

INCORPORATING COMMON LAW INTO THE CONSTITUTION OF CANADA: *EGALE v. CANADA* AND THE STATUS OF MARRIAGE[©]

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Recent decisions of the Supreme Court of Canada raise complicated questions about the relationship between the common law and the *Constitution*. In particular, a distinction may now be drawn between constitutional common law concepts that are “incorporated” by the *Constitution* and those that are “free-standing” or “text-emergent.” The author explores the significance of these distinctions by examining the argument, accepted in the recent case of *EGALE v. Canada*, that the reference to marriage in section 91(26) of the *Constitution* serves to incorporate the common law definition of marriage into the *Constitution*, thus preventing federal or provincial legislation from legalizing same-sex marriages.

Les récents arrêts de la Cour Suprême du Canada soulèvent des interrogations complexes sur la relation entre la common law et la *Constitution*. En particulier, on peut dorénavant établir une distinction entre d’une part, les concepts constitutionnels de la common law “incorporés” par la *Constitution* et d’autre part, ceux qui sont “autonomes” ou “se dégagent des textes.” L’auteur scrute la signification de ces distinctions en examinant l’argument, reçu lors de la récente affaire *EGALE contre le Canada*, selon lequel la référence au mariage figurant à l’article 91 (26) de la *Constitution* sert à incorporer à la *Constitution* la définition du mariage que donne la common law, empêchant dès lors la législation fédérale ou provinciale de légaliser les mariages entre personnes du même sexe.

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[A] statute hath no auctoritie to prohibite nor to confourme no ryghte of matrimonie: but as the churche prohibiteth it, or confermeth it. And therefore if hit were prohibited, that no lordes sonne shulde affie an housbande mannes daughter, or suche other and if he dyd thaffiaunce to be voyde, I thynke that statute were voyde.

Christopher St. German, *Doctor and Student* (1531)¹

This statement, written by Christopher St. German about 470 years ago, appears today as a dusty relic of another constitutional era. St. German's assertion that matrimony, or at least a certain conception of it, constitutes a constraint upon Parliament is inconsistent with the doctrine of parliamentary sovereignty developed in England during the seventeenth century and later exported in modified form to Canada and other former British colonies. It would be unusual today for a judge to conclude that the traditional conception of marriage limits federal (and, by implication, provincial) parliamentary authority in Canada. Yet, the recent case of *EGALE Canada Inc. v. Canada*² provides such an example. In *EGALE*, Justice Pitfield of the British Columbia Supreme Court held that the federal Parliament is prohibited from exercising its exclusive authority over marriage, pursuant to subsection 91(26) of the *Constitution Act, 1867*,³ to alter the common law definition of marriage, and, therefore, that Parliament cannot legalize same-sex marriages. Justice Pitfield acknowledged that provincial legislatures have the authority pursuant to subsection 92(13) (property and civil rights) to formalize and recognize same-sex relationships, but, given their lack of authority over the capacity of people to marry, the clear implication of *EGALE* is that neither federal nor provincial legislatures can enact same-sex marriage legislation. Justice Pitfield may be separated from St. German by nearly five hundred years, but he shares with him a common approach to marriage and parliamentary authority—namely, that the one constrains the other.

The *EGALE* judgment can be viewed as part of a larger judicial narrative about legislative authority and common, or unwritten, law. This theme is an old one, but in Canada it has become more pronounced and complicated in recent years.⁴ Judges have confirmed that parliamentary sovereignty in Canada is

¹ Christopher St. German, *Dialogue Between a Doctor of Divinity and a Student in the Laws of England*, ed. by T.F.T. Plucknett & J.L. Barton (London: Selden Society, 1974) at 331 [*Doctor and Student*]. *Doctor and Student* consists of the First Dialogue, first published in 1523, the Second Dialogue, first published in 1530, and thirteen additional chapters, entitled *New Additions*, published in 1531. The above quotation is taken from *New Additions*. See Plucknett & Barton, eds., "Introduction" at xiv-xv.

² [2001] 95 B.C.L.R. (3d) 122 (B.C. S.C.) [*EGALE*].

³ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution*].

⁴ See e.g. Dale Gibson, "Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution" (1999-2000) 11 N.J.C.L. 49; Robin Elliott, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar. Rev. 67; Mark D. Walters, "The

constrained by a number of unwritten principles. Some of these unwritten principles are treated as free-standing norms with sources exterior to the written *Constitution* (e.g., judicial independence and the rule of law), while others are treated as text-emergent norms derived from contextual readings of written instruments (e.g., federalism and respect for minorities).⁵ These two types of unwritten constitutional law may be contrasted with text-incorporated common law principles that have been elevated to constitutional status and given a normative footing within the written *Constitution* (e.g., Aboriginal rights).⁶ The principal difference among these categories is the conceptual distance between the written constitutional texts and the practical legal rules enforced by judges over legislatures: that distance is great for free-standing unwritten norms, less so for text-emergent unwritten norms, and generally small or non-existent for text-incorporated unwritten norms. As the distance between common law and the written constitutional text increases, so does the need for judges to justify, with a particular form of principled argument, decisions that characterize common law as supreme over legislatures. The synthesis of common law and constitutional law in *EGALE* ultimately fails because Justice Pitfield wrongly assumed that there is little or no conceptual distance to cover between the common law definition of marriage and the written *Constitution*, and little or no need to offer a principled justification for the elevation of common law into the *Constitution*.

In this article I will explore the idea of marriage as a common law construct and suggest reasons why this construct cannot be considered as a constitutional norm binding upon both federal and provincial legislatures. Courts in Ontario and Quebec have concluded that Justice Pitfield erred by failing to subject the meaning of marriage in subsection 91(26) to the so-called living-tree doctrine that secures interpretative dynamism in Canadian

Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 U.T.L.J. 91 [Walters, “Common Law Constitution”]; and Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s L.J. 389.

⁵ These labels are developed further in Walters, “Common Law Constitution”, *ibid.* at 97–98, relying upon, *inter alia*, *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 [Provincial Judges], Lamer C.J.C. (judicial independence is “at root an *unwritten* constitutional principle” because its legal “home” is “exterior” to Canada’s written constitutional texts at 63–64) [emphasis in original]; *Reference Re the Secession of Quebec from Canada*, [1998] 2 S.C.R. 217 [Quebec Secession Reference] (unwritten principles of federalism and respect for minorities “emerge” from a contextual “understanding of the constitutional text itself,” and in particular from the “political compromise[s]” that led to specific written constitutional provisions at 240, 261–262).

⁶ See *Mitchell v. Canada (M.N.R.)*, [2001] 1 S.C.R. 911 at 927, McLachlin C.J.C. Aboriginal rights enjoyed a common law status and were then elevated to constitutional status by the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Constitution Act 1982].

constitutional law.⁷ I think they were right in reaching this conclusion; however, the living-tree doctrine will not be the focus of my comments. Instead, I will concentrate on analyzing a proposition that is logically prior to and independent of any consideration of the living-tree doctrine—the mechanical correlation between marriage in the constitutional text and marriage as defined at common law. In Part II, I will argue that how the issue is approached may affect the manner in which the living-tree doctrine is applied, and in Part III, I will argue that a proper consideration of legislative authority and the common law in Canada may lead to the conclusion that resort to the living-tree doctrine may be unnecessary to support Parliament’s jurisdiction over same-sex marriage. First, however, it is necessary to analyze the legal challenges to the heterosexual definition of marriage and, in particular, Justice Pitfield’s reasons for concluding that the common law definition of marriage is an entrenched constitutional norm.

I. *EGALE, HALPERN, AND HENDRICKS*

The issue of same-sex marriage is the subject of legal, political, and moral debate in Canada and other jurisdictions.⁸ Applying the *Canadian Charter of Rights and Freedoms*,⁹ the Supreme Court of Canada has held that at least certain legislative benefits granted to heterosexual spouses must be extended to same-sex couples,¹⁰ and both federal and provincial legislatures have responded accordingly.¹¹ In light of these judgments, it was only a matter of time before the heterosexual definition of marriage itself was challenged under the *Charter*. The definition of marriage as the union of one man and one

⁷ *Halpern v. Canada (A.G.)* (2002), 60 O.R. (3d) 321 at 404–411 (Div. Ct.), LaForme J. [*Halpern*]; *Hendricks c. Québec (Procureur général)*, [2002] J.Q. no 3816 at paras. 111–122 (C.S.) (QL) [*Hendricks*].

⁸ In the Canadian context, see e.g. Bruce MacDougall, “The Celebration of Same-Sex Marriage” (2000–2001) 32 *Ottawa L. Rev.* 235; Nicholas Bala, “Alternatives for Extending Spousal Status in Canada” (2000) 17 *Can. J. Fam. L.* 169; Kathleen A. Lahey, *Are We ‘Persons’ Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 254–261; Martha Bailey, “How Will Canada Respond to Same-Sex Marriages?” (1998) 32 *Creighton L. Rev.* 105; and Alice Woolley, “Excluded by Definition: Same-Sex Couples and the Right to Marry” (1995) 45 *U.T.L.J.* 471. For European developments, see Caroline Forder, “European Models of Domestic Partnership Laws: The Field of Choice” (2000) 17 *Can. J. Fam. L.* 371. For the American context, see e.g. William N. Eskridge, Jr., *The Case For Same-Sex Marriage: From Sexual Liberty To Civilized Commitment* (New York: Free Press, 1996); and L.D. Wardle, “Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage” (1998) 39 *S. Tex. L. Rev.* 735.

⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

¹⁰ *M. v. H.*, [1999] 2 S.C.R. 3; *Egan v. Canada*, [1995] 2 S.C.R. 513.

¹¹ See e.g. *Amendments Because of The Supreme Court of Canada Decision in M. v. H.*, S.O. 1999, c. 6; and *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

woman is a common law rather than statutory rule, at least in the common law provinces.¹² In Quebec, this definition was implicit in the 1866 *Civil Code of Lower Canada*, which, on this point, applied until new civil code provisions were confirmed by federal legislation in 2001; these new provisions explicitly define marriage as heterosexual.¹³ The heterosexual definition is also confirmed by an interpretive provision in the federal *Modernization of Benefits Act*.¹⁴ These two recent federal statutes suggest that Parliament is resistant to the idea of legalizing same-sex marriages.

Same-sex couples therefore resorted to *Charter* litigation in British Columbia, Ontario, and Quebec to establish a right to marry, arguing that the heterosexual definition of marriage found at common law and, in Quebec, in legislation, is a violation of section 15 equality rights under the *Charter* that cannot be justified under section 1. The argument failed in British Columbia in *EGALE*, but it succeeded before the Ontario Divisional Court in *Halpern*,¹⁵ which held the common law definition of marriage invalid, and before the Quebec Superior Court in *Hendricks*,¹⁶ which held the statutory definition invalid. In both *Halpern* and *Hendricks* the judges declined to articulate an alternative definition suspending the effect of their rulings for two years to give Parliament time to develop a non-discriminatory approach to marriage. The federal government has responded to these decisions on two fronts: first, on the legal front, it insists that the heterosexual definition of marriage is not unconstitutional and it is therefore appealing *Halpern* and *Hendricks*; second, on the political front, it has initiated public consultations and parliamentary deliberations on same-sex unions and marriage.¹⁷ In November 2002, the

¹² See e.g. *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.).

¹³ See Arts. 115–185 C.C.L.C. These articles continued to govern the validity of marriage in Quebec by virtue of section 129 of the *Constitution* until 2001 (see note 94 below). The heterosexual definition of marriage was made explicit by Quebec when the Code was amended in 1994. See Art. 365 C.C.Q., which provides: “Marriage may be contracted only between a man and a woman expressing openly their free and enlightened consent.” Insofar as this provision touched upon the federal power over marriage it was ineffective until confirmed by federal legislation, which was enacted in 2001. See *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 5: “Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.”

