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Same-Sex "Marriage" in Canada: A Guide for American Legislators

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Recent legal and political developments in Canada on same-sex "marriage" are enlightening for the American constitutional debate. Canada shares a number of important characteristics with the United States. It has a complex federal system, activist courts, and evolving public opinion on questions related to homosexuality. And on the issue of homosexual rights, Canada is a nation on the leading edge of change.

In 1999, Canadian law enshrined the traditional definition of marriage as between a man and a woman.[1] This definition was supported by the Canadian people and was passed overwhelmingly by the Canadian Parliament. By early 2005, legislation was introduced in Parliament that would enact a new definition of marriage that includes same-sex couples. By late June, the legislation had passed in the House of Commons by a vote of 158 to 133.

One thing is clear from this development: Triggered by a series of court decisions, Canadian law and political attitudes have changed with remarkable speed. The rapidity and nature of these changes offer lessons for American legislators.

This paper concentrates on several matters. First, it offers a brief overview of the Canadian constitutional system to place the Canadian developments in context. Second, it summarizes recent Canadian court decisions on same-sex marriage. Third, it examines changes in Canadian law, spurred by these judicial decisions. Fourth, it looks at Canadian public opinion on same-sex marriage, which is not markedly different from U.S. public opinion. Finally, it points to

Talking Points

- The single most alarming thing about the Canadian developments in same-sex marriage is the speed at which change—in the judicial and legislative halls, if not in public opinion—has overtaken the traditional definition of marriage. The political and legal "facts on the ground" have been fundamentally altered, and incremental advancements of the same-sex agenda are difficult to reverse.
- In June 1999, the Parliament of Canada voted by a margin of 216 to 55 to retain the common-law definition of marriage as "the union of one man and one woman to the exclusion of all others."
- In 2003, a series of appellate court cases declared the common-law definition of marriage—the "union of one man and one woman"—to be unconstitutional.
- By late June 2005, legislation had passed the House of Commons that would redefine marriage to include same-sex couples.

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the implications and lessons of the Canadian developments for the United States and offers suggestions to Members of Congress who wish to prevent a similarly rapid imposition of same-sex marriage in the United States.[2]

The Canadian Constitutional System

In the years before 1982, the basic constitutional document governing Canada was an 1867 act of the British Parliament, known as the British North America (BNA) Act. The BNA Act, like the U.S. Constitution, created the institutional framework for the Canadian federal system of government, including the recognition of particular executive, legislative, and judicial powers and institutions. It also distributed legislative powers between the federal Parliament and the provincial legislatures. As with American states, Canadian provinces are constitutionally constituted entities with guaranteed jurisdiction. The Canadian federal system is thus distinguished from its more unitary British mother. Under the BNA Act, the Parliament of Canada has exclusive legislative authority over "marriage and divorce," although questions regarding the "solemnization of marriage" are reserved to the provinces.

Under the BNA Act, judges for all superior courts are appointed federally, although most of these courts have jurisdictions limited to individual provinces, with the exception of the Supreme Court of Canada, which, like its U.S. counterpart, is the final appellate court for the country. Judicial review, to the extent it existed in Canada prior to 1982, was limited largely to separation of powers questions, particularly questions of national versus provincial power. Canadian common-law courts inherited from the British courts a belief in judicial deference and parliamentary supremacy on all matters legitimately within the legislative ambit of Parliament. Canadian courts modeled themselves after the British courts and largely relied on their constitutional jurisprudence.

In 1982, the Liberal government of Prime Minister Pierre Elliott Trudeau managed to Canadianize the BNA Act, which was renamed the "Constitution Act, 1867." This process of gaining full control over the Canadian Constitution was known as "patriation." The patriation package brought in by Trudeau had several elements. For example, formal constitutional amendments could henceforth come only from Canada, in accordance with a new amending formula relying on a combination of federal and provincial consent.

