The effects of same-sex civil marriage in Canada—restrictions on free speech rights, parental rights in education, and autonomy rights of religious institutions, along with a weakening of the marriage culture—provide lessons for the United States.

Would recognizing same-sex relationships as marriages be much of a game-changer? What impact, if any, would it have on the public conception of marriage or the state of a nation’s marriage culture?

There has been no shortage of speculation on these questions. But the limited American experience with same-sex marriage to date gives us few concrete answers. So it makes sense to consider the Canadian experience since the first Canadian court established same-sex marriage a decade ago. There are, of course, important cultural and institutional differences between the US and Canada and, as is the case in any polity, much depends upon the actions of local political and cultural actors. That is to say, it is not necessarily safe to assume that Canadian experiences will be replicated here. But they should be considered; the Canadian experience is the best available evidence of the short-term impact of same-sex marriage in a democratic society very much like America.

Anyone interested in assessing the impact of same-sex marriage on public life should investigate the outcomes in three spheres: first, human rights (including impacts on freedom of speech, parental rights in public education, and the autonomy of religious institutions); second, further developments in what sorts of relationships political society will be willing to recognize as a marriage (e.g., polygamy); and third, the social practice of marriage.
The Impact on Human Rights

The formal effect of the judicial decisions (and subsequent legislation) establishing same-sex civil marriage in Canada was simply that persons of the same-sex could now have the government recognize their relationships as marriages. But the legal and cultural effect was much broader. What transpired was the adoption of a new orthodoxy: that same-sex relationships are, in every way, the equivalent of traditional marriage, and that same-sex marriage must therefore be treated identically to traditional marriage in law and public life.

A corollary is that anyone who rejects the new orthodoxy must be acting on the basis of bigotry and animus toward gays and lesbians. Any statement of disagreement with same-sex civil marriage is thus considered a straightforward manifestation of hatred toward a minority sexual group. Any reasoned explanation (for example, those that were offered in legal arguments that same-sex marriage is incompatible with a conception of marriage that responds to the needs of the children of the marriage for stability, fidelity, and permanence—what is sometimes called the conjugal conception of marriage), is dismissed right away as mere pretext. When one understands opposition to same-sex marriage as a manifestation of sheer bigotry and hatred, it becomes very hard to tolerate continued dissent. Thus it was in Canada that the terms of participation in public life changed very quickly. Civil marriage commissioners were the first to feel the hard edge of the new orthodoxy; several provinces refused to allow commissioners a right of conscience to refuse to preside over same-sex weddings, and demanded their resignations. At the same time, religious organizations, such as the Knights of Columbus, were fined for refusing to rent their facilities for post-wedding celebrations.

The Right to Freedom of Expression

The new orthodoxy's impact has not been limited to the relatively small number of persons at risk of being coerced into supporting or celebrating a same-sex marriage. The change has widely affected persons—including clergy—who wish to make public arguments about human sexuality.

Much speech that was permitted before same-sex marriage now carries risks. Many of those who have persisted in voicing their dissent have been
subjected to investigations by human rights commissions and (in some cases) proceedings before human rights tribunals. Those who are poor, poorly educated, and without institutional affiliation have been particularly easy targets—anti-discrimination laws are not always applied evenly. Some have been ordered to pay fines, make apologies, and undertake never to speak publicly on such matters again. Targets have included individuals writing letters to the editors of local newspapers, and ministers of small congregations of Christians. A Catholic bishop faced two complaints—both eventually withdrawn—prompted by comments he made in a pastoral letter about marriage.

Reviewing courts have begun to rein in the commissions and tribunals (particularly since some ill-advised proceedings against Mark Steyn and Maclean’s magazine in 2009), and restore a more capacious view of freedom of speech. And in response to the public outcry following the Steyn/Maclean’s affair, the Parliament of Canada recently revoked the Canadian Human Rights Commission’s statutory jurisdiction to pursue “hate speech.” But the financial cost of fighting the human rights machine remains enormous—Maclean’s spent hundreds of thousands of dollars in legal fees, none of which is recoverable from the commissions, tribunals, or complainants. And these cases can take up to a decade to resolve. An ordinary person with few resources who has drawn the attention of a human rights commission has no hope of appealing to the courts for relief; such a person can only accept the admonition of the commission, pay a (comparatively) small fine, and then observe the directive to remain forever silent. As long as these tools remain at the disposal of the commission—for whom the new orthodoxy gives no theoretical basis to tolerate dissent—to engage in public discussion about same-sex marriage is to court ruin. Similar pressure can be—and is—brought to bear on dissenters by professional governing bodies (such as bar associations, teachers’ colleges, and the like) that have statutory power to discipline members for conduct unbecoming of the profession. Expressions of disagreement with the reasonableness of institutionalizing same-sex marriage are understood by these bodies to be acts of illegal discrimination, which are matters for professional censure.
Teachers are particularly at risk for disciplinary action, for even if they only make public statements criticizing same-sex marriage outside the classroom, they are still deemed to create a hostile environment for gay and lesbian students. Other workplaces and voluntary associations have adopted similar policies as a result of their having internalized this new orthodoxy that disagreement with same-sex marriage is illegal discrimination that must not be tolerated.  