¹⁴ The *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1 provides: “For greater certainty, the amendments made by this Act do not affect the meaning of the word ‘marriage’, that is, the lawful union of one man and one woman to the exclusion of all others.”

¹⁵ *Supra* note 7.

¹⁶ *Supra* note 7.

¹⁷ On November 12, 2002, the Minister of Justice referred the following question to the House of Commons Standing Committee on Justice and Human Rights: “Given our constitutional framework and the traditional meaning of marriage, should Parliament take measures to recognize same sex unions and, if so, what should they be?” The bases for these deliberations and public consultations are found in Department of

Department of Justice issued a discussion paper that suggests, whatever the ultimate outcome on the legal front, on the political front Parliament could elect to do one of the following: (1) keep the heterosexual definition of marriage but provide for a “civil union or domestic partnership” equivalent to marriage for same-sex couples; (2) legalize same-sex marriages; or (3) eliminate legal references to marriage and, with provincial cooperation, create a neutral registry for all conjugal relationships in its place, leaving marriage as a purely private and religious designation.¹⁸ The discussion paper concedes that the first option would be legally and politically difficult if *Halpern* and *Hendricks* are upheld on appeal, and *EGALE* is reversed: a non-marriage equivalent for same-sex couples might still fail to meet constitutional standards, in which case the paper observes that Parliament could invoke the section 33 notwithstanding clause to immunize it from a *Charter* challenge or resort to the second or third options.¹⁹ The prospects for same-sex marriage in Canada are therefore far from clear, and much depends upon the fate of *EGALE*, *Halpern*, and *Hendricks* at the appellate levels. The proposition articulated in *EGALE*—that the *Constitution* incorporates the common law definition of marriage—was argued by counsel but rejected by the courts in both *Halpern* and *Hendricks*. There is no doubt that it will be argued again at each of the three provincial courts of appeal and potentially at the Supreme Court of Canada. The argument raises troubling questions about the relationship between written and unwritten constitutional law and it is worth considering in detail.

In *EGALE*, Justice Pitfield accepted that *Charter* rights to equality were infringed by the common law definition of marriage but concluded that the infringements were justified pursuant to section 1. This conclusion was, however, an alternative ground for rejecting the claim. The primary ground was his conclusion that the common law definition of marriage had been entrenched by subsection 91(26) of the *Constitution*. Justice Pitfield presented his reasoning in this respect as a traditional federal division-of-powers analysis. He began with the proposition that the entire range of legislative authority in Canada is divided between federal and provincial legislatures by sections 91 and 92 of the *Constitution* and that it therefore “permits one or other, but not both, of Parliament or the provincial legislatures to enact legislation that will publicly sanction and recognize same-sex relationships.”²⁰ He narrowed the potential heads of power under which same-sex relationships might fall to the federal

Justice, *Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper* (Ottawa: Department of Justice, 2002).

¹⁸ *Ibid.* at 21–27.

¹⁹ *Ibid.* at 22–23.

²⁰ *EGALE*, *supra* note 2 at 142.

power over marriage and divorce pursuant to subsection 91(26) and the provincial power over property and civil rights pursuant to subsection 92(13).²¹ Earlier in his judgment he asserted that, in the absence of a statutory definition, marriage is a “relationship defined by common, or judge-made, law,”²² and he adopted the definition articulated by the House of Lords in 1866 that marriage is “the voluntary union for life of one man and one woman, to the exclusion of all others.”²³ The transformation of this common law definition into a constitutional constraint on Parliament came swiftly and without much analysis. “There is nothing to suggest,” stated Justice Pitfield, “that ‘marriage’, in s. 91(26), was used in any context other than its legal context as understood in 1867.” Federal legislation changing the common law definition of marriage would therefore be an unlawful attempt to “unilaterally amend the Constitution.”²⁴ He acknowledged that the *Constitution* is generally regarded as “a living tree capable of growth and expansion” and that its provisions are not to be read in a “narrow and technical” way but rather should be given a “large and liberal” reading allowing “development through usage and convention.”²⁵ However, he refused to apply this living-tree rule of construction to subsection 91(26). “None of the words [in sections 91 and 92] that have been construed in a liberal manner”—such as Banking or Trade and Commerce, for instance—“were legal relationships *created by the common law*,” he said; non-legal words permit a “fluid interpretation,” but words referring to “legal construct[s],” such as marriage, do not.²⁶ Therefore the federal marriage power in subsection 91(26) must retain its original common law boundary, one that excludes same-sex relationships. Justice Pitfield concluded that same-sex relationships are “a matter of civil rights” under provincial jurisdiction pursuant to subsection 92(13) and that a provincial legislature could provide for the “formalization and recognition” of same-sex relationships “should it wish to do so.”²⁷

Although the analysis of constitutional authority over same-sex relationships in *EGALE* is presented as a traditional division-of-powers analysis, it is not traditional. Justice Pitfield is clear about two things: Parliament cannot legalize same-sex *marriages*, but provincial legislatures may formalize and

²¹ *Ibid.* at 142–143.

²² *Ibid.* at 138.

²³ *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 at 130 (H.L.).

²⁴ *EGALE*, *supra* note 2 at 143.

²⁵ *Edwards v. Canada (A.G.)*, [1930] A.C. 124 at 136 (P.C.), Sankey L.C.

²⁶ *EGALE*, *supra* note 2 at 144–145 [emphasis added].

²⁷ *Ibid.* at 147.

recognize same-sex *relationships*. That leaves the obvious question: Can provincial legislatures select marriage as a means of formalizing and recognizing same-sex relationships? Unless they can, the reasoning in *EGALE* means that neither federal nor provincial legislatures may legalize same-sex marriages. It must therefore be concluded that the constitutionalization of the common law definition of marriage results in something that, on the traditional view, is not supposed to exist: a “gap” or “hiatus” in legislative power between sections 91 and 92.²⁸ Courts have traditionally assumed that the sole purpose of the heads of power listed in sections 91 and 92 is to divide otherwise plenary legislative power between two levels of government, and, therefore, within the internal confines of those sections, the only limit to the power conferred by section 91 is section 92 and vice versa.²⁹ The two sections must be read together to ensure a continuum of legislative power,³⁰ and attempts to limit legislative authority by isolated consideration of the attributes of a particular head of power are “meaningless or at least defective.”³¹ Using the common law concept of marriage as the limit to federal legislative competence over marriage is therefore defective—unless it can be said that the common law limit is necessary to prevent federal incursion into a provincial sphere of legislative competence.

What sphere of provincial legislative authority would be infringed by a federal law legalizing same-sex marriage? Is there a provincial same-sex marriage power—a provincial power to either legalize or prohibit same-sex marriages? Justice Pitfield did not suggest that there was, and for good reason. The text of the *Constitution* makes marriage a federal matter (section 91(26)) and solemnization of marriage a provincial matter (section 92(12))—the former covering capacity to marry, the latter the procedures necessary to marry³²—and it cannot be argued that a provincial power over the capacity of same-sex couples to marry exists. Provinces may formalize and recognize same-sex relationships, but they may not select marriage as a means of doing so, nor may they prohibit same-sex marriages.

²⁸ *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91 at 114–115 (P.C.), Haldane V.

²⁹ *Bank of Toronto v. Lambe*, [1887] 12 A.C. 575 at 588 (P.C.), Hobhouse L.

³⁰ *Paquet v. Pilot Corporation*, [1920] A.C. 1029 at 1031 (P.C.), Haldane V.; *Reference Re Waters and Water-Powers*, [1929] S.C.R. 200 at 217, Duff J.; and *Alberta (A.G.) v. Canada (A.G.)*, [1939] A.C. 117 at 129–130 (P.C.), Maugham L.C.

³¹ Albert S. Abel, “The Neglected Logic of 91 and 92” (1969) 19 U.T.L.J. 487 at 499.

³² Leslie Katz, “The Scope of the Federal Legislative Authority in Relation to Marriage” (1975) 7 Ottawa L. Rev. 384.

Legislative provisions in Alberta³³ and Quebec³⁴ that purport to define marriage as heterosexual are, at best, declaratory of the (traditional) common law and civil law definitions, respectively, and cannot, as a matter of constitutional law, prohibit the federal Parliament from enacting legislation legalizing same-sex marriages (a point that counsel for Quebec acknowledged in argument in *Hendricks* and that, at any rate, became moot once Quebec's legislation was confirmed by federal legislation).³⁵ Indeed, because the common law and civil code rules governing capacity to marry fall within federal legislative competence, these provincial statutes could not even prevent the judicial reinterpretation of the common law or civil code rules to permit same-sex marriage. Furthermore, if courts must reinterpret the common law and civil code definitions of marriage to include same-sex unions in order to secure *Charter* values, then such *Charter*-driven reinterpretations cannot be precluded by provincial attempts to immunize the heterosexual definition of marriage from *Charter* review by use of the section 33 notwithstanding clause (as Alberta's *Marriage Act* purports to do).³⁶

Given the federal power over capacity to marry the question remains: What provincial power would be infringed by a federal same-sex marriage law? The essence of Justice Pitfield's argument is that such a law would infringe the exclusive provincial power under subsection 92(13) to formalize and recognize same-sex relationships by means other than marriage. He portrayed same-sex relationships as a zero-sum game, with one or the other but not both of Parliament and provincial legislatures having jurisdiction to sanction and recognize same-sex relationships. Once he found same-sex relationships to be a matter of civil rights under provincial jurisdiction, it followed (according to the zero-sum premise) that a federal same-sex marriage law would be *ultra vires*. This reasoning has at least the look of a traditional division-of-powers

³³ *Marriage Act*, R.S.A. 2000, c. M-5, s. 1(c), defines marriage as meaning "a marriage between a man and a woman."

³⁴ Art. 365 C.C.Q. limits marriage to opposite-sex couples (see note 13 above). For judicial doubts regarding the constitutionality of this provision, see *Droit de la famille-2161*, [1995] R.D.F. 237 at 239 (C.S.), Senecal J.; *M.C. v. M.M.*, [2001] R.J.Q. 518 at 526 (C.S.), Guthrie J. For confirmatory federal legislation see *supra* note 13.

³⁵ *Broddy v. Alberta* (1982), [1983] 41 A.R. 255 (C.A.) upheld the validity of an Alberta statute on the capacity of relatives through adoption to marry on the basis that it related to adoption, a provincial matter. The preamble to Alberta's *Marriage Act*, *supra* note 33, purports to link the heterosexual definition of marriage to a provincial head of power in a similar manner, stating that the definition is "fundamental in considering the solemnization of marriage," which is a provincial matter under s. 92(12)). However, if the solemnization power permits provinces to define capacity to marry, the federal power over marriage would be reduced to nothing. For Quebec's position in *Hendricks*, see *supra* note 7 at para. 123.

³⁶ Section 1.1(a) of Alberta's *Marriage Act*, *supra* note 33, provides that the Act "operates notwithstanding ... provisions of sections 2 and 7 to 15 of the *Canadian Charter of Rights and Freedoms*," a provision made pursuant to s. 33 of the *Charter*.

analysis (although it still leaves the above-noted gap over same-sex *marriage*); however, it played at best a secondary role in *EGALE*. The stated reason given by Justice Pitfield for the conclusion that a federal same-sex marriage law would be unconstitutional is that it would violate the *common law* definition of marriage, a limitation on subsection 91(26) that he identified without any reference to competing provincial powers.