More importantly for present purposes, the Canadian Charter of Rights and Freedoms was added to the constitution. The addition of this document provided a basis for a broad, rights-based judicial review of legislation that hitherto had not existed in Canada. Language in the Charter authorizes Parliament or provincial legislatures in effect to override judicial interpretations of the Charter. This is the "notwithstanding clause," which, if specifically invoked, allows legislation to be passed notwithstanding a Charter right. However, this clause is never invoked, often because politicians fear being painted as "anti-Charter" or as against the Constitution or human rights for simply asserting the age-old doctrine of parliamentary supremacy.

Complicating the Canadian legal picture on marriage is the existence of provincial human rights commissions and quasi-judicial tribunals to investigate and adjudicate complaints. These commis-

1. This common-law definition is, in turn, rooted in the view that marriage is reflective of the natural order, and particularly the procreative order, rather than the satisfaction of individuals' desires to be contractually "recognized." In support of this procreative order, marriage confers unique rights and obligations on parents and cements a father's obligations to his children. Indeed, the proper rearing of children is essential to the survival and flourishing of all societies. Marriage thus has a civilizing—and civil, in addition to ecclesiastical—purpose. The long-established and essentially universal rule has therefore been that marriage is possible only between a man and a woman. The fact that some marriages do not result in children does not vitiate the rule or the natural order that it reflects.
2. For a more detailed analysis of the same-sex "marriage" debate as it has developed in the United States, and the case for amending the U.S. Constitution to protect marriage, see Matthew Spalding, Ph.D., "A Defining Moment: Marriage, the Courts, and the Constitution," Heritage Foundation *Backgrounder* No. 1759, May 17, 2004, at *www.heritage.org/Research/LegalIssues/bg1759.cfm*.

sions and tribunals and the human rights codes that they enforce came about in the early 1960s as ways of consolidating existing provincial equal rights laws and addressing human rights claims that common-law courts in Canada had traditionally avoided. Appeal of tribunal decisions to common-law superior courts is generally available. Indeed, Canadian courts are now often "ahead" of even these dedicated, very progressive human rights laws and institutions.

The Charter guarantees equality before the law but specifically enumerates only race, national or ethnic origin, color, religion, sex, age, and handicap as prohibited grounds of discrimination. But this limited enumeration has been no barrier to Canadian courts, which have gone as far as any in the world to grant unique advantages to homosexuals in their efforts to undermine traditional and rational understandings of human nature and, with them, the definition of marriage.

Canadian Court Cases

By the late 1990s, Canadian courts began leading the progressive charge to eliminate legal distinctions between heterosexuals and homosexuals and, in fact, to elevate homosexual rights over other human preferences and understandings.

In the 1998 case of *Vriend v. Alberta*,[3] an employee of a Christian college was fired for being a practicing homosexual. The employee attempted to file a complaint with the Alberta Human Rights Commission even though sexual orientation was not a prohibited ground of discrimination under Alberta law. Yet the Supreme Court of Canada ruled that the Alberta human rights legislation must be read as if discrimination on the basis of sexual orientation were specifically prohibited. The Alberta human rights law, in the court's view, was underinclusive insofar as it denied the equal benefit and protection of the law on the basis of a personal characteristic—homosexuality—that is "analogous" to those specifically protected by the Charter. After *Vriend*, no one in Canada may discriminate on the basis of sexual orientation in the provision of services or employment.

Vriend v. Alberta illustrates how far nominally common-law courts will go in matters of homosexual rights adjudication. As I have written elsewhere:

> [I]n Canada, a government need not pass a specific law…that infringes on an alleged constitutional right…. [I]t may be challenged if it *does not* pass legislation that furthers a sweepingly egalitarian human rights agenda; and its failure may be rectified by a judicial "reading in" of the absent provision…. Parliament and the provincial legislatures have, in important respects, been reduced to mere errand boys for the judicial branch.[4]

In *M. v. H.* (1999),[5] the Supreme Court of Canada heard a case involving a plaintiff, formerly involved in a common-law relationship with a same-sex partner, who was suing for spousal support under Ontario's Family Law Act. The court held that the opposite-sex definition of "spouse" under the act was unconstitutional, thus laying the preliminary groundwork for full acceptance of same-sex "marriage."

