...]. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage. (Member of Parliament Jason Kenney, as quoted in Parliament Second Reading – Sitting 61, 3780)

Similarly, Conservative Party Member of Parliament Bob Mills echoed the statements above, noting that the "primary function [of marriage] is to create a stable and supportive foundation for procreation." (Parliament Second Reading – Sitting 74, 4555)

This sentiment was also expressed by members of the Hutterian Brethren, who combined notions of sin with biology:

> It's [same-sex marriage] a terrible sin. If all the people on the Earth would turn that way, ***the people in the world would die out***, Wollman told the CBC. (CBC News, Hutterites, 2005; emphasis added)

Reduced to its core, the biological dimension noted by these social actors positions marriage as a unique way to "transmit life" (Member of Parliament Jason Kenney, Parliament Second Reading – Sitting 61, 3779). To these social actors the debates about marriage are more than just semantics. Including same-sex couples in the marriage regime means rethinking the very nature of procreation: for them, stripping marriage of its biological elements threatens the creation of future generations of Canadians. Only through the preservation of this particular truth, rooted in time immemorial, can the future be secured (in their view). By naturalizing marriage as a religious institution these social actors engage in a productive process that delimits the field of marriage and those authorized to regulate it.

Some social actors invoked a gender divide and explicitly gendered roles as a core element of the type of marriage they were defending. This 'complementary' expression of gender roles is an iteration of a particular Christian understanding:

> The Attorney General of Alberta also argued that "marriage is understood as an opposite-sex construct. It is an historical and worldwide institution which has been consistently recognized as being the union of a man and a woman..." (Attorney General of Alberta, at para. 16).

> Males and females complement each other. Children need the warmth and comfort of the mother and the playful rough and tumble as well as the protection of the father. The law of the land should not deny children the possibility of having both a mother and a father. The great circle of life is male and female. (Member of Parliament Gurbax Malhi, Parliament Second Reading – Sitting 74, 4537)
>
> A table is not complete without a chair. A picture needs the support of a frame. Opposites come together and complete the circle of life. We need a key to open a door lock. Wheels are needed to drive a car. Likewise, men and women need each other to complete the circle of life. Marriage is an expression of natural and divine law. (Member of Parliament Gurbax Malhi, Parliament Second Reading – Sitting 74, 4537)
>
> Marriage is a form of life geared toward managing the sexual differences between men and women. (The Association for Marriage and the Family in Ontario, at para. 28)
>
> Marriage is easily the best way in which men relate to women and is easily the best way in which women relate to men. (Member of Parliament John McKay, Parliament Second Reading – Sitting 71, 4350)

The universality of the opposite sex arrangement of marriage was also used to justify its untouchability and its supra-human status. The Attorney General of Alberta wrote:

> The central question now before the Court is whether Canadian society will be allowed to maintain the opposite-sex character of marriage itself. ***That character has existed almost universally and since time immemorial.*** Its rejection necessarily involves the extraordinary conclusion that, in the context of marriage, the unique and fundamental nature of the male-female relationship is of no consequence. (Attorney General of Alberta, at para. 3; emphasis added)

The opposite-sex nature of marriage was something that ultimately was framed as something that not only transcended time, but also culture, and religion (Attorney General of Alberta, at para. 53). It was not something humans to meddle with. This sentiment was also echoed in the parliamentary debates. One Member of Parliament said that

> It fundamentally erodes what has been for millennia a definition which most people in the world understand universally today [...] the affirmation of marriage through a ritual of a right was common in almost every single interchange between societies. (Member of Parliament Dan McTeague, Parliament Second Reading – Sitting 71, 4355)

Conservative Member of Parliament Gordon O'Connor also argued that "Marriage has been a fundamental concept of societies for thousands of years across all continents and cultures involving the union of men and women ..." (Parliament Second Reading – Sitting 71, 4380).