In the end, it must be said that the language in *EGALE* of the federal-provincial division of powers obscures what amounts to a very different sort of constitutional reasoning, one in which a substantive rather than a division-of-powers limitation is imposed on legislative authority. The common law limit to the federal marriage power is not required to prevent federal infringement of an exclusive field of provincial legislative authority; rather, it stops federal legislation even when no provincial power would be infringed. Justice Pitfield's zero-sum premise—that one or the other, but not both, levels of legislature may formalize and sanction same-sex relationships—is highly suspect. Consider, for example, constitutional authority over *opposite-sex* relationships. Provinces have the authority pursuant to subsection 92(13) to legislate on issues of property rights,³⁷ child adoption, custody, and welfare³⁸ as they relate to married spouses, and they have the authority to recognize and formalize non-marital *opposite-sex* conjugal relationships and to extend to those relationships provincial legislation on married spouses relating to property and children.³⁹ If the federal power over opposite-sex marriages can co-exist with this provincial power to recognize and sanction non-marital opposite-sex relationships for the purposes of regulating matters of provincial jurisdiction, there is no reason to think that a federal power to legalize same-sex marriages would interfere with the provincial authority to recognize and sanction same-sex relationships for similar purposes. Nova Scotia legislation defines “common-law partner” in a gender-neutral manner and permits both opposite-sex and same-sex couples to make “domestic-partner declarations” to claim certain property rights enjoyed by married spouses.⁴⁰ The authority of the province to formalize and recognize such non-marital opposite-sex and same-sex relationships in this manner for the purposes of regulating property law issues that fall within provincial legislative

³⁷ *K. v. K.* (1975), 53 D.L.R. (3d) 290 at 298 (Man. C.A.); *Zacks v. Zacks*, [1973] S.C.R. 891; and *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

³⁸ *Reference Re Adoption Act*, [1938] S.C.R. 398; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Reference Re B.C. Family Relations Act*, [1982] 1 S.C.R. 62.

³⁹ Indeed, the absence of provincial recognition of opposite-sex relationships for the purpose of extending benefits given to married spouses is, in some cases, a violation of section 15 of the *Charter*. See *Miron v. Trudel*, [1995] 2 S.C.R. 418.

⁴⁰ *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, S.N.S. 2000, c. 29.

competence is not inconsistent with the right of opposite-sex couples in Nova Scotia to marry if they have the capacity to do so under federal laws relating to marriage. Nor would it be inconsistent with the right of same-sex couples in Nova Scotia to marry, if such a right existed. In short, while there is clearly a provincial authority to regulate certain aspects of same-sex relationships, there is no area of exclusive provincial authority that would be infringed by a federal same-sex marriage law.

The effect of *EGALE*, then, is to recognize the common law definition of marriage not as a mere dividing line between provincial and federal powers but as a substantive, constitutionally entrenched principle that limits federal and provincial legislative authority in Canada absolutely. It is for this reason that the case presents an opportunity to explore some of the difficult theoretical issues surrounding the relationship between common, or unwritten, law and supreme constitutional law in Canada, particularly the question of how mere common law principles that are normally subject to parliamentary sovereignty come to occupy a position within the *Constitution* that defines and limits parliamentary sovereignty at both federal and provincial levels. In exploring this issue, the internal divisions between federal and provincial legislatures are not important; the real question is how unwritten, or common law, principles obtain a status within the constitutional hierarchy such that they control or limit all sources of legislative authority in Canada.

As noted at the outset, courts now acknowledge three general types of common, or unwritten, laws with supreme constitutional status that are therefore binding upon both federal and provincial legislatures: free-standing unwritten norms, text-emergent unwritten norms, and text-incorporated unwritten norms.⁴¹ The first two types are genuinely unwritten, in the sense that their normative force as supreme laws cannot reasonably be ascribed to the written parts of the *Constitution*; the third type, however, contains norms that, having been incorporated into the written *Constitution*, obtain their constitutional force directly from the written *Constitution*. Given this difference, there will be less need for judges to justify the identification of text-incorporated unwritten norms as supreme constitutional laws than is the case with free-standing or text-emergent unwritten norms. In theory, at least, the constitutional status of text-incorporated norms derives not from judicial justification but from a constitutional settlement reached and justified by the political actors who framed the written constitutional text. The same cannot be said of free-standing and text-emergent unwritten norms, so convincing and principled independent justifications for their status as supreme constitutional laws must be given by judges, justifications that will usually involve overt integration of legal analyses

⁴¹ See notes 5 and 6 above.

with moral, political, and historical analyses.⁴²

Even in relation to text-incorporated common law norms, however, there will likely be at least some conceptual distance between the common law rule being incorporated and the written provision that is purported to achieve the incorporation. Similarly, there will be some need for a principled justification for the conclusion that the written text actually serves to incorporate the common law norm. In fact, there are very few examples of written constitutional provisions that expressly incorporate common law or unwritten norms. The language of section 35(1) of the *Constitution Act, 1982*—“existing aboriginal and treaty rights are hereby recognized and affirmed”—is perhaps as direct as the *Constitution* gets in this respect, yet courts have still rejected the suggestion that Aboriginal rights are restricted to the common law as it stood in 1982.⁴³ The language of subsection 91(26) is far less direct than that of section 35(1). It does not explicitly incorporate the common law definition of marriage as a limit on federal legislative sovereignty; to the contrary, in the words of William Lederman, it seems to allocate legislative power over a “class” of “actual *and potential* laws.”⁴⁴ Of course, this power has limits. It is restricted by competing heads of provincial jurisdiction listed in section 92, by other parts of the written *Constitution* (e.g., the *Charter*), and by unwritten principles that have been held to form part of the supreme *Constitution*. It is not at all clear from the written text, however, that in addition to these limitations, this power, and by implication provincial legislative authority as well, is limited by an *a priori* conception of what marriage is or what marriage could legitimately be. Nor is it clear that even if some *a priori* conception of marriage limits federal (and by implication provincial) legislative authority that conception is the narrow common law definition of marriage or a broader gender-neutral definition. The use of any such conception, narrow or broad, that is not dictated by the need to prevent federal incursion into provincial legislative territory will lead to a doctrinally awkward gap in legislative power between sections 91 and 92. Hence, the justification for adopting any such conception of marriage (narrow or broad) as a limitation on the federal marriage power would have to explain why a deviation from the traditional approach to legislative power under sections 91 and 92 is required. Such deviations may be justified. It has been held, for example, that sections 91 and 92 do not exhaust all legislative power in Canada but must be read in light of unwritten constitutional principles securing residual spheres of Aboriginal

⁴² See generally Walters, “Common Law Constitution”, *supra* note 4.

⁴³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1106, Dickson C.J.C. and LaForest J.; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1106–1107, Lamer C.J.C.

⁴⁴ William R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981) at 229 [emphasis added].

self-government.⁴⁵ Assuming that this first point can be satisfactorily addressed and the conclusion is that legislative sovereignty in Canada is restricted absolutely by some *a priori* conception of marriage, the case must still be made for saying that it is the common law definition rather than some other definition that represents the constitutionally entrenched definition of marriage. If the common law definition of marriage is treated as incorporated by the mere use of the word “marriage” in subsection 91(26), the distance between this common law definition and the written language of subsection 91(26) suggests the need for judicial justification on the above two points that approximates the analytical rigour that accompanies the judicial identification of unwritten constitutional norms of a free-standing or text-emergent sort. It needs a demonstration that inclusion of the common law of marriage within Canada’s supreme constitutional law is necessary for the structural coherence of the *Constitution* as a whole in light of the moral, political, and social values that it aspires to embrace and protect.

In *EGALE* no such rigorous principled justification for incorporation was given. The only justification Justice Pitfield gave was what may be called a modified original-intent argument. He acknowledged that the meanings of constitutional words and phrases evolve under the living-tree doctrine, but only non-legal words and phrases; constitutional provisions that refer to legal constructs, including those created by the common law, must retain the original meanings intended by the framers of the *Constitution*. Justice Pitfield did not refer to historical evidence to identify the framers’ intentions about marriage but simply observed that “[t]here is nothing to suggest” that marriage was not used in 1867 in its common law sense. Elsewhere in his judgment he asserted that marriage had a deep social, religious, and moral meaning in 1867 and was considered by the framers to be of such “pressing and substantial national importance” as to warrant its inclusion within federal authority.⁴⁶ Under his own modified original-intent theory, however, the conclusion that the framers thought marriage was important would not, on its own, immunize the constitutional reference to marriage from the living-tree rule of construction. To escape the living-tree rule, it was necessary (according to his theory) to demonstrate that the word or phrase the framers had selected was a reference to a legal construct. Yet Justice Pitfield offered no argument in relation to this particular point: the equation between common law and constitutional law references to marriage was automatic, mechanical, and immediate. He did not acknowledge any conceptual distance between common law and written text that needed explaining: the use of a supposedly technical legal term by the

⁴⁵ *Campbell v. British Columbia (A.G.)* (2000), 189 D.L.R. (4th) 333 (B.C. S.C.) [*Campbell*].

⁴⁶ *EGALE*, *supra* note 2 at 160.

written text was presumed to be a reference to that technical legal term.

Justice Pitfield's approach to the *Constitution*, the common law, and the living-tree doctrine is novel and will not likely survive on appeal; it was rejected in both *Halpern* and *Hendricks*. Justice Pitfield must be wrong to conclude that marriage is "the only word in either s. 91 or 92 [referring to a legal] construct."⁴⁷ If his approach to marriage were applied consistently, then federal and provincial legislatures would be prohibited from altering the 1867 definitions of bankruptcy, insolvency, patents, copyrights, naturalization, and aliens. Also, the application of a different rule of construction to legal and non-legal words and phrases in the *Constitution* would threaten interpretative coherence. Once a dynamic living-tree principle is accepted as a general rule of constitutional construction,⁴⁸ it follows that the coherent growth of the *Constitution* requires its consistent application to all parts of the document; to exempt some words and phrases, but not others, from at least the possibility of organic development over time may result in a deformed and unhealthy constitutional tree.

In the following analysis I will assume that the failure to apply the living-tree doctrine was an error. I will argue that in addition to this error, there is a general assumption in *EGALE* about the relationship between constitutional law and common law that is problematic and requires exposure and distinct analysis, and that by focusing on the living-tree issue alone this underlying problem may be obscured. It is important to observe that the approach in *EGALE* to the relationship between common law and constitutional law is based on two distinct propositions. The first proposition is that written constitutional references to concepts created by the common law must be taken as entrenching the common law at the time the *Constitution* was framed. The second proposition is that the living-tree rule of construction that generally applies to the *Constitution* does not apply to these common law constitutional words and phrases. Even if we assume that the second proposition is false (as we must) we are left with the first proposition, and it raises fundamental concerns about the theoretical relationship between common law and constitutional law in Canada that I wish to explore. In the next two parts I will therefore focus upon the first proposition; I will argue in Part II that the equation of constitutional words with pre-existing legal constructs may in many cases be inappropriate and may

⁴⁷ *Ibid.* at 145.

⁴⁸ For a discussion regarding the general acceptance of the rule, see Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87 at 97–98. For recent judicial support for the living-tree doctrine see *Quebec Secession Reference*, *supra* note 5 at 248; *Reference Re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 at 209–210; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 at 404; and *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 618.

distort the manner in which the living-tree rule of construction operates. I will argue that the treatment of marriage as a legal construct is a good example of this potential danger. In Part III, I will argue that a proper consideration of common law and legislative authority in Canadian constitutional history may render the application of the living-tree doctrine unnecessary in relation to certain areas of legislative authority that have been historically constrained by common law notions—and that, again, the example of marriage illustrates this point.

II. MARRIAGE AS A “LEGAL CONSTRUCT”

The argument in *EGALE* that marriage is a relationship “created by the common law”⁴⁹ and that this common law meaning was entrenched by the constitutional reference to marriage is premised on a particular jurisprudential vision about the nature of law and what it means to say that an idea, principle, or norm has a common law status. Underlying *EGALE* is a form of legal positivism according to which social, religious, or moral norms are legally irrelevant until acknowledged as law by a legislature or court; once acknowledged by positive law, that law exists as such independently of whatever social, religious, or moral context it might have. From this perspective, “marriage” can be characterized as an empirical artifact created by common law judges and fixed by them with a certain meaning. When another piece of positive law, the *Constitution*, uses the same word, there is, from this positivist perspective, no other legally relevant concept to which that word could refer except this detached common law artifact.