In *Hall v. Powers* (2002),[6] a judge in Ontario ruled that a male Catholic school student was permitted to bring his boyfriend to the high school prom even though the Catholic Church formally disapproves of homosexuality. The court relied on what it alleged was the lack of centrality to Catholic schooling of the prom event itself and the lack of centrality of homosexuality—or at least division of opinion on the matter—within Catholic doctrine. In short, the court second-guessed the holders of religious belief as to what constituted a religious belief. Further, the court determined that even if religious beliefs on homosexuality are

3. *Vriend v. Alberta*, 1 S.C.R. 493 (1998).
4. Bradley C. S. Watson, *Civil Rights and the Paradox of Liberal Democracy* (Lanham, Md.: Lexington Books, 1999), pp. 49–50.
5. *M. v. H.*, 2 S.C.R. 3 (1999).
6. *Hall (Litigation guardian of) v. Powers*, O.J. No. 1803 (O.S.C., 2002).

in some sense "legitimately held," they cannot necessarily be acted on.

These cases—camels' noses under the tent—pointed inexorably to the eventual elimination of marriage as it had always been known in Canada. In 2002, in *Hendricks v. Quebec*,[7] the highest trial court in Quebec ruled unconstitutional the statutory requirement in the province that marriage be between a man and a woman. In 2003, the Ontario and British Columbia Courts of Appeal (the rough equivalents of U.S. Federal Circuit Courts of Appeal) declared the common-law definition of marriage—the "union of one man and one woman"—to be unconstitutional. These cases were, respectively, *Halpern v. Canada*[8] and *Equality for Gays and Lesbians Everywhere (EGALE) v. Canada*.[9]

Additional appellate courts in some, but not all, provinces followed suit, though the Supreme Court of Canada never pronounced on the matter. However, based on decisions in *Vriend* and *M. v. H.*, along with the by now well-established political leanings of the Canadian Supreme Court, there is little doubt that the court would ratify the appellate court decisions.

Federal Legislative Developments

In June 1999, in response to *M. v. H.*, the Parliament of Canada voted by a margin of 216 to 55 to retain the common-law definition of marriage as "the union of one man and one woman to the exclusion of all others."

However, in 2000, after the Ontario government amended provincial law, Parliament amended federal law to ensure that same-sex couples were entitled to essentially the same benefits and obligations as married couples or opposite-sex common-law couples. Significantly, Parliament included language that sent a strong message that the traditional definition of marriage, as the union of one man and one woman, was to be unaffected by this legislation.

In July 2003, only four years after the overwhelming 1999 vote to retain the common-law definition of marriage, Parliament released the draft of a bill that would legalize same-sex marriage throughout Canada (but protect the right of religious officials, though not religious groups, to refuse to perform such marriages). Rather than rebelling against appellate court decisions such as *Halpern* and *EGALE*, the prime minister announced that they would not be appealed.

By this point, Parliament appeared simply to be trying to get ahead of a judicial tidal wave and to avoid the chaos that might be generated in a federal system by a patchwork of competing legal decisions and laws. Beyond this, politicians feared the "anti-constitution" or "anti-human rights" labels that might be applied to them for resisting judicial supremacy. With the assertion of this judicial supremacy, Canadian politicians froze like deer in the headlights and then quickly retreated. Although public opinion had not dramatically shifted, many politicians who had opposed same-sex marriage now believed that time was not on their side and that it was easier to switch than fight.

In 2004, the federal government asked the Supreme Court to render judgment on a number of questions prior to enactment of the same-sex marriage bill. (Such a prospective opinion, known as a "reference case," is permissible under Canadian law.) Essentially, the court was asked whether the federal government (Parliament) had the exclusive power to define who can marry, whether expanding the definition of marriage to include same-sex couples was the constitutionally correct thing to do, and whether religious officials could be protected from being compelled to perform same-sex marriages. In December 2004, the court handed down its decision, which confirmed that Parliament has the power to define marriage, but the court declined to pronounce on whether or how Parliament had to redefine marriage. (By now, the direction of the lower courts and the government

7. *Hendricks v. Quebec*, J.Q. No. 3816 (2002).
8. *Halpern v. Canada*, O.J. No. 2268 (O.C.A., 2003).
9. *Equality for Gays and Lesbians Everywhere (EGALE) v. Canada*, B.C.J. No. 993 (B.C.C.A., 2003).

was clear, so the Supreme Court could display a false modesty.) The court also declined to mark out in detail the exemptions that religious officials or organizations might enjoy in refusing to perform or promote same-sex marriage, instead leaving these matters of solemnization of marriage to the provinces and their respective human rights laws.