8.3.1.4 Social cohesion and the end of the world as we know it

Those who used natural law arguments to establish the 'truth' of opposite sex marriage and its supra human origins sometimes predicted potentially dire consequences for transgressing the transcendental order, drawing on slippery slope narratives to suggest harm not only to religious people, but to society in general. The Interfaith Coalition submission, for example, referenced potential consequences to tampering with marriage: "The full effects of a fundamental change to the millennia-old religious and social institution will not be immediately apparent, but they will be real, and they will be borne by these interveners" (at para. 4). It is unclear whether this is a veiled reference to a transcendental wrath. Similarly, Member of Parliament Mark Warawa said:

> It is changing historical religious definitions such as marriage without any thought of the consequences. The government wants to legalize marijuana, legalize prostitution, and take away charitable status from faith based organizations. Who knows what will be next. (Parliament Second Reading – Sitting 71, 4352)

Those opposed to including same-sex couples in the civil marriage regime emphasized the inevitability of social instability, crafting a narrative rooted in moral panic and intertwining morality and law:

> Marriage has four basic prohibitions which are pretty much universal and timeless. We can only marry one person at a time, only someone of the opposite sex, never someone beneath a certain age, and not a close blood relative. These prohibitions have been grounded in morality and law. We need this stabilization in an ever changing world, but the Liberals want to take it away from us. (Member of Parliament Nina Grewal, Parliament Second Reading – Sitting 74, 4587)
>
> It's [same-sex marriage] going to affect the families, it's going to affect young people we have to stand for righteousness [...] If we feel something is coming to our community that would destroy our lifestyle, we have to protect it, we have to speak against it. (CBC News, Nunavut MP, 2005 Glad Tiding Church member Leonie Duffy of Coral Harbour, Nunavut)

A similar protectionist sentiment was expressed by former MP Elsie Wayne: "It is time for a group who believe in good moral Christian values to stand up and speak out and get things turned around." (CBC News, Elsie Wayne, 2006)

Social instability was imagined to extend to religious communities:

> All religious faiths traditionally have upheld the belief that marriage is a child-centred union of a man and a woman, whether Catholic, Protestant, Jewish, Hindu, Sikh or Muslim. All of these cultural communities, rooted in those faiths, will find their position in society marginalized. (Member of Parliament Stephen Harper, Parliament Second Reading – Sitting 58, 3580)

Another dimension of the social cohesion argument manifested in statements about immigrants. The 'fad' of same-sex relations was positioned against the wisdom of newcomers, an Orientalist essentializing that drew on a stereotypical immigrant 'Other':

> What these new Canadians also understand, and what this government does not, is that there are some things more fundamental than the state and its latest fad. New Canadians know that marriage and family are not the creature of the state but pre-exist the state and that the state has some responsibility to uphold and defend these institutions. (Member of Parliament Stephen Harper, Parliament Second Reading – Sitting 58, 3584)

Former Prime Minister Stephen Harper, then leader of the Conservative Party, said that:

> New Canadians know that their cultural values are likely to come under attack if this law [concerning same-sex marriage] is passed. (CBC News – Canadians..., 2005)

In summary, those who opposed extending civil marriage to include same-sex couples drew on a past preserving narrative that was rooted on a particular Christian historical framing of marriage, which was in turn grounded in natural law and transcendental authority. These social actors used slippery slope arguments, which predicted the demise of Canadian society should one of its foundational social institutions change. In this light, marriage was seen as pre-existing law and society: it was handed down by God and was therefore something humans should not change. Not everyone directly referenced the divine. However, we argue that the 'natural' order is a form of argument that allows those social actors opposed to same-sex marriage to reference a transcendent order without explicitly invoking religion or a god or otherworldly source. The alleged stability of marriage since 'time immemorial' and across cultures as the union between one man and one woman further lent credence to the assumption that marriage was inalterable. Marriage was to remain between a man and a woman for the primary purposes of procreation and to ensure the continuation of future generations of Canadians. This narrative was one that prioritized the values, beliefs, and practices of a particular Christian vision of marriage no matter what the cost to gay and lesbian couples. However, this was not the only narrative evidenced in our data sources and it is to the other, future forming narrative, that we now turn.