Before this reasoning can be assessed, it is necessary to explore the senses in which an idea like marriage can be said to enjoy a common law status. It is beyond the scope of this article to develop a full jurisprudential analysis of this issue, so I will limit the inquiry to a consideration of how common law judges characterized marriage historically; after all, Justice Pitfield’s analysis hinges on the assumption that judges and legislators in 1867 would have shared the positivist approach to marriage that he developed. I will begin with a discussion of marriage at English common law and then consider the law of matrimony in the colonial context with particular emphasis on pre-confederation Canadian law.

A. *Marriage and English Common Law*

The relationship of “*husband and wife*,” wrote Sir William Blackstone,

⁴⁹ *EGALE*, *supra* note 2 at 145.

is “founded in nature” though modified by “civil society.”⁵⁰ Thus, the prohibitions on polygamy and divorce—two important parts of the definition of marriage as the union of one man and one woman for life—were described by Blackstone as derived from “natural law,” “canon law,” and “divine revealed law.”⁵¹ English law turned to the law of nature and canon law—which were both closely associated with the continental civilian tradition—because it had no law of marriage of its own.⁵² In England, matrimonial issues fell within the jurisdiction of ecclesiastical courts.⁵³ “[T]hose Courts alone,” observed Lord Campbell, “took direct cognisance of the validity of marriage; and when the question arose incidentally before the common-law Judges”—as it often did in actions for dower or other property rights—“they referred themselves to the Bishop as the ecclesiastical Judge, and were governed by the certificate, which he returned.”⁵⁴ These “Courts Christian” remained under the supervision of the See of Rome until 1533 and did not lose their jurisdiction over matrimonial causes until 1857.⁵⁵ The ecclesiastical courts applied not common law but the canon law of Rome, or *corpus iuris canonici*, which originated in papal decrees, the earliest of which dated from the twelfth century.⁵⁶

The failure by papal delegate judges to dissolve the marriage of Henry VIII and Catherine of Aragon was one of the factors leading to England’s break with Rome in 1533–1534,⁵⁷ a break confirmed by the first statute of Elizabeth I’s reign, the *Act of Supremacy, 1558*.⁵⁸ After the Reformation, the canon law of marriage, or at least those parts of it not inconsistent with the Reformation or repealed by statute, continued to be applied by English ecclesiastical courts,⁵⁹

⁵⁰ Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765) at 410 [emphasis in original].

⁵¹ *Ibid.* at 423, 428–29.

⁵² Frederic William Maitland, *Roman Canon Law in the Church of England* (London: Methuen & Co., 1898) at 39–40.

⁵³ *Collins v. Jessot* (1704), 6 Mod. 155 at 157 (K.B.); *Jesson v. Collins* (1704), 2 Salk. 437 (K.B.).

⁵⁴ *R. v. Millis* (1843), 10 Cl. & Finn. 534 at 758 (H.L.) [*Millis*].

⁵⁵ R.H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1974) at 3; William S. Holdsworth, *A History of English Law*, vol. 4 (London: Methuen & Co., 1924) at 235–236.

⁵⁶ Maitland, *supra* note 52 at 2; Blackstone, *supra* note 50 at 82.

⁵⁷ Appeals to Rome were prohibited and the King’s supremacy over spiritual matters was confirmed by the *Act in Restraint of Appeals, 1533*, 24 Hen. VIII, c. 12 and the *Act of Supremacy, 1534*, 26 Hen. VIII, c. 1.

⁵⁸ *An Act Restoring to the Crown the Ancient Jurisdiction over the State Ecclesiastical and Spiritual, 1558-1559*, 1 Eliz. I, c. 1.

⁵⁹ *Proctor v. Proctor* (1819), 2 Hag. Con. 292 at 300–301 [*Proctor*]. In general see Holdsworth, *supra* note 55 at 272.

although a new theoretical foundation evolved to explain its place within English law. By tracing through this evolution, the precise sense in which marriage was considered a common law construct is revealed.

In *Doctor and Student*, written just before the Reformation, St. German identified canon law and common law as distinct sources of law.⁶⁰ His purpose was to offer a restrictive interpretation of the scope of “the lawe canon” and “the popes prerogatyue,”⁶¹ but he did not question the prevailing assumption, that in relation to spiritual matters, including the basic definition of marriage, the church law of Rome did prevail—even to the point of rendering conflicting Acts of Parliament “voyde.”⁶² The post-Reformation legal discourse was markedly different. In his report of *Caudrey’s Case*,⁶³ Coke stated that the *Act of Supremacy, 1558* did not introduce “a new law” but was “declaratory” of the “ancient laws of the realm” by which the Crown had always had “plenary and entire power” over “all causes ecclesiastical or temporal.”⁶⁴ However, Coke maintained the clear distinction between temporal and spiritual laws. The “temporal laws of England” governed “temporal causes,” but “in causes ecclesiastical and spiritual . . . the conusance whereof belong not to the common laws of England . . . the same are to be determined and decided by ecclesiastical judges, according to the King’s ecclesiastical laws of this realm.”⁶⁵ In a long list of such causes that “belong not to the common laws,” he included “rights of matrimony.”⁶⁶ Thus, after the Reformation, the *corpus iuris canonici* was given an indigenous legal root fitting for England’s independence from Rome: its force in England derived not from papal authority but from local “consent and custom.”⁶⁷ It remained a discrete body of law, separate substantively and institutionally from the common law and the common law courts.

This general explanation was adopted and refined by Sir Matthew Hale. He divided English law into *lex non scripta*, or laws derived from immemorial usage and custom, and *lex scripta*, or laws derived from legislative authority.⁶⁸

⁶⁰ St. German, *supra* note 1 at 31–71.

⁶¹ *Ibid.* at 238ff.

⁶² *Ibid.* at 246ff. See also St. German, *ibid.* at 315–340. Regarding parliament and marriage, see *supra* note 1.

⁶³ (1596), 5 Co. Rep. 1a (K.B.).

⁶⁴ *Ibid.* at 8a–8b.

⁶⁵ *Ibid.* at 8b–9a.

⁶⁶ *Ibid.* at 9a. Also, see *ibid.* at 40a (ecclesiastical causes are “exempted from the jurisdiction of the common law”).

⁶⁷ *Ibid.* at 9a.

⁶⁸ Sir Matthew Hale, *The History of the Common Law of England*, 3d ed. (London: T. Waller, 1739) at 1–2.

He then divided *lex non scripta* into two categories: the “Common Law in its usual and proper Acceptation,” or general and local customs acknowledged in common law courts, and “particular Laws,” or the laws applied in admiralty, military, and church courts.⁶⁹ In Hale’s scheme, canon law was *lex non scripta* because the various papal decrees were part of English law only by virtue of “immemorial Usage and Custom.”⁷⁰ English law never acknowledged any “Foreign” legislative authority;⁷¹ rather, canon laws had been “transposed . . . into the Common and Municipal Laws”⁷² through local usage. As such, canon laws were “*Leges sub graviore Lege*” and the “Common Laws” retained a “Superintendency” over them.⁷³ For Hale, canon and common law were clearly distinct, but his analysis indicates that the distinction was beginning to erode in subtle ways.

To Blackstone, this process of erosion was even more explicit. He repeated Hale’s analysis—that the *corpus iuris canonici* derived its authority in England from immemorial usage and custom and was therefore part of England’s *lex non scripta*—but he described this body of unwritten law, of which canon law was a part, as the “common law, or *lex non scripta*” of the realm.⁷⁴ In other words, Blackstone used common law as a synonym for Hale’s *lex non scripta*; however, in this context he meant it in an umbrella sense of common law that remained distinct from the discrete bodies of law it covered, including canon law and the common law “in its stricter and more usual signification.”⁷⁵

By an important shift in the use of the term “common law,” Hale and Blackstone were able to assert something that Coke in *Caudrey’s Case* did not—that ecclesiastical law (and with it the law of marriage) was both a part of and separate from the English common law.⁷⁶ Nineteenth-century English judges accepted this theoretical explanation. Canon law obtained status in England not as a “foreign” law, said Lord Blackburn in 1881, for although it was not part of the common law in the “narrow sense,” it could, like equity, be

⁶⁹ *Ibid.* at 24.

⁷⁰ *Ibid.* at 26–28.

⁷¹ *Ibid.* at 27.

⁷² *Ibid.* at 28.

⁷³ *Ibid.* at 43.

⁷⁴ Blackstone, *supra* note 50 at 67, 80, and 82.

⁷⁵ *Ibid.* at 67.

⁷⁶ The theory was no doubt implicit in Coke’s report: he asserted that “by the ancient common laws of this realm . . . the King is the only supreme governor, as well over ecclesiastical persons, and in ecclesiastical causes, as temporal,” thus suggesting an umbrella sense of common law: See *Caudrey’s Case*, *supra* note 63 at 40a.

regarded as part of the common law in its “wider sense.”⁷⁷ Indeed, the emergence of this umbrella sense of common law, which embraced the customary adoption of the *corpus iuris canonici* in England, reflects the shift to a modern conception of common law as any source of law acknowledged by judges but not derived from legislation. The inclusion of marriage law under the common law umbrella did not mean, however, that judges ceased to view marriage as derived from the cultural, moral, and religious traditions of Europe. “[A]ll Christian Europe being one great moral territory,” said Lord Brougham in 1844, “[t]he presumption is that the English law touching marriage is the same with the general law of Catholic Europe.”⁷⁸ “[T]he whole of our matrimonial law” in “matter and form,” said Sir William Scott in 1819, is “constructed upon” and has as “its entire root ... the ancient canon law of Europe.”⁷⁹

As mentioned, the English common law of marriage acknowledged both ecclesiastical and natural law sources. Indeed, it may be said that a marriage law with continental origins was palatable to English judges in part because its civil and canon law manifestations were regarded as mere reflections of a natural law common to all nations. Marriage is “not merely either a civil or religious contract,” ruled Scott in 1795, but “a contract according to the law of nature, antecedent to civil institution” arising “wherever two persons of different sexes engage ... to live together ... for the procreation and bringing up of children.”⁸⁰ In *Dalrymple v. Dalrymple*,⁸¹ Scott stated that marriage is “a contract of natural law” between “two individuals of different sexes,” and that the institution of marriage “is the parent, not the child, of civil society”; civil and religious sanctions may have been “superadded” to this institution, but its essence was determined by the law of nature.⁸² Indeed, the classical natural law tradition that informed English and other European laws characterized matrimony as the moral precept upon which civil and political society depended. According to Samuel von Pufendorf, John Locke, and Jean Jacques Burlamaqui—who were influential for common law lawyers like

⁷⁷ *Mackonochie v. Lord Penzance* (1881), 6 A.C. 424 at 446, Blackburn L.J. Similarly, Sir John Nicholls stated in *Wilson v. M'Math* (1819), 3 Phill. Ecc. R. 67 at 79 (Peculiars Ct. Canterbury): “the whole canon law [now] rests for its authority in this country upon received usage”; “it is not binding here proprio vigore” but is “part of the common law of the land, as a part of the *lex non scripta*.”

⁷⁸ *Millis*, *supra* note 54 at 691, 722.

⁷⁹ *Proctor*, *supra* note 59 at 296, 301.

⁸⁰ *Lindo v. Belisario* (1795), 1 Hag. Con. 216 at 230–231.

⁸¹ (1811), 2 Hag. Con. 54.