In February 2005, Canadian Prime Minister Paul Martin stood in the House of Commons to support Bill C-38, which allows for same-sex marriage. His articulation of the new center of gravity within his Liberal Party is instructive. It represents well the mindset of progressive politicians overawed by naked assertions of judicial power. His remarks had four main thrusts.

First, he lost no opportunity to lionize the Charter, despite the fact that his bill furthered only one judicially mandated and highly tendentious interpretation of that document. This political routine is similar to that of U.S. politicians who claim to support the U.S. Constitution when what they really support is the latest controversial judicial interpretation of it.

Second, he strongly suggested that religious faith, including his own, might well be contrary to the rights of all citizens, thereby denying the possibility that faith and reason on the question of marriage are in harmony; i.e., that the natural law ordains that marriage be a union of a man and a woman.

Third, he indicated his view that rights as defined by courts are absolute, regardless of public opinion (and, in the Canadian case, the overwhelming opinion of Parliament itself—including Martin—only a few years earlier). Yet, as is true of the U.S. Constitution, nothing in the Canadian Constitution suggests that courts ought to enjoy this paramount position, or that they are inerrant. Indeed, language in the Canadian Constitution—the notwithstanding clause—explicitly authorizes legislative override of judicial interpretations or creations of a Charter "right." Martin explicitly rejected the use of the notwithstanding clause as a retrograde contraction of rights established—if only just—by courts. He also perversely claimed that such a rejection reflected the fact that rights are "eternal," not subject to "political whim." This claim to eternity was incoherently mingled with the claim that laws must reflect today's conception of equality, not that of a century or even a mere decade ago.

Fourth, he dismissed the idea that civil union status might be an acceptable substitute for marriage, thus making clear the strategy, also prevalent in the U.S., of relying on incremental steps toward recognition of homosexual couples as ways of moving toward the redefinition of ancient terms like marriage. The eventual object seems to be the wresting of control of the English language itself, à la *Nineteen Eighty-Four*, from the pages of the *Oxford English Dictionary* and turning it over to the whims of governmental—especially judicial—authorities.[10] According to this new moralism masquerading as judicial neutrality, the word "marriage" can no longer retain its age-old and universal connection to natural sexual relationships and the begetting and rearing of children.

Canadian Public Opinion

While it can be argued that Canadian social attitudes are generally more liberal than American attitudes, there has never been a clear or stable majority in Canada in favor of same-sex marriage. Same-sex marriage in Canada is not being imposed as the result of the conscious choice of a liberal electorate. On the contrary, Parliament has rushed to codify a series of judicial decrees, not to mention trying to anticipate the direction of public opinion nudged (or so many thought it would be) by these decrees.

As in the United States, public opinion in Canada varies considerably depending on such factors as region, income, education, and age of respondents. Since polling on the issue commenced in 1996, most polls have showed that Canadian opinion is split, with some polls showing a bare majority in support of same-sex marriage and others showing a bare majority against. However, it is unclear how salient the issue appeared to respon-

10. I have written elsewhere on this highly unusual claim and its implications. See Bradley C. S. Watson, "Love's Language Lost," *Claremont Review of Books*, Vol. 5, No. 2 (Spring 2005).

dents, particularly in the early polls, or the extent to which respondents felt obliged to give the politically correct response.