8.3.2 A different imaginary

In contrast to the transcendent order envisioned by many of those opposed to same-sex marriage, the alternative narrative presented a different imaginary of nation, law and the future. Entangled in notions of justice and inclusion, this narrative embraced the idea of legal change, seeing it as the obligation of courts and the state to reflect a changing society. Although we have analyzed the debate and interventions in terms of two dominant narratives, these broad characterizations must be read as just that. Those in favor of same-sex marriage occasionally invoked history or nature, but they were more likely to turn to justice, dignity and fairness as core reference points and to see particular histories as unjust or a point of departure. Rather than being frozen in time, the Constitution was framed as a living document which must respond to social change and in particular to a national imaginary that sees pluralism as a touchstone. The Supreme Court said the following:

> The reference to "Christendom" is telling. Hyde spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life (at para. 22)

This statement speaks to a particular narrative of Canada, which once was a Christian society of shared values, but is now a pluralistic reality. Most importantly, however, the Court links this ability of the law to change – the living tree doctrine – to the relevance and even the very legitimacy of the Constitution.

The idea of a pluralistic reality is something that we see echoed in the preamble of the *Civil Marriage Act.* The preamble recognizes the values of "tolerance, respect and equality" while also acknowledging that religion and other "diverse views on marriage" comprise the diversity that characterizes Canadian society.[34] In this pluralistic reimagining of Canada, religion remains part of the country's social fabric of Canada, but does not dominate. Religion is not to guide Canadian

34 The preamble says: "WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;" and "AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the Canadian Charter of Rights and Freedoms, access to marriage for civil purposes should be extended by legislation to couples of the same sex". See https://laws-lois.justice.gc.ca/eng/acts/c-31.5/page-1.html.

law as it once did. The Canadian Bar Association made this explicitly clear when it argued that

> The primary basis for justifying the opposite-sex requirement of marriage – procreation and raising of children – ***is derived from ecclesiastical law which has no place in Canadian law governed by the Charter.*** (Canadian Bar Association, at para. 36; emphasis added)

The Ontario and Quebec Couples also argued that "the recognition of civil marriage in Canada is not governed by religious law […]" (Ontario and Quebec Couples, at para. 20). In these submissions, religious law has no place in the formulation of civil marriage, marking a clear de-imbrication of marriage and religion, and of law and religion and an articulation of recrafted boundaries.

8.3.2.1 The secular and the plural

Some of the social actors explicitly employed the notion of 'the secular' to frame their arguments. The Canadian Civil Liberties Association, for example, referred to the notion of the 'purely secular' and stated:

> Civil marriage is a public institution, intended to be available to all without regard to religious affiliation or adherence to religious doctrine. As such, it must be secular. Defining the secular institution of civil marriage in terms that do not happen to coincide with a particular conception of a divine will does not threaten the legitimate interests of religious groups or individuals. (Canadian Civil Liberties Association, at para. 3)

The 'secular' was used to articulate an understanding of society not guided by religion but rooted in equality and inclusion. For the Canadian Civil Liberties Association specifically, the 'secular' was equated with equality (at para. 3). To this intervener, a 'secular' understanding of marriage was "the best way of reconciling the competing beliefs and views of all Canadians, regardless of their religion" (at para. 3). 'Secular' public institutions were understood as being freely accessible to all (at para. 12). For the Canadian Civil Liberties Association, the 'secular' represented a space without religious barriers (at para. 22).

What interested us about this use of the secular is that its meaning was almost always assumed. Yet, civil marriage has always been intertwined with religion. As we have noted, early in Canadian history civil marriage was a stop gap measure until clergy could perform a Christian ceremony, and later by couples who might not always identify as nonreligious, but who were for one reason or another refused religious marriage for one reason or another (when one or both parties were divorced, had different religions, and so on). We have been careful in our considerations of nonreligion to avoid equating it with 'the secular' and so we

raise this here to query the work that the secular does for social actors who supported same-sex marriage.

Rather than a Christendom of shared values, the social imaginary referenced by those who supported same-sex marriage emphasized pluralism and its attendant multiple values. EGALE Canada, for example, argued that:

> The proposed legislation, which provides a civil marriage alternative to same-sex couples who do not satisfy the marriage requirements of some religious faiths, actually *enhances religious freedom in Canada* by providing an umbrella under which we all can live, despite our passionate differences. (at para. 11)

In this vision of Canada people may disagree 'passionately', but all are included. The Canadian Bar Association similarly argued that:

> the proposed legislation does not infringe upon the religious freedom of those who believe homosexuality is a sin and that same-sex couples should not be recognized. (at para. 19)

And, the Canadian Civil Liberties Association implicitly noted the parting of ways of the two regimes, saying

> Defining the secular institution of civil marriage in terms that do not happen to coincide with a particular conception of a divine will does not threaten the legitimate interests of religious groups or individuals. (at para. 3)

For those who supported same-sex marriage, the proposed legislation concerning marriage would in no way infringe the equality rights of religious individuals, but instead enhanced the rights enjoyed by all Canadians (EGALE Canada, at para. 12). Rather than insisting on one model for all, this narrative explicitly grappled with difference.