⁸² *Ibid.* at 63ff. See also *Millis* *supra* note 54 (“marriage ... [is] a civil contract flowing from the natural law” at 806 and “the institution of marriage is older than any law; it may be said to exist by the common law of all mankind” at 811).

Blackstone—marriage was originally a pre-political, or natural, state in which men and women united for the purpose of having and raising children. It was commonly assumed by these theorists that husbands had natural authority over wives and that, from the combination of several families together under a common *paterfamilias*, the first political societies emerged.⁸³ “Matrimony,” said Pufendorf, is the “source of families and furnishes, as it were, the material for the establishment of governments and states”;⁸⁴ marriage, he concluded, was the basis of “organized social order.”⁸⁵ Notwithstanding this theoretical-historical link to public institutions, marriage was regarded by both Roman law and English law as a quintessential “private law” matter.⁸⁶

The two basic features of this classical natural law account of matrimony—procreation and authority of husbands over wives and children—were premised on the assumption that marriage was heterosexual. If homosexuality was addressed at all by such writers, it was only to condemn it as a violation of natural law.⁸⁷ It should be noted, however, that the natural law account of marriage and sexual relations was academic and theoretical and may not have been wholly reflective of practical realities. As Justice Blair observed in *Halpern*, scholars have recently argued that same-sex relationships occasionally received various forms of official sanction and were acknowledged as a form of marriage, at least in ancient and, to a lesser extent, early medieval times.⁸⁸

B. *Marriage and Empire: Accommodating Legal, Cultural, and Religious Pluralism*

The common law references to natural law discussed above were, in one sense, misleading. Natural law was viewed by English lawyers as fixed,

⁸³ Samuel von Pufendorf, *De Jure Naturae et Gentium Libri Octo*, trans. by Charles Henry Oldfather & William Abbott Oldfather (Oxford: Clarendon Press, 1934) at 839–840; John Locke, “An Essay Concerning the True Origin, Extent, and End of Civil Government” in Peter Laslett, ed., *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) 285 at 337–40, 354–55; Jean Jacques Burlamaqui, *The Principles of Natural Law In Which The True Systems of Morality and Civil Government Are Established*, trans. by Thomas Nugent (London: J. Nourse, 1748) at 40–41.

⁸⁴ Pufendorf, *ibid.*

⁸⁵ *Ibid.* at 846.

⁸⁶ *The Institutes of Justinian*, trans. by T.C. Sanders (London: Longmans, Green & Co., 1874) at lib. i, tit. i, para. 4; Blackstone, *supra* note 50 at 410.

⁸⁷ See e.g. Pufendorf, *supra* note 83 at 842.

⁸⁸ Eskridge, *supra* note 8 at 17–42; John Boswell, *Same-Sex Unions in Pre-Modern Europe* (New York: Villard Books, 1994) at 218–268. See *Halpern*, *supra* note 7 at 345–349.

immutable, and universally authoritative across all human communities.⁸⁹ However, English judges of the nineteenth century did not characterize the definition of marriage in this way; to the contrary, they expressly acknowledged that various cultures and religions defined marriage differently and that the common law in its wider sense could accommodate these other conceptions of marriage. “If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each,” observed Lord Brougham in 1834, then, in the course of applying the *lex loci contractus* when considering matrimonial issues arising in other nations, it was necessary for judges to acknowledge these different conceptions of marriage.⁹⁰ Marriage may be “one and the same thing substantially all the Christian world over,” he continued, but “it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives.”⁹¹ The departure from the common law definition of marriage by the acknowledgment of polygamy was perhaps most significant in the context of British India, in which Hindu and Muslim marriage laws, including rules permitting polygamy, were regularly recognized and applied by local British courts as well as the Judicial Committee of the Privy Council.⁹² Marriage in many non-Christian parts of the British Empire was regarded, to use

⁸⁹ Blackstone, *supra* note 50 at 41.

⁹⁰ *Warrender v. Warrender* (1834), 9 Bli. N.S. 89 at 112–113 (H.L.) [*Warrender*].

⁹¹ *Ibid.*

⁹² The continuity of Hindu and Muslim laws in British India at common law was assumed, although in some cases these laws were also acknowledged in legislation: *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 305 at 323–336. In *Ardaseer Cursetjee v. Perozeboye* (1856), 10 Moo. P.C. 375 at 413–414 [*Ardaseer*], it was held that the Supreme Court at Bombay, which was granted jurisdiction to apply “Ecclesiastical law as the same is now used and exercised in the Diocese of London,” did not have jurisdiction to entertain “a suit for restitution of conjugal rights” in which “the parties are Parsees, professing the religion of Zoroaster.” The views of the dissenting judge in the court below that “such a jurisdiction seems wholly inapplicable to Asiatics, whose creed admits of polygamy and great facilities of divorce” was accepted by the Privy Council, which observed that “English Ecclesiastical law is founded exclusively on the assumption that all the parties litigant are Christians,” and “the Sudder Adawlut at Bombay will take cognizance of matrimonial suits between Parsees” according to “their own laws and customs” which are “wholly at variance with the principles which govern the matrimonial law of the Diocese of London, and incompatible with the Ecclesiastical law” insofar as (for example) “the husband is permitted to take a second wife, the first being [still] alive.” See *Ardaseer, ibid.* at 415, 418, and 419. In *Advocate-General of Bengal v. Dossee* (1863), 2 Moo. P.C. N.S. 22 at 62, an appeal from the Supreme Court at Calcutta, Lord Kingsdown observed: “To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied [in British India].” In *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (1872), 14 Moo. Ind. App. 570 at 586, 594 (P.C.) [*Ramalakshmi*], an appeal from the High Court of Judicature at Madras involving rights of succession to property of a deceased who had three wives simultaneously, Sir Montague Smith identified the relevant Hindu customary laws governing the rights of “Sons by different Wives,” considering in *obiter* the customs relating to the “position of honour, and precedence” that the “first Wife” had over junior wives.

Lord Brougham's words, as "something different" from the Christian conception of marriage, on which English matrimonial law was based. The important point is that nineteenth-century judges did not refuse to apply the term marriage to these relationships; non-Christian marriages, even polygamous ones, were accepted as having "one and the same name," despite having a somewhat "different nature."⁹³ In other words, either the natural law that the common law definition of marriage embraced varied from culture to culture and from nation to nation, or the common law definition of marriage was not really a natural law principle at all. Either way, the recognition by the common law in its wider sense of marriages that did not meet the criteria of the *corpus iuris canonici* confirms that marriage was seen by nineteenth-century judges as a cultural or religious construct rather than an immutable and universal norm. The English definition of marriage, it seems, was at best a principle of European natural law.

As within the broader imperial constitutional order, so too, within the colonies that joined to form the Dominion of Canada in 1867, national, religious, and cultural pluralism was accommodated through varying degrees of legal pluralism, with distinctive approaches to matrimony adopted by British, French-Canadian, and Aboriginal communities. The original three confederating provinces—Canada, Nova Scotia, and New Brunswick—each had systems of law that, by section 129 of the *Constitution*, continued in force after Confederation. Insofar as these laws related to matters falling under section 92, they continued in force as provincial laws subject to amendment or repeal by provincial legislatures; insofar as they related to section 91 matters, they continued in force as federal laws subject to amendment or repeal by the new federal Parliament.⁹⁴ English law had been received into Nova Scotia, New Brunswick, and that part of the Province of Canada that was previously Upper Canada (and later Ontario).⁹⁵ In that part of the Province of Canada that was previously Lower Canada (and later Quebec), the *Quebec Act, 1774* compromise still applied: English law governed criminal matters and "the Laws of Canada" applied in relation to "Property and Civil Rights," or private law matters.⁹⁶ The "Laws of Canada," or the civil law of New France, consisted mainly of the *Coutume de Paris* supplemented by Roman law, legislation, and,

⁹³ Warrender, *supra* note 90 at 112–113.

⁹⁴ On section 129, see Jean Leclair, "Réflexions sur les problèmes constitutionnelles soulevés par l'abrogation de Code civil du Bas-Canada" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: A Collection of Studies* (Ottawa: Minister of Justice, 1997) 357.

⁹⁵ See note 99 below.

⁹⁶ *Quebec Act, 1774*, 14 Geo. III, c. 83.

in relation to marriage, canon laws.⁹⁷ These various sources were codified in 1866 by the *Civil Code of Lower Canada*. In addition, Aboriginal customary laws on marriage continued to govern certain Aboriginal communities, though no explicit written foundation for these laws was included in the *Constitution*.⁹⁸

In the common law jurisdictions, differences in marriage laws were few. At the time that English law was introduced into Nova Scotia, New Brunswick, and Upper Canada,⁹⁹ ecclesiastical courts still had jurisdiction over matrimonial causes in England; nevertheless, no such church courts were established in these colonies.¹⁰⁰ The emerging characterization in England of marriage law as part of a wider sense of common law was therefore consistent with the colonial institutional framework and with judicial statements.¹⁰¹ However, the ecclesiastical/common law distinction retained some importance. Upper Canada and, later, Ontario courts determined matrimonial issues arising in the course of other (mainly property) litigation, and it was unclear whether they had jurisdiction to entertain matrimonial causes directly.¹⁰² One such court held in 1930 that “the jurisdiction exercised by the Ecclesiastical Courts of England in

⁹⁷ Murray Greenwood, “Lower Canada (Quebec): Transformation of Civil Law, From Higher Morality to Autonomous Will, 1774-1866” (1996) 23 Man. L.J. 132 at 133.

⁹⁸ *Connolly v. Woolrich and Johnson* (1867), 17 R.J.R.Q. 75 (Que. S.C.) [*Connolly*]; aff’d *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266 (Que. Q.B.), recognized Aboriginal marriage customs in British territories outside colonial boundaries. This case was followed in *The Queen v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 (N.W.T. S.C.) in which Aboriginal marriage customs were recognized even after the statutory introduction of English law and colonial government into the Northwest Territories. Late nineteenth-century cases limit the recognition of Aboriginal marriage customs to communities in remote locations. See *Robb v. Robb* (1891), 20 O.R. 591 at 596 (C.P.); *Re Sheran* (1899), 4 Terr. L.R. 83 at 91–93 (N.W.T. S.C.). Doubt may therefore exist as to whether pre-Confederation judges in Upper Canada, for example, would in fact have acknowledged Aboriginal marriage customs. It is worth noting, however, that government officials recognized the exercise of Aboriginal jurisdiction over marriage and family law issues in mid-nineteenth-century Upper Canada. See Mark D. Walters, “‘According to the Old Customs of Our Nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826-1847” (1998–99) 30 Ottawa L. Rev. 1 at 37–39 [Walters, “Old Customs of Our Nation”].

⁹⁹ English law was received in Nova Scotia in 1758, see *Uniacke v. Dickson* (1848), 2 N.S.R. 287 (Ch.); in New Brunswick in 1660, see *Scott v. Scott* (1970), 15 D.L.R. (3d) 374 (N.B. A.D.); and in Upper Canada in 1792, see *An Act to introduce the English Law, 1792*, 32 Geo. III, c. 1 (U.C.), which introduced English private law, English criminal law being already in force.

¹⁰⁰ See generally Kimberley Smith Maynard, “Divorce in Nova Scotia, 1750-1890” in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, vol. 3 (Toronto: Osgoode Society, 1990) 232; William Renwick Riddell, “The Law of Marriage in Upper Canada” (1921) 2 Can. His. Rev. 226.

¹⁰¹ Chief Justice Robinson observed that the statutory introduction of the “law of England” into Upper Canada in 1792 included both English common and statute law, and this body of law “included the law generally which related to marriage.” See *R. v. Roblin* (1862), 21 U.C.Q.B. 352 at 353 [*Roblin*]. In *Doe ex dem. Breakey v. Breakey* (1845), 2 U.C.Q.B. 349 at 355–356, he characterized the relevant rules and principles as “the common law of England” on marriage, but elsewhere he still considered “the canons” and works on “Ecclesiastical Law” when determining the content of this law: See *Roblin, ibid.* at 355–356.