It is also unclear whether the wording of the polls caused respondents to direct their minds to the full implications of marriage status, as opposed to something paralleling mere civil union status. For example, in a poll taken just before the Supreme Court released its opinion in the same-sex marriage reference case in late 2004, only 39 percent of respondents said that same-sex marriage should be "fully recognized and equal to conventional heterosexual marriage."[11] By contrast, 59 percent opted for civil unions or no change, with more than a quarter saying that any sort of same-sex recognition "is wrong and should never be lawful." Another poll taken in December 2004 showed remarkably similar numbers: 60 percent in favor of applying the term "marriage" only to the union of one man and one woman.[12]

By February 2005, when the issue became truly salient insofar as it was clear that Parliament would push to redefine marriage, one poll showed a striking 67 percent of Canadians in favor of a referendum to decide the question rather than leaving it in the hands of legislators, with 65 percent opposed to applying the term "marriage" to same-sex couples.[13] Respondents split into three roughly equal groups: those in favor of same-sex marriage, those in favor of civil unions, and those opposed to any change.

Dangerous Portents

What we have seen in Canada in a very short period of time is nothing short of a judicial and legislative juggernaut. In the United States, at least in most jurisdictions, legislatures are perhaps less likely to subordinate themselves willingly to the judicial branch, although same-sex partner legislation is becoming increasingly commonplace. As in Canada, there is a certain disingenuousness on the part of some as to the significance of such incremental steps.

Although the pro-federalism position appeals to many American conservatives, allowing states to define marriage as they see fit does not really serve the interests of federalism. Same-sex couples married in one state will invariably seek to have their marriages or the incidents thereof—including child custody orders—enforced in states that do not recognize such relationships. For traditional marriage to survive in most jurisdictions, these states must routinely ignore the court orders of other states (assuming this is constitutionally possible). As Lincoln said of the fundamental moral question of slavery, which, like marriage, also implicated the natural basis of society, "this government cannot endure, permanently, half slave and half free…. It will become all one thing, or all the other." In the unique circumstances of same-sex marriage, the survival and flourishing of both marriage and federalism might well depend on a federal constitutional amendment.[14]

However, in the U.S., as in Canada, the implications of continued judicial activism on same-sex rights extends well beyond the questions of marriage and federalism. Churches are likely to be legally marginalized by ever more judicial decisions that suggest, directly or indirectly, that their core moral beliefs conflict with the state or federal constitutions. This will go well beyond the "high wall of separation" between church and state that the Supreme Court of the United States has erected since the 1940s. Instead, court decisions will continue to suggest, at least implicitly, that the tenets of traditional faith are atavistic anachronisms, and the constitutional gulf between the secular and religious worlds is likely to grow wider.

11. Ipsos-Reid poll, conducted November 19–22, 2004.
12. Nordic Research Group poll, conducted December 11–16, 2004.
13. Compas poll, released February 2, 2005.
14. For further analysis of how a federal constitutional amendment to protect marriage supports and strengthens federalism, see Edwin Meese III and Matthew Spalding, Ph.D. "A Shotgun Amendment," Heritage Foundation *Commentary*, March 10, 2004, at *www.heritage.org/Press/Commentary/ed031004b.cfm*.

Furthermore, in any liberal democratic system, changing the definition of marriage will almost certainly necessitate an expansion of aggressive nondiscrimination laws and actions once the law finally removes the last difference in legal principle between heterosexual and homosexual couplings. For example, in a particularly odious peculiarity of Canadian law, statements opposing or condemning same-sex marriage might be viewed as hate propaganda under a recently passed federal criminal law (Bill C-250).

In addition, provincial and federal human rights codes that now must include sexual orientation and/or same-sex partner status as prohibited grounds of discrimination set up the possibility that religious organizations can be penalized for or prohibited from acting in accordance with their moral understandings of same-sex relationships. In a human rights case in Ontario,[15] a Christian printer who refused to print homosexual literature was held to be in violation of the provincial Human Rights Code. According to a human rights code decision in Saskatchewan,[16] certain Bible passages, such as Leviticus 20:13 or 1 Corinthians 6: 9–10, could be found to promote hatred.