In his letter to the editor of Amherst Daily News, one social actor, Gerard Veldhoven, drew attention to this grappling with difference in his letter to the editor of Amherst Daily News. Veldhoven pointed out that:

> The fact is he [Archbishop Terence Pendergast] is of the opinion same-gender marriage is not and should not be recognized. The fact this is a civil issue and not a religious one, does not even occur to him. It seems plausible to me that it is the attitudes of some of the so-named Christian churches that should be of concern to us, as we know *not all Canadians practice the teachings of Christianity, especially as of late* (Gerard Veldhoven, Letter to the Editor, Amherst Daily News, A4)

Conservative Member of Parliament Belinda Stronach similarly argued that:

> My position on Bill C-38 is taken as a conservative. I respect very much the views of others based on the values they perceive in traditional marriage, but for me the transcending and overriding value is the liberty of the individual to choose what is right for herself or himself without the state telling her or him what to do, how to arrange their lives or how to behave. I think John Stuart Mill summed it up in his classic formulation: "Over himself, over his own body and mind, the individual is sovereign". (Parliament Second Reading, Sitting 85, 5277)

As evidenced by Veldhoven and Stronach, the future forming narrative recognized the changing social imaginary of Canada, a nation not exclusively Christian, and the need to be aware of the differences that this changing social imaginary implies. In considering this changing (non)religious and social diversity in Canada, some social actors argued that to continue to *limit* marriage to opposite-sex couples would *harm* same-sex couples and others in society who do not share Christian heteronormative opinions about marriage. Again, Veldhoven argued that:

> We are now the fourth country to have legalized same-gender marriage and to stir up further debate by religious leaders is harmful and indeed, detrimental to Canadian society as a whole… (Gerard Veldhoven, Letter to the Editor, Amherst Daily News, A4)

All of this is to say that for many of the social actors who supported same-sex marriage, there was overwhelming emphasis placed on inclusion, diversity, and the idea of pluralism – all of which were framed as ensuring the full and equal participation of all in Canadian society, regardless of one's sexuality and/or (non)religion. As Liberal Member of Parliament Tony Ianno said:

> Overwhelmingly, Canadians recognize the value of bringing together people of many backgrounds, beliefs and lifestyles, and giving each of them the opportunity to contribute to their own unique strengths. It is our very diversity that breeds harmony. We learn from each other. We build on each other's strengths. We love the nature of our country and we are committed to making it work. We encourage citizenship, education and participation in the political process. That, I explained to people from other countries, is Canada's underlying strength: our celebration of diversity and respect for one another. (Parliament Second Reading, Sitting 74, 4563)

The notion of pluralism expressed by the Supreme Court and those who supported same-sex marriage also draws attention to the legal status of gays and lesbians in Canadian society. The Canadian Civil Liberties Association recognized the religious historical roots of marriage but argued that in "the modern context [marriage is] an important practical and symbolic determinant of legal status" (at para. 18). For many of those who supported same-sex marriage, the opening of the institution of marriage to the LGBTQ community was a way for same-sex couples to fully participate in Canadian society: exclusion from the institution of marriage would mean to marginalize gays and lesbians "on the basis of stereotypes

about the legitimacy and worth of their relationships" (Foundation for Equal Families, at para. 33). For the intervener 'Ontario Couples and Quebec Couple', excluding same-sex couples from the institution of marriage was to "deny that gays and lesbians are fully persons in Canadian law" (at para. 14). Marriage was thus portrayed as the precursor for the full legal recognition of LGBTQ as persons.