¹⁰² *Lawless v. Chamberlain* (1889), 18 O.R. 296 at 297–298 (Ch.), Boyd Ch.

1792 could not have been introduced into Upper Canada except by legislation,” and because the legislation establishing Upper Canadian and Ontario courts conferred only general common law and equity jurisdictions, the courts lacked ecclesiastical jurisdiction over matrimonial causes (e.g., annulment).¹⁰³ In relation to the critically important matter of judicial jurisdiction, at that time, the common law did not include ecclesiastical matters such as marriage, and special federal legislation was required to remedy the problem.¹⁰⁴

In Lower Canada the integration of ecclesiastical laws on marriage into the general law had not progressed to the same point as in Upper Canada, in part due to the special position of the Roman Catholic Church. It was said that the Catholic Church was a legally established church and that under the pre-codified civil law of Lower Canada “le Droit Canon” and “les lois de l’Église” governed the validity of marriages, with civil courts merely adopting ecclesiastical rulings.¹⁰⁵ In 1874 the Privy Council ruled that, upon the British conquest of New France, the Catholic Church ceased to be “an Established Church in the full sense of the term,” but under the *Quebec Act, 1774* it continued to be “a Church recognised by the State.”¹⁰⁶ Sir Robert Phillimore ruled that, although “there are now in Canada no regular Ecclesiastical Courts” as there were under the French regime, “a bishop is always a *judex ordinaries*” and, “according to the general canon law,” a bishop “may hold a Court and deliver judgment.”¹⁰⁷ Indeed, the civil courts in Lower Canada did defer to ecclesiastical authorities on matrimonial issues. In 1848 one court held that, “chez les catholiques, le mariage étant un sacrement” and therefore “l’autorité civile ne’en peut prononcer la dissolution, et ne fait que donner l’effet civil après que la sentence a été prononcée par le tribunal compétent”—“l’autorité ecclésiastique.”¹⁰⁸

Article 127 of the 1866 Civil Code recognized that this ecclesiastical jurisdiction enjoyed by the Catholic Church over marriage between Catholics

¹⁰³ *Vamvakidis v. Kirkoff*, [1930] 2 D.L.R. 877 at 890 (Ont. C.A.).

¹⁰⁴ The *Divorce Act (Ontario)*, S.C. 1930, c. 14, gave Ontario courts authority to entertain annulment and divorce actions. In Nova Scotia and New Brunswick, divorce courts had been established prior to confederation. See Maynard, *supra* note 100.

¹⁰⁵ E. Lef. De Bellefeuille, “Code Civil du Bas-Canada: Législation Sur le Mariage” (1864) 1 *Revue canadienne* 602 at 606–609.

¹⁰⁶ *Brown v. Les Curé et Marguilliers de L’Oeuvre et Fabrique de Notre Dame de Montréal* (1874), L.R. 6 P.C. App. 157 at 206.

¹⁰⁷ *Ibid.* at 211.

¹⁰⁸ *Lussier v. Archambault* (1848), 11 L.C. Jur. 53 at 54 (Q.B.), Rolland C.J. See also, *Vaillancourt v. Lafontaine* (1866), 11 L.C. Jur. 305 (S.C.).

also existed in other churches over their communities.¹⁰⁹ One authority said that the purpose of this provision in the Civil Code was unambiguous: “il est la consécration d’un état social et religieux existant avant le code civil”; the point was to “conserve au mariage son caractère religieux,” recognizing “[le] droit canonique de chaque église, les règles de celle-ci ce qui concerne la capacité de se marier et la célébration du mariage.”¹¹⁰ Indeed, the Civil Code was interpreted this way and, after Confederation, the courts followed the pre-Confederation practice by civil courts of deferring to ecclesiastical authorities on the validity of marriages.¹¹¹ Finally, judges in Lower Canada/Quebec shared with English judges similar views about the moral foundations of matrimony. In *Connolly*, decided in the year of Canadian Confederation, Justice Monk recognized and applied the Aboriginal marriage customs of the Cree nation, having first reviewed the history of European ideas about marriage and having concluded that civil, common, and canon laws reflected a principle of matrimony common to all peoples, even non-Christians—a principle founded on the natural law.¹¹²

C. *Implications for Constitutional Interpretation*

Having reviewed the evolution of the law of matrimony both at English common law and within the larger British imperial context, with particular emphasis on pre-Confederation law in Canada, it is now possible to consider more accurately the difficult issues created by the assumption that marriage in subsection 91(26) of the *Constitution* must have incorporated constitutionally the common law definition of marriage in 1867. *EGALE* is premised on the propositions that, in 1867, marriage was regarded as a relationship created by the common law, that the definition of marriage as the union of one man and one woman for life was judge-made law, and that because marriage was a legal construct, it followed that the use of the word marriage in subsection 91(26) should be assumed to incorporate or entrench that legal construct. Even if it is

¹⁰⁹ Art. 127 C.C.L.C. provides: “The other impediments [to a valid marriage] recognized according to the different religious persuasions, as resulting from relationship or affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities.”

¹¹⁰ A.A. Bruneau, *Question de Droit, Du Mariage* (Montreal: G. Ducharme, 1921) at 20–21, 25.

¹¹¹ *Laramée v. Evans* (1881), 25 L.C. Jur. 261 (S.C.); *Globensky v. Wilson* (1886), 2 M.L.R. 174 (S.C.). The Privy Council would later reject the view that civil law was bound by ecclesiastical law on this point; see *Despatie v. Tremblay*, [1921] 1 A.C. 702 (P.C.). But this decision did not reflect the state of the law in 1867: J.E.C. Brierley, “Husband and Wife in the Law of Quebec” in Derek Mendes da Costa, ed., *Studies in Canadian Family Law* (Toronto: Butterworths, 1972) 795 at 806.

¹¹² *Connolly*, *supra* note 98 at 97. See *Connolly*, *ibid.* at 97–102 for Justice Monk’s historical and comparative account.

accepted that the living-tree doctrine applies to the present-day interpretation of subsection 91(26)—as I have argued it must—it is still necessary to consider the preliminary conclusion that the constitutional meaning of marriage necessarily incorporates the pre-existing common law meaning. Three important reasons emerge from the analysis of marriage within English common law and the larger imperial context, including pre-Confederation Canada, for concluding that this mechanical equation between constitutional law and common law is highly inappropriate.

First, it is clear that mid-nineteenth-century English judges would have rejected the idea that marriage either was a common law construct or the result of judge-made law. In their view, marriage in England was an integral part of a pan-European-Christian intellectual and cultural tradition; it was reflected in religious edicts and linked to European conceptions of natural law. The common law did not create the relationship of marriage any more than it created families, friendship, or religion; indeed, the statements of judges and commentators examined above confirm that the common law was respectful of the fact that it had not created the institution of marriage. The common law, properly speaking, did not include a law of matrimony, and the common law, broadly defined, purported merely to acknowledge a social and religious custom that was regarded by Europeans as a moral principle that pre-existed and supported, rather than derived from, law and legal systems. If the common law in 1867 merely acknowledged marriage as a pre-existing social-religious-moral phenomenon, why should we accept the conclusion that marriage, as used in subsection 91(26), referred to a technical legal construct? The common law gloss on the social-religious-moral conception of marriage was so thin and insignificant that it seems far more plausible to read the constitutional reference to marriage as a direct reference to the social-religious-moral conception itself, as opposed to the constitutional entrenchment of a common law concept. It may be argued in response to this point that, today, it makes no practical difference whether marriage in subsection 91(26) is considered to incorporate the common law or simply to reflect a social-religious-moral custom, so long as the living-tree interpretative principle is applied to ensure that its present meaning coheres with present-day conditions and expectations. I will return to this important argument below.

The second significant point to emerge from the above analysis of the common law of marriage relates to nineteenth-century judges' relativistic conception of marriage. Because the common law in its wider sense merely acknowledged Christian-European customs, it was also capable of acknowledging different conceptions of marriage followed in other cultures and religions found within the British Empire. Despite references to a universal natural law, the common law took a culturally contingent approach to marriage. The assertion that marriage in subsection 91(26) must be taken as incorporating

the existing legal construction of marriage simply begs a question: Which legal construction? In its wide sense, the common law was simply an empty container, ready to receive and hold whatever conception of marriage was appropriate in light of the social-religious-moral customs of the relevant community.

The third point follows from the second. Even if it is accepted that the definition of marriage had a singular, concrete common law status in 1867, that common law concept could not have been transposed directly into the *Constitution*. The “grand entrance hall”¹¹³ to the *Constitution*, as Chief Justice Lamer described the *Constitution*’s preamble, which proclaims a desire to have a “constitution similar in principle to that of the United Kingdom,” thus confirming that a principal source of Canadian public law is the British common law tradition. However, the *Constitution* also recognizes, in a less grand way, non-common law systems, particularly in the private law sphere. As a result, in areas of private law—including marriage—the common law cannot provide a direct or sole source of constitutional principle. If some historical-legal context is to be taken as informing the meaning of words used in the *Constitution* enacted in 1867, then the civil law system of pre-Confederation Quebec must be included with the common law tradition as part of that historical-legal context, at least in relation to constitutional references to matters of private law such as marriage. The same might also be said for Aboriginal customary law. As Viscount Haldane observed in the course of interpreting solemnization of marriage in section 92(12), “[t]he common law of England and the law of Quebec before Confederation” would “naturally have been in the minds” of the framers of the *Constitution*.¹¹⁴

The brief account of the state of the laws of marriage in 1867 suggests what would have been in the minds of the common and civil lawyers who framed the *Constitution*. In Upper Canada, the English process of blurring the distinction between canon and common law was well under way, although the distinction remained important when defining judicial jurisdiction over matrimonial causes. In Lower Canada the law regarding the validity of marriages was still canon law, and civil judges deferred to ecclesiastical authorities on its application. Finally, to the extent that judges thought about Aboriginal customary laws at all, they accepted differences so long as basic (European) conceptions of natural law were respected. Given their common roots in the *corpus iuris canonici* and the European natural law tradition, we can assume that, in 1867, both common law and civil law systems would have defined marriage as the union of one man and one woman for life. However, it

¹¹³ *Provincial Judges*, *supra* note 5 at 78.

¹¹⁴ *Re Marriage Legislation in Canada*, [1912] A.C. 880 at 887 (P.C.).

is clear that the general point made above in relation to English law is equally applicable to pre-Confederation Canadian law: marriage was not viewed by judges as a construct of civil or common law but as a social-religious-moral phenomenon acknowledged by the law. Lower Canadian civil law echoed the traditional common law view that the law merely confirmed “un état social et religieux.” The same conclusion also follows: if the law expressly acknowledged marriage in this way in 1867, then it is not obvious that the framers of the *Constitution* used the word marriage in subsection 91(26) differently, instead referring to a technical term created by law. Once the civil law of Lower Canada is factored into the interpretative context of subsection 91(26)—as it must be—it is even less plausible to suggest that the brand of legal positivism underlying *EGALE* in relation to the concept of marriage would have been accepted by judges and legislators in 1867 than it was when only the common law context was considered.¹¹⁵

Aside from the importance of considering substantive approaches to marriage in both common and civil law when interpreting the historical legal context of the *Constitution*, the mere fact that both systems are part of that legal context means that the simple, direct incorporation of the *common law* definition of marriage into the *Constitution* is impossible; marriage in 1867 was defined in Canada by several legal systems.¹¹⁶ At best, it could be said that the reference to marriage in subsection 91(26) refers to the common core elements of marriage that both common law and civil law acknowledged: one could compare the two systems, derive common principles from both, and synthesize them to produce a hybrid unwritten legal norm that could then be said to have been incorporated and constitutionalized by the *Constitution*. However, the construction of this hybrid norm would simply be the stripping away of the common law–civil law veneer from the institution of marriage to expose the basic European social-religious-moral idea of matrimony then prevailing. It simply cannot be said that a particular pre-existing law was entrenched in the *Constitution* by the word marriage.