In response to the Supreme Court reference case, one province (Ontario) has proposed a specific exemption to the *Vriend* rule for religious officials and their "sacred places" when it comes to matters related to "solemnization" of marriage. But this partial exemption leaves many areas where religious officials or organizations might, in effect, be forced to provide services (e.g., rental of facilities) or other support to homosexuals. Even with respect to marriage solemnization, legal questions will undoubtedly arise as to whether same-sex marriage is really contrary to the "doctrines, rites, usages or customs" of the religious body, as the proposed legislation requires. In other words, courts—hardly the most sympathetic or knowledgeable bodies on such questions—will have the final say.

Beyond the question of solemnization of marriage, defenses to charges of discrimination or promotion of hate often involve proving that the organization or individual has a reasonable or bona fide religious objection. As a consequence, religious organizations and individuals, in order to protect themselves from lawsuits, increasingly find themselves under complex legal obligations to identify and articulate their core faith beliefs, lest courts or human rights tribunals do this for them. Additionally, as a matter of law—not policy, prudence, or faith—they must be concerned with avoiding singling out protected groups for condemnation and ensuring that they are completely consistent in enforcing policies based on moral norms, lest they be challenged in court. The consequence in Canada is that lawyers have found a wealth of new clients in the form of churches concerned about legal liability.

As the homosexual rights agenda is furthered through the courts, these concerns, which are primarily for freedom of religion and association, are certainly not irrelevant to Americans. In *Boy Scouts v. Dale*,[17] four of nine justices of the U.S. Supreme Court—just one vote shy of a majority—voted to force the Boy Scouts to accept James Dale, an openly homosexual adult, as a uniformed leader. The Scouts had argued that Dale's presence would convey a message opposite to the one that they wished to convey as an organization. By contrast, the dissenting justices—notably Justice David Hackett Souter and Justice John Paul Stevens—made much of what they (the justices) claimed to be the Scouts' core message or philosophy. To these justices, the First Amendment rights of a private organization must give way to the rights of homosexuals.

The Time for Action Is Now

The question for Canadians and Americans is: Who ultimately gets to decide the contours and limits of "rights" when there is serious, substantive disagreement over them? Are courts to be the final arbiters? In a federal system such as Canada's, overriding a patchwork quilt of legal decisions—which

15. *Ontario v. Brillinger*, O.J. No. 2375 (O.S.C., 2002).

16. *Owens v. Saskatchewan*, 228 Sask. R. 148 (Sask. Q.B., 2002).

17. *Boy Scouts v. Dale*, 530 U.S. 640 (2000).

nonetheless pointed in a single direction—would have required a Parliament with the courage and political judgment to invoke the notwithstanding clause. In the United States, it will require a nation with the even greater courage and political judgment to amend the Constitution to define marriage as the union of a man and a woman.

If marriage is severed from its natural, Biblical, and historical/traditional meaning, almost anything is possible. Indeed, in Canada, some have suggested that, on the egalitarian logic legalizing same-sex "marriages," there is no logical basis to prohibit polygamous marriages. What comes next is truly anyone's guess.

There are at least four critical lessons that American observers can take from the Canadian example:

- The single most alarming thing about the Canadian developments is the *speed* at which change—in the judicial and legislative halls, if not in public opinion—has overtaken the traditional definition of marriage. The political and legal "facts on the ground" have been fundamentally altered, and incremental advancements of the same-sex agenda are difficult to reverse.
- Legal logic and judicial assertiveness, if not challenged forcefully and intelligently, quickly take on lives of their own and can overwhelm weak or disorganized opposition.
- The Canadian federal system is similar enough to the American system to give pause to those who argue that same-sex marriage can be contained in certain states. The goal of those arguing for it at the state level is not the protection of federalism, but the eventual universal triumph of same-sex marriage. This, combined with the logic of modern federal systems unduly dominated by judicial power, does not bode well for traditional marriage *or* federalism.
- In the U.S. system, there are obvious constitutional mechanisms that can be used to resist judicial dominance. These range from congressional power to limit the Supreme Court's appellate jurisdiction to impeachment of judges to amendment of the Constitution. In the absence of quick action on one or more of these fronts, the next generation of Americans is likely to have only a distant recollection of what marriage once meant.

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