8.3.2.2 Who is a citizen?

Questions about legal status and the participation of same-sex couples in Canadian society naturally led to concerns about citizenship and belonging. Indeed, debates about same-sex marriage often confronted questions about citizenship and how denying same-sex couples access to the institution of marriage was the equivalent of not recognizing them as full Canadian citizens. Member of Parliament Gilles Duceppe said to the House of Commons that:

> The debate on same-sex marriage is, ultimately, a question of citizenship. No one can say that Quebec or Canada are just societies if the people of this country are not all treated equally (Parliament Second Reading – Sitting 58, 3585)[35]

Similarly, Member of Parliament Bill Graham said that:

> I come from Toronto, which has a strong gay and lesbian community. I believe that this community makes a contribution to our city. I believe that their being free and able to contribute as full fledged citizens help to enrich Canada. That will strengthen our rights. (Parliament Second Reading – Sitting 58, 3587).

Denying same-sex couples' access to the institution of marriage positioned them as "second-class citizens" and unequal members of society (Member of Parliament Gilles Duceppe, Parliament Second Reading – Sitting 58, 3585). More specifically, to deny same-sex couples' access to the institution of marriage denied them the same rights and protections as other members of society. But, as Member of Parliament Monique Guay argued:

> Everyone has equal rights. We know full well that for many years the gay community has had many challenges. Gays and lesbians have been looked upon unfavourably and have been mistreated by the public because they were not necessarily understood. (Parliament Second Reading, Sitting 76, 4698)

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35 Member of Parliament Réal Ménard also said that: "The first reason why this bill must be supported is, it seems to me, a matter of citizenship. I do not believe that homosexual men and women have different reasons for wanting to marry. Nor do I believe that motivations other than those for heterosexuals are involved in the debate." (Parliament Second Reading, Sitting 71, 4349).

Debates about same-sex marriage in the future forming narrative were thus entangled with questions about one's legal status and citizenship. Equality played an important role in the future forming narrative, providing a key pillar in a society which was inclusive and non-discriminatory. Same-sex marriage went to belonging and citizenship. For Member of Parliament Bill Siksay,

> Gay and lesbian people cannot be considered full citizens if key institutions of our society are considered out of bounds [...] We cannot be considered full citizens if civil marriage, one of those central institutions, is seen to be outside our experience and our reach (Parliament Second Reading – Sitting 58, 3590).

Those who supported same-sex marriage also rejected a natural, biological element to marriage that was found in the past-preserving narrative. EGALE Canada explicitly rejected the proposition that "the primary purpose of marriage and/or of the restriction against same-sex marriage is the establishment of an institution within which procreation is fostered" (at para. 45). The Foundation for Equal Families similarly argued that "The state's interest in promoting procreation, the justification most frequently advanced for limiting civil marriage to heterosexual couples, has been rejected…" (at para. 53)

To these actors, the original objective of marriage had never been to procreate and ensure the perpetuation of future generations of Canada. Rather, the "original objective of [the] opposite sex definition of marriage was to invest majoritarian religious views with the force of law" (EGALE Canada, at para. 51).[36] Marriage did not represent a unique way to bind a man and a woman. Instead, marriage is but one way for *all* couples to "state their love, fidelity, and commitment to each other, to their friends and families, and to society at large through the civil marriage ceremony [...]" (Foundation for Equal Families, at para. 2). Love was therefore positioned as an important element of marriage, not the biology of those involved. Member of Parliament Gilles Duceppe draws attention to this element of love, when he asked the House of Commons:

> are there still MPs in this place who believe that love, whether it be between two people of the same sex between a man and a woman, is something to be condemned? (Parliament Second Reading – Sitting 58, 3585)

36 EGALE Canada argued "the real purpose [of opposite-sex marriage] is to entrench and preserve the exclusive privileged status of heterosexual conjugal relationships in society" (at para. 53).

Member of Parliament Bill Siksay, similarly drew attention to the love experienced by same-sex couples, when he said that

> When it comes down to it, there is no difference in the love experienced by gay and lesbian couples and heterosexual couples. Love is love is love. (Parliament Second Reading – Sitting 58 – 3591).

For Member of Parliament Monique Guay, to extend marriage to same-sex couples would be to provide all Canadians a "chance to be happy, to be in love and to live well." (Parliament Second Reading, Sitting 76, 4698).

In the future forming narrative civil marriage is reimagined as something that allows same-sex couples one way to fully express their love for one another, while at the same time providing the bases for the formation of a stable family unit (Foundation for Equal Families, at para. 53). Attorney General Andrew Petter made this quite clear when he said that:

> If the institution of marriage is a positive and beneficial institution for society, and works for heterosexual couples, it should work for same-sex couples [...] We have no right to deny same-sex couples the same opportunity to participate in that institution (CBC News, Legalizing same-sex marriages, 2000).