It follows from these three points that reading the constitutional word marriage as a reference to a pre-existing legal construct, as opposed to a prevailing social-religious-moral custom, is at best questionable and at worst

¹¹⁵ And even if Aboriginal customary law weighed lightly in the minds of judges and legislators at the time, it is worth observing that the rejection of legal positivism in this respect would have been consistent with the law, which generally denied strict analytical distinctions between spirituality, social custom, and law: see Walters, “Old Customs of Our Nation”, *supra* note 98 at 6–14.

¹¹⁶ In the modern context, the continuity of Aboriginal marriage customs is probably less important for the interpretation of marriage and more important for the general question of whether sections 91 and 92 as a whole affect residual spheres of Aboriginal self-government. *Campbell*, *supra* note 45 cited, *inter alia*, the recognition of continuity of Aboriginal marriage customs in *Connolly*, *supra* note 98, in holding that these sections are not inconsistent with a residual sphere of Aboriginal self-government.

erroneous. Even if one were to accept Justice Pitfield's modified original-intent argument as valid—that the living-tree doctrine is inapplicable to constitutional references to legal constructs—it is hardly obvious that that argument applies in relation to marriage in subsection 91(26). However, the modified original-intent argument is deeply problematic, and it is far more reasonable to accept that the living-tree doctrine applies to all constitutional words and phrases, even constitutional references to pre-existing legal constructs. If this approach is accepted, then the question mentioned above arises: so long as the living-tree principle is applied to the present-day interpretation of marriage, what difference does it make if the word's historical meaning is taken as referring to a pre-existing legal construct or to a pre-existing social-religious-moral custom? This argument must now be addressed.

In general, it is inappropriate to take constitutional words or phrases that had at the time the *Constitution* was framed a clear common law or other legal meaning and mechanically equate the constitutional meaning of the word with that pre-existing common law or other legal meaning. Such an approach to constitutional interpretation would permit judges to circumvent the normal process of constitutional construction, which requires an express consideration of substantive moral, political, or other factors relevant to a proper determination of what the word or phrase ought to mean (or to have meant) in its constitutional context. The mechanical equation—constitutional word X equals common law rule X—permits judges to avoid having to address, let alone acknowledge, the existence of difficult interpretative choices that the construction of constitutional provisions normally requires. In response, it might be argued that so long as this sort of mechanical constitutional law–common law equation is only an initial step in constitutional interpretation, the obvious deficiencies in the initial constitutional law–common law equation are cured by the later consideration of the shifting social-moral-political factors that must inevitably be considered at the living-tree stage of analysis.

This response does not adequately address the problem. The second living-tree step in the interpretative process does not occur in a vacuum. The inquiry is not “What should this constitutional word mean today?” Rather, it involves this type of question: “In light of the fact that this word originally meant X, is there any legal, moral, political, or other justification for concluding that its meaning has shifted over time so that it now means Y?” Courts do not regard the living-tree doctrine as a licence to rewrite the constitutional text so that it reads as contemporary judges think it ought to read.¹¹⁷ Rather, judges have insisted that in applying the living-tree doctrine, the historical starting

¹¹⁷ See *e.g.* *R. v. Prosper*, [1994] 3 S.C.R. 236, L'Heureux-Dubé J. (“the ‘living tree’ theory has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset” at 236).

point for the analysis matters. The doctrine is, after all, about the growth of constitutional meaning, and it must involve an intertemporal dimension to the construction of words and phrases—a consideration of whether previous understandings of their meanings still prevail in subsequent interpretative contexts. The constitutional tree is “rooted in past and present institutions,” writes Justice McLachlin, and its proper interpretation requires “a philosophy which is capable of explaining the past and animating the future”; thus, “[h]istory is important” to the application of the living-tree doctrine in so far as it suggests “the philosophy underlying the development” of the constitutional right or provision in question.¹¹⁸ In short, we cannot reasonably know where the meaning of a constitutional provision is going unless we know from whence it has come—a point acknowledged in *Hendricks*.¹¹⁹ The historical starting point will inform subsequent growth and will invariably preclude certain proposed new interpretations: in some cases the suggested interpretative development might amount to the creation, in the words of Justice Iacobucci, of “some new doctrine” that would involve “something more than a living-tree approach,” wholly inconsistent with relevant “historical fact[s].”¹²⁰

Returning to the relationship between constitutional words and the common law, if the preliminary meaning of the constitutional word is taken, in a mechanical way, to be the same as the pre-existing common law, then the next question in the inquiry—has the meaning grown with our living-tree constitution?—may yield a different answer from that obtained if the starting point in the analysis is that the constitutional word did not initially refer to a concrete legal construct but, rather, its meaning was simply informed by a social, moral, or political opinion existing at the time. In the latter scenario, a possibility of dynamism is already built into the analysis: the meaning of the word is acknowledged as directly contingent upon or the direct product of its social, moral, or political context. In the former scenario, the possibility of dynamism still exists, but it may be held hostage to particular judicial jurisprudential attitudes concerning the nature of law and its relation to shifting social and moral contexts. There is, in short, a danger that the characterization of the word as a legal construct may, for some judges, mean that the word begins the living-tree interpretative process with an added degree of definitional rigidity. To avoid distorting the interpretative process, it is better to challenge rigorously the mechanical equation between constitutional law and common law

¹¹⁸ *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 180–181, 187.

¹¹⁹ *Hendricks*, *supra* note 7 at para. 116: “L’intention initiale du législateur ne doit pas être ignorée mais une interprétation dynamique oblige à ne pas se limiter strictement au sens qu’avaient les termes de la Constitution en 1867 ce qui nierait toute la souplesse et la flexibilité de cette loi pour répondre aux réalités et besoins nouveaux de la société canadienne.”

¹²⁰ *British Columbia (A.G.) v. Ontario (A.G.)*, [1994] 2 S.C.R. 41 at 87.

in the first place. It may well be that reading a constitutional word as a reference to a common law concept before subjecting it to the living-tree interpretative process is perfectly justifiable, but that conclusion must be based on principled and reasoned analysis, not mechanical assumption. This approach will lead, in general, to a more coherent model of principled constitutional analysis in a modern context. In light of recent trends in the case law towards acknowledging various sorts of unwritten or common law constitutional principles, it is necessary to be careful and precise about the relationship between written constitutional texts and unwritten, or common law, principles. A purely mechanical equation between common law and constitutional written texts would be appropriate only in relation to the most technical of narrow common law constructs—for example, a constitutional phrase such as “seised as of Freehold ... of Lands ... held in Free and Common Socage.”¹²¹ Marriage, however, is not such a word. It can be read as a technical legal term, but it can also be read in other ways. As a result, some convincing and principled argument must be made for reading it one way or the other—even before a consideration of whether its meaning has shifted pursuant to the living-tree doctrine.

III. MARRIAGE, COMMON LAW, AND LEGISLATIVE AUTHORITY IN 1867

Even if the framers of the *Constitution* used the word marriage in a technical-legal sense, there is no need to apply the living-tree rule of construction to see if that sense of the word still applies under the modern *Constitution* unless the legalistic sense of marriage used in 1867 was regarded as binding upon Parliament. If the technical-legal sense of marriage was not regarded as binding Parliament, then resort to the living-tree rule is unnecessary to show that the current Parliament has the authority to depart from the historical definition of marriage.

In this respect it is important to distinguish between historical attitudes about political realities and historical attitudes about legal powers. On the basis of the account of the social, religious, and moral assumptions about marriage provided above, it is fair to assume that in 1867 it would have been unthinkable that Parliament would enact same-sex marriage legislation. However, it would also have been unthinkable that members of the legal community—legislators, lawyers, and judges—would have acknowledged a legal rule preventing same-sex marriage legislation in 1867.

There was, of course, a long tradition in jurisprudential and common

¹²¹ Declaration of Qualification of Senators, Fifth Schedule to the *Constitution*.

law thought according to which natural law, divine law, or other fundamental principles of law prevailed over acts of Parliament.¹²² By the nineteenth century, however, the theoretical supremacy of natural law over legislation had been subordinated to the emerging doctrine of parliamentary sovereignty, according to which Parliament was considered to be legally omnipotent—at least in relation to the legislative powers of the United Kingdom, or imperial Parliament.¹²³ The position of colonial legislatures within the British Empire was, in this respect, somewhat less clear, even as late as the 1860s.¹²⁴ When Justice Benjamin Boothby of the South Australia Supreme Court began striking down colonial statutes on the grounds that they violated fundamental principles of English law, local political reaction was one of horrified disbelief. The judicial review of legislation was, a committee of the Legislative Council concluded, “abhorrent” to the principles of the English Constitution.¹²⁵ However, the law officers of the Crown were receptive to the theoretical possibility of a natural law limitation on colonial legislative authority. In 1862 the Attorney and Solicitor Generals in the United Kingdom concluded that colonial legislatures were constrained not only by imperial statutes that extended to the colony but also, implicitly, by fundamental principles of English law.¹²⁶ According to this theory, as it was accepted by the imperial ministry, the range of fundamental principles of English law that constrained colonial legislative power was so narrow as to be practically unimportant: the relevant principles were those of “natural jurisprudence”¹²⁷ that were “equally applicable in the nature of things to all Her Majesty’s Christian Subjects in every part of the British dominions,” such as Crown sovereignty, laws against slavery, the right not to be punished without trial, and—significantly for present purposes—laws prohibiting polygamy.¹²⁸ In other words, if a colonial statute on the subject of marriage purported to alter the English legal definition of

¹²² Walters, “Common Law Constitution”, *supra* note 4 at 105–120.

¹²³ *Logan v. Burslem* (1842), 4 Moo. P.C. 284 at 292, 296; *Lee v. Bude and Torrington Junction Rly. Co.* (1871), L.R. 6 C.P. 576 at 582.

¹²⁴ Walters, “Common Law Constitution”, *supra* note 4 at 120–128.

¹²⁵ “Report of the Select Committee of the Legislative Council, Upon Recent Decisions and Conduct of Mr. Justice Boothby,” 27 August 1861, in U.K., H.C., “Correspondence Between the Governor of South Australia and the Secretary of State, Relative to Mr. Boothby”, Cmnd 3048 in *Sessional Papers*, vol. 37 (1862) 22–23 [“Boothby Correspondence”].

¹²⁶ W. Atherton, Attorney General, and Roundell Palmer, Solicitor General, to Duke of Newcastle, 12 April 1862, in “Boothby Correspondence,” *ibid.* at 68–69.

¹²⁷ This was the expression used by the imperial government when it informed the South Australian government of the law officers’ opinion: Duke of Newcastle, Secretary of State for the Colonies, to Sir Dominic Daly, Governor of South Australia, 24 April 1862, in “Boothby Correspondence,” *ibid.* at 66–67.

¹²⁸ Atherton and Palmer, *supra* note 127 at 69–70.

marriage by permitting polygamy among Christians it would, according to this view, have been void as repugnant to European natural law principles embedded in English law. It is not unreasonable to assume, in light of historical attitudes towards homosexuality, that a colonial statute purporting to alter the English legal definition of marriage by permitting same-sex marriages would have been held void, under this view, for the same reasons.