Rather than mobilizing history to justify a continued narrow application of the definition of marriage and its reservation for opposite sex couples only, some interveners mobilize history to illustrate the need for change. Here narratives of discrimination are pulled forward to link to a future forming discourse of equality, social inclusion and access to marriage for same-sex couples. The BC couples' intervention, for example, uses historical debates about racial segregation and desegregation in the United States to draw attention to how same-sex marriage should be legislated in Canada to ensure the full participation of those who are part of the LGBTQ community (at para. 53). This same intervener also draws on discourse about the illegal nature and subsequent decriminalization of same-sex sex in 1969 and how this decriminalization allowed for people "to become more open about their sexualities, relationships, and families" (at para. 4). These interveners use historical discourses of discrimination and social change to highlight how challenging societal norms that have historically discriminated against certain social groups have subsequently allowed for members of the LGBTQ community (and other minority groups) to have a "growing number of legal rights" (at para. 4).

The Attorney General of Canada also highlighted human rights issues faced by the LGBTQ community and how laws must better reflect a changing social demo-

graphic (at paras. 4–7, 17–18). The Attorney General of Canada promoted a future forming narrative when it argued that

> marriage' refers only to a topic of 'class of subjects' of potential legislation, it cannot contain an internal frozen-in-time meaning that reflects the presumed framers' intent as it may have been in 1867 (at para. 38).

Similarly, Member of Parliament Paul Harold Macklin, drew on historical discourse about the discrimination gay and lesbian individuals had been subjected to in other societies throughout the world, particularly in Nazi Germany "where they were forced to wear pink triangles and many were housed in concentration camps" (Parliament Second Reading – Sitting 61, 3741). Macklin goes on to argue that the need to recognize same-sex marriage is a human rights issue in our ever-changing society and to suggest otherwise is "a denial of history and a denial of fact" (3741). In sum, historical debates about discrimination (i. e., human rights) are used to help frame arguments promoting social change.

Some explicitly *religious* social actors also drew on the future forming narrative in their reimagining of marriage. We see an emphasis on inclusivity, diversity, and equality in the written submissions made by several of the religious interveners in the *Reference.* The Liberal Rabbis, for example, argued that they had "confirmed that the spiritual meaning and sanctity of marriage applies as much to same sex couples as to heterosexual couples […]" (at para. 5) and that "Marriage holds a central place in the Jewish tradition, and it is natural that Jewish gays and lesbians would wish to be included in a sacrament that is at the heart of their religious belief and practice." (at para. 14)

Similarly, The United Church of Canada said that "marriage is a blessing, which "should be available to all" (at para. 37). Rather than aligning themselves with natural law, some religious interveners suggested the religious beliefs and practices concerning marriage were out of touch with the social reality of the Canadian context – these practices were "outdated" (MCC at para. 4). In making such a suggestion, these actors challenged the theological underpinnings of arguments in opposition to same-sex marriage and asserted values such as equality and diversity. The Metropolitan Community Church of Toronto, for example, said that the conservative Christian position that homosexuality is a sin is the result of the misinterpretation of scripture and is an "ancient, unscientific and outdated" belief "about the nature of human sexuality" (MCC, at para. 4).[37] Rather

37 The Canadian Unitarian Council also said that "Unitarians share with the Metropolitan Community Church (MCC), and even more so with the Liberal Rabbis, the conviction that Scripture is misused by the selection of a few verses to support positions contrary to the over-

than drawing on natural law to justify their positions concerning marriage, the MCC and other religious groups advocate for inclusivity and the promotion of diversity through their emphasis on Charter rights and values:

> Great social evil and centuries of bloodshed have resulted in Europe, and elsewhere, from attempts to enforce the supremacy of one religious view on minority faiths, Canada has avoided this evil by a wise policy reflected in our Charter of secular laws that respect religious diversity. (MCC, at para. 38)

The Canadian Unitarian Council drew explicitly on Charter rights, arguing that the opposite-sex requirement of marriage violated section 15 (equality rights) of the Charter (at para. 10). This intervener insisted that "the federal government [had] an obligation to remedy the situation by introducing legislation that creates a uniform standard for the capacity to marry across Canada" (at para. 10). The Canadian Unitarian Council also affirmed that "while we are a religious intervener, we do not want religious dogma enshrined in our laws" (at para. 24).

In sum, these religious actors reimagined civil, and even religious marriage, as something that should be available to same-sex couples. These actors very much sought to speak out "on justice and equality issues" (Canadian Unitarian Council, at para. 3). For these actors, denying same-sex couples the ability to marry was discrimination. These interveners suggested that difference and pluralism was to be celebrated, accepted, and supported in society (Canadian Unitarian Council, at para. 23).

8.3.2.3 The common good

Ultimately, social actors from all positions imagined themselves as defending the common good. The rhetoric of the public debate over same-sex marriage included discussions in which people weighed in on how their definition of marriage promoted of the 'common good'. Both those who wanted to preserve marriage for 'one man, one woman' and those who argued that marriage should be available to same-sex couples championed the common good.

For those opposed to sex marriage, keeping the institution of marriage for opposite sex couples was a plea for what they felt was in the best interests of everyone:

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arching message of Scripture, that justice should flow down from government like water. Our movement in history has experienced the use of Scripture to defend both slavery and segregation" (Canadian Unitarian Council, at para. 25).

> I would simply ask that we preserve the current definition of marriage since it is wholesome for the common good, in keeping with the natural law and in conformity with God's design for the world. (Member of Parliament Gurbax Malhi, Parliament Second Reading – Sitting 74, 4538).

This notion of the common good was often juxtaposed with 'individual rights', an allusion to the *Charter* and its protections. In this way the common good was separated from the human rights that the *Charter* protects:

> Marriage between one man and one woman is a natural institution as it predates all recorded, formally structured, social, legal, political and religious systems. In so far as it is a social institution, marriage is concerned with the common good, not individual rights. The State must strengthen and protect marriage between a man and a woman because it assures the survival of society by creating the next generation." (As quoted by Member of Parliament Randy White, Parliament Second Reading – Sitting 71, 4389)

Those opposed to same-sex marriage framed heterosexual marriage as a moral path that was good for everyone. In the quote above we see an oblique reference to natural law and a transcendent order. Stripped of explicitly religious language, this form of argument could be interpreted as a Habermasian (2006) translation of religious values into a publicly accessible language.

But future forming social actors were also concerned about the common good, also claiming that moral territory in their articulations of a just society. The Supreme Court of Canada, for example, noted that:

> The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster. (at para. 46)

These statements about the common good positioned competing moralities against each other. Importantly, those who supported same-sex marriage articulated a morality based on inclusion and social enrichment. The common good was imagined to include everyone and did not allow one group to define the parameters of that space.

8.4 Conclusion

The rhetoric of the public debate over same-sex marriage was around notions of the 'common good'. Both those who wanted to preserve marriage for 'one man, one woman' and those who argued that marriage should be available to same-

sex couples championed the common good. For those opposed to sex marriage, keeping the institution of marriage for opposite sex couples was a plea for what they felt was in the best interests of everyone: "I would simply ask that we preserve the current definition of marriage since it is wholesome for the common good, in keeping with the natural law and in conformity with God's design for the world." (Member of Parliament Gurbax Malhi, Parliament Second Reading – Sitting 74, 4538). "The following statement in the media echoed a similar sentiment: "The real issue is not individual rights, but rather the common good of the institution of marriage," said Father John Williams, at St. Mary's Basilica in Halifax." (CBC News – Church fights same-sex bill, 2005). This notion of the common good was often juxtaposed with 'individual rights', an allusion to the Charter and its protections. In this way the common good was separated from the human rights that the Charter protects. Marriage between one man and one woman is a natural institution as it predates all recorded, formally structured, social, legal, political and religious systems. In so far as it is a social institution, marriage is concerned with the common good, not individual rights. The State must strengthen and protect marriage between a man and a woman because it assures the survival of society by creating the next generation." (As quoted by Member of Parliament Randy White in Parliament Second Reading – Sitting 71, 4389). Those opposed to same-sex marriage framed heterosexual marriage as a moral path that was good for everyone. In the quote above we see an oblique reference to natural law and a transcendent order. Stripped of explicitly religious language, this form of argument could be interpreted as a Habermasian (2006) translation of religious values into a publicly accessible language. But future forming social actors were also concerned about the common good, also claiming that moral territory in their articulations of a just society.