The implications of this theory were troubling for the imperial ministry: the judicial review of colonial legislation on general natural law principles as manifested in English law was inconsistent with the doctrine of parliamentary sovereignty established in relation to the British Parliament and was generally unacceptable to British political-legal culture at the time. In direct response to the Boothby affair, the imperial Parliament enacted the *Colonial Laws Validity Act, 1865*.¹²⁹ This Act confirmed that there was only one ground on which courts could hold colonial statutes to be invalid—repugnancy to imperial statute. The idea that legislative power was constrained by natural jurisprudence embedded in English law was repudiated by section 3 of the Act, which stated: “No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England.” Reading section 3 of the Act in light of the law officers’ opinion that prompted its enactment, it is clear that, after 1865, colonial legislatures were to be considered as being, and as having been, empowered to enact statutes that violated rules of English common law and the principles of natural law embedded therein. These legislatures were trusted to exercise their legislative powers wisely, and any transgressions could be remedied by either imperial statute or use of the imperial Crown’s disallowance power.¹³⁰ As the Supreme Court of Canada acknowledged in the *Patriation Reference*, the *Colonial Laws Validity Act* “was intended to be a liberating statute . . . from subservience to British common law.”¹³¹

In relation to the question of marriage, the effect of the *Colonial Laws Validity Act* is obvious. The traditional definition of marriage was clearly regarded as a potential constraint on colonial legislatures before the Act, insofar as the rule against polygamy between Christians was thought to be one of the rules of natural jurisprudence beyond colonial legislative competence. The purpose of the Act was to confirm that these constraints on colonial legislative competence did not exist. After 1865, colonial statutes enacted before or after that date altering the English legal definition of marriage by permitting polygamy would have been held valid, so long as no imperial statute extending

¹²⁹ (U.K.), 28 & 29 Vict., c. 63 [*Colonial Laws Validity Act*]. See Walters, “Common Law Constitution”, *supra* note 4 at 128.

¹³⁰ See generally D.B. Swinfen, *Imperial Control of Colonial Legislation, 1813–1865* (Oxford: Clarendon Press, 1970).

¹³¹ *Reference Re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753 at 794.

to the colony was violated. The English common law, including the definition of marriage, did not operate as a legal constraint on colonial legislatures.¹³² It follows that colonial legislation altering the English legal definition of marriage by permitting same-sex marriages would also have been valid.

This was the state of the law on the eve of Confederation in relation to the colonies that united to form the new Dominion of Canada under the *Constitution*, or, as it was called, the *British North America Act, 1867* (*BNA Act*). If colonial legislatures in Canada could have enacted same-sex marriage legislation before Confederation, did the legislatures recognized or created under the *BNA Act* lack that power? In other words, if section 3 of the *Colonial Laws Validity Act* expressly removed any English common law constraint on colonial legislative authority over, *inter alia*, the definition of marriage, did subsection 91(26) of the *BNA Act* reimpose it? In answering this question it is important to appreciate that the *Colonial Laws Validity Act* continued to apply to Canadian legislatures after 1867; it applied until it was repealed for Canada and other dominions by the *Statute of Westminster, 1931*.¹³³ As a result, a complete statement of Canadian legislative power at this time would include both sections 91 and 92 of the *BNA Act* and section 3 of the *Colonial Laws Validity Act*. If section 91, which gives the federal Parliament authority to make laws for the peace, order, and good government of Canada, including laws in relation to marriage, is read together with section 3 of the *Colonial Laws Validity Act*, which says no Canadian law shall be void on the ground of repugnancy to the “Law of England” unless repugnant to some imperial statute, and if the historical context of section 3 is kept in mind, the argument that Canadian legislatures were constrained by the English common law definition of marriage becomes untenable. It is difficult to see how the express statement in the 1865 Act permitting legislatures to enact laws repugnant to English law—that is, in effect, the granting of power to enact same-sex marriage laws—was somehow repealed or limited by provisions in the 1867 Act that empower the federal Parliament to enact laws relating to marriage. The only rational way to read these provisions together consistently is to conclude that the federal Parliament had exclusive legislative authority to enact laws in relation to marriage and that it was, in the exercise of that power, in no way bound by English law, including the common law definition of marriage. Indeed, when courts interpreted these two Acts together, they consistently held that Canadian legislatures, provincial and federal, were given plenary, sovereign, or supreme legislative authority over internal matters as ample as that

¹³² *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1. See Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens and Sons, 1966) 400.

¹³³ (U.K.), 22 & 23 Geo. V, c. 4. See generally Sir Kenneth Wheare, *The Statute of Westminster and Dominion Status*, 4th ed. (Oxford: Oxford University Press, 1949).

of the imperial Parliament itself (which was, by then, regarded as legally omnipotent under the theory of parliamentary sovereignty), subject only to the imperial constitution and the constraint of federalism—that federal statutes could not infringe provincial spheres of power, and vice versa.¹³⁴ Unless it can be shown that the federal marriage power must be constrained by the English legal definition of marriage in order to avoid infringement of provincial powers, it must be concluded that English law, or the rules of natural jurisprudence embedded therein, were not regarded in 1867 as constraining federal legislative authority over marriage. However, this constraint cannot be shown. As seen above, federal same-sex marriage laws would not violate any sphere of provincial legislative competence, and therefore it cannot be said that the federal marriage power must be constrained by the common law definition of marriage to avoid conflict with provincial powers. As a result, a historical reading of the *BNA Act* with the *Colonial Laws Validity Act* leads to the conclusion that the English common law definition of marriage could not have represented a limitation on the federal marriage power in 1867.

Section 3 of the *Colonial Laws Validity Act* was essentially re-enacted as section 2(2) of the *Statute of Westminster, 1931* and is still technically in force in Canada today as part of the supreme Constitution of Canada defined by section 52 of the *Constitution Act, 1982*. In other words, there is an express written provision in the *Constitution* to the effect that the federal Parliament of Canada is not bound by the English common law (including, *inter alia*, the common law definition of marriage) when enacting legislation. Whether this provision has any meaningful force today is open to question; for example, it is unlikely that it would capture English common law rules that are now regarded as Canadian common law rules. However, in considering the historical status of Canadian legislative authority for the purposes of identifying a starting point for a living-tree analysis, this issue is not relevant. The history of the *Colonial Laws Validity Act* confirms that, in 1867, the common law definition of marriage could not have represented a constitutional limitation on Canadian parliamentary sovereignty. Therefore, there is no need to argue that the scope of that power has grown pursuant to the living-tree rule of construction to

¹³⁴ *Re Goodhue* (1872), 19 Gr. / U.C. Ch. 366 at 382, 385–386 (Ont. C.A.); *R. v. Brierly* (1887), 14 O.R. 525 at 531, 533 (Ch.); *Re The Criminal Code, 1892, Sections 275-276, Relating to Bigamy* (1897), 27 S.C.R. 461 at 491–94, Ginouard J. and at 480, Gwynne J.; *Hodge v. The Queen* (1883), 9 A.C. 117 at 132 (P.C.); *Dunphy v. Croft*, [1931] S.C.R. 531 at 539–540, Newcombe J. Also A.V. Dicey, “Unjust and Impolitic Provincial Legislation” (1909) 45 Can. L.J. 457; W.H.P. Clement, *The Law of the Canadian Constitution*, 2nd ed. (Toronto: Carswell, 1904) 57; Walters, “Common Law Constitution”, *supra* note 4 at 131–133. Aside from imperial legislation extending to a colony, unwritten principles of the imperial constitution may also have constrained colonial legislatures—see *e.g.* legislation affecting the imperial Crown’s royal prerogative (such as the right to entertain appeals from colonial courts) was held invalid due to its extra-territoriality: *Nadan v. The King*, [1926] A.C. 482 (P.C.) (see Wheare, *ibid.* at 88–99).

include the power to enact same-sex marriage legislation.

IV. CONCLUSION

A general theory of the relationship between the common, or unwritten, law and Canadian constitutional law is still only implicit in the case law. It is still somewhat unclear what sort of principled argument must be made before the conclusion is accepted that a given common law or unwritten norm is part of the supreme *Constitution* binding on both federal and provincial legislatures. The free-standing and text-emergent unwritten norms that have been acknowledged as part of the supreme *Constitution* in Canada thus far do, however, share a number of characteristics. First, they are not necessarily narrow common law concepts that might have been enforced historically by English common law courts; on the contrary, they seem for the most part to form part of the common law in the broad sense, or, as Hale would say, *leges non scripta* based on custom, usage, and consent.¹³⁵ That the institution of marriage was part of the common law in its broad sense, then, is not in itself a reason to conclude that the common law definition of marriage cannot be a constitutional norm. However, it is fair to say that the unwritten constitutional norms thus far acknowledged by courts have special features that the common law definition of marriage lacks. They are principles of public law that may be characterized in one or more of the following ways: they are uncontroversial when stated in abstract form (e.g., democracy, the rule of law, judicial independence); they are considered essential to the institutional structure of the *Constitution* (e.g., parliamentary privileges); and they are essential to protecting arrangements between communities on which constitutional order was founded (e.g., federalism, Aboriginal self-government).¹³⁶ Other categories of unwritten constitutional law no doubt exist, but it is fair to say that, however such norms are characterized, it will be necessary to demonstrate that their status as supreme constitutional laws is somehow essential to the coherence of the *Constitution* as a whole when interpreted in today's light.

Of course it was not suggested in the *EGALE* judgment that the common law definition of marriage is part of the unwritten constitution. The common law of marriage was treated instead as a text-incorporated common law rule, and the identification of such norms requires a different, and often less rigorous, form of justification from free-standing and text-emergent unwritten norms. I have argued, however, that when there is considerable distance between the

¹³⁵ Walters, "Common Law Constitution", *supra* note 4 at 98.

¹³⁶ These points can, I think, be inferred from the following line of cases: *Provincial Judges*, *supra* note 5; *Quebec Secession Reference*, *supra* note 5; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; and *Campbell*, *supra* note 45.

incorporated common law rule and the written text that is said to incorporate it, a principled judicial justification is required before the conclusion is accepted that the common law rule is part of supreme constitutional law, and that the form that this justification must take may not differ very much from the justifications necessary for genuinely unwritten constitutional norms.

It is not possible to consider here the sorts of principled arguments that might be made to justify the conclusion that the common law definition of marriage has been incorporated into the supreme *Constitution* by the mere use of the word marriage, but it is fair to say that the justification will have to be analytically rigorous, including a careful and complete assessment of exactly what the common law was and how it related to its broader social, political, and moral context. The written text of the Canadian Constitution does not enshrine a particular substantive definition of marriage; it simply gives the federal Parliament exclusive legislative authority over marriage. Although the position of the institution of marriage as a common law concept in the broader sense does not disqualify it from consideration as a constitutional norm, it certainly precludes any mechanical equation between the common law and textual references to the word. Furthermore, the legally plural context of the Canadian Constitution may, in certain cases, prohibit the direct incorporation of English or British common law concepts into the text. At least in relation to textual references to private law matters, the civil law of pre- and post-Confederation Quebec will be important; in these and other instances, Aboriginal legal perspectives may be important as well. Finally, careful consideration must be given to the nature of the common law rule, or unwritten law, and whether it was historically regarded as binding on legislatures. The conclusion in this respect will not be determinative of the status of the rule in today's *Constitution*, but it will provide a clear starting point for analysis. Once this historical point of reference is established, the focus of attention can then be turned to the central question: Is the inclusion of the unwritten norm important for the coherence of the *Constitution* as the normative foundation for a just political and social order in Canada today?

This kind of principled analysis is required before it can be said that the common law definition of marriage has been incorporated into the supreme Constitution of Canada. No such analysis was presented in the *EGALE* judgment. While it can be accepted that families and marriage were regarded historically as essential to civil society, and that order and stability within the present Canadian constitutional system is in some way dependent on these institutions, it must also be accepted that Canada is a secular, liberal, and legally/culturally/nationally plural state in which the actual definitions of families and marriage are very much contested. As a result, it is appropriate to conclude that the definition of marriage is left to majoritarian democratic will as exercised in Parliament subject to the discipline of the *Charter*.