Was the legal regulation of marriage de-imbricated from religious normativities in the Reference case? Perhaps. But it is not quite as clear cut as this: while the proposed Act dealt with civil marriage, in reality all marriage was opened to the possibility of same-sex unions. It was, after all, the MCC and its performance of church weddings for same-sex couples that instigated the legal reconfiguration under consideration in the Reference. The transcendent 'natural' law of 'one man, one woman' that defined civil and religious marriage, was replaced with a future forming imaginary that emphasized pluralism and equality. Ironically, those who argued for a static understanding of marriage based on the past argued that the new Act would impose a dominant ethos "and will thus limit the freedom to hold religious beliefs to the contrary" (*Reference*, at para. 47). Under the proposed Act, religious groups retained the authority to regulate marriage in their own domains. Pragmatically, whether the ceremony is conducted by a civil officiant or clergy, all marriages enter a central registry in each province.

Those who embraced a past-preserving approach erased the difference between civil and religious marriage, insisting that marriage was being redefined. The distinction between civil and religious marriage had been functionally minimal: the same rules for eligibility for marriage had applied to both; the same registry process existed for both; and the ceremonies were in many cases similar. To be sure, there were religion-specific impediments to eligibility around divorce (i. e., in some churches one could not be married if one were divorced). The inclusion of same-sex couples in the civil marriage regime marked what was likely the first significant difference between the two regimes. But this was also not as distinct as we might first think when we recall the role of the MCC. So, there is no easy division between 'religious' and civil marriage, despite the fact that the vast majority of opposition to the changes in law came from social actors who referenced a transcendent source for the nature of marriage.

It is important not to be pulled into the characterization of the issues by some religious actors, who positioned the public controversy as being about a clash between 'people of faith' and a 'secular society'. This rhetorical strategy excludes those who would describe themselves as 'people of faith' and who were also supportive of a more inclusive marriage regime. It also excludes those who were not 'people of faith' and opposed to same-sex marriage. These complexities render it extremely difficult to align past preserving narratives only with religion or 'the religious' and future forming narratives with nonreligion and those who identify as 'nones'. Some of those who weighed in understood this complexity. We will end with their words: "The Law Commission correctly recognizes the conflict that exists between diverse conceptions of marriage in a pluralistic society. Even religious conceptions of marriage are very diverse." (Working Group on Civil Unions, at para. 21)

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Timeline

1800s: The state extends the ability to solemnize marriage to other clergy members of 'established' and 'long recognized' religious groups, eventually to other smaller groups like the Quakers, Jewish community, and Salvation Army
1866: *Hyde v. Hyde* establishes the common law definition of marriage
1867: The *British North American Act 1867* legally joins three territories to create Canada. Legislative responsibility for marriage and divorce is divided between the provinces and the federal government under sections 91 and 92. The 1867 Confederation also solidifies the dominant story as one in which Protestantism and Catholicism were constitutionally recognized, though not established, by the state
1930: Judicial divorce is now permitted in Ontario through the *Divorce Act (Ontario)*
1954: In *Saumur v. City of Quebec*, the Supreme Court of Canada acknowledges the 'fact' of Canada as part of Christendom and the Christian character of Canada
1960s: A massive shift in the social order begins, Canada implements multiculturism as a policy
1968: Judicial divorce is now permitted in Quebec and Newfoundland through the federal *Divorce Act (1968)*
1968: Divorce laws are no longer governed by pre-Confederation and English statutes
1982: The *Charter of Rights and Freedoms* (*Charter*) is created to protect several rights and freedoms, including freedom of expression and the right to equality
1995: Following the *Egan v. Canada* decision, sexual orientation is added to the protected characteristic in the *Charter*
2003: *Halpern v. Canada* rules that the common law definition of marriage violates same-sex marriage equality rights under the *Charter*
2004: The Supreme Court of Canada rules on the constitutionality of same-sex marriage in *Reference Re Same-Sex Marriage*
2005: The *Canadian Civil Marriage Act* extends the capacity for civil marriage to same-sex couples nationwide

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