**Parental Rights in Public Education**

Institutionalizing same-sex marriage has subtly but pervasively changed parental rights in public education. The debate over how to cast same-sex marriage in the classroom is much like the debate over the place of sex education in schools, and of governmental pretensions to exercise primary authority over children. But sex education has always been a discrete matter, in the sense that by its nature it cannot permeate the entirety of the curriculum. Same-sex marriage is on a different footing.

Since one of the tenets of the new orthodoxy is that same-sex relationships deserve the same respect that we give marriage, its proponents have been remarkably successful in demanding that same-sex marriage be depicted positively in the classroom. Curriculum reforms in jurisdictions such as British Columbia now prevent parents from exercising their long-held veto power over contentious educational practices. The new curricula are permeated by positive references to same-sex marriage, not just in one discipline but in all. Faced with this strategy of diffusion, the only parental defense is to remove one’s children from the public school system entirely. Courts have been unsympathetic to parental objections: if parents are clinging to outdated bigotries, then children must bear the burden of “cognitive dissonance”—they must absorb conflicting things from home and school while school tries to win out.

The reforms, of course, were not sold to the public as a matter of enforcing the new orthodoxy. Instead, the stated rationale was to prevent bullying; that is, to promote the acceptance of gay and lesbian youth and the children of same-sex households. It is a laudable goal to encourage acceptance of persons. But whatever can be said for the objective, the means chosen to achieve it is a gross violation
of the family. It is nothing less than the deliberate indoctrination of children (over the objections of their parents) into a conception of marriage that is fundamentally hostile to what the parents understand to be in their children’s best interests. It frustrates the ability of parents to lead their children to an understanding of marriage that will be conducive to their flourishing as adults. At a very early age, it teaches children that the underlying rationale of marriage is nothing other than the satisfaction of changeable adult desires for companionship.

**Religious Institutions’ Right to Autonomy**

At first glance, clergy and houses of worship appeared largely immune from coercion to condone or perform same-sex marriages. Indeed, this was the grand bargain of the same-sex marriage legislation—clergy would retain the right not to perform marriages that would violate their religious beliefs. Houses of worship could not be conscripted against the wishes of religious bodies. 14

It should have been clear from the outset just how narrow this protection is. It only prevents clergy from being coerced into performing marriage ceremonies. It does not, as we have seen, shield sermons or pastoral letters from the scrutiny of human rights commissions. It leaves congregations vulnerable to legal challenges if they refuse to rent their auxiliary facilities to same-sex couples for their ceremony receptions, or to any other organization that will use the facility to promote a view of sexuality wholly at odds with their own.

Neither does it prevent provincial and municipal governments from withholding benefits to religious congregations because of their marriage doctrine. For example, Bill 13, the same Ontario statute that compels Catholic schools to host "Gay-Straight Alliance" clubs (and to use that particular name), also prohibits public schools from renting their facilities to organizations that will not agree to a code of conduct premised on the new orthodoxy. 15 Given that many small Christian congregations rent school auditoriums to conduct their worship services, it is easy to appreciate their vulnerability.

**Changes to the Public Conception of Marriage**

It has been argued that if same-sex marriage is institutionalized, new marital categories may be accepted, like polygamy. Once one abandons a
conjugal conception of marriage, and replaces it with a conception of marriage that has adult companionship as its focus, there is no principled basis for resisting the extension of marriage licenses to polygamist and polyamorist unions.

In other words, if marriage is about satisfying adult desires for companionship, and if the desires of some adults extend to more novel arrangements, how can we deny them? I will not here evaluate this claim, but simply report how this scenario has played out in Canada.

One prominent polygamist community in British Columbia was greatly emboldened by the creation of same-sex marriage, and publicly proclaimed that there was now no principled basis for the state’s continued criminalization of polygamy. Of all the Canadian courts, only a trial court in British Columbia has addressed whether prohibiting polygamy is constitutional, and provided an advisory opinion to the province’s government. 16

The criminal prohibition of polygamy was upheld, but on a narrow basis that defined polygamy as multiple, concurrent civil marriages. The court did not address the phenomenon of multiple common-law marriages. So, thus far, the dominant forms of polygamy and polyamory practiced in Canada have not gained legal status, but neither have they faced practical impediments.

The lesson is this: a society that institutionalizes same-sex marriage needn’t necessarily institutionalize polygamy. But the example from British Columbia suggests that the only way to do so is to ignore principle. The polygamy case’s reasoning gave no convincing explanation why it would be discriminatory not to extend the marriage franchise to gays and lesbians, but not discriminatory to draw the line at polygamists and polyamorists. In fact, the judgment looks like it rests on animus toward polygamists and polyamorists, which is not a stable juridical foundation.

The Impact on the Practice of Marriage
As for the practice of marriage, it is too soon to say much. The 2011 census data establish that, first, marriage is in decline in Canada, as it is in much of
the West; second, same-sex marriage is a statistically minor phenomenon; and third, there are very few same-sex couples (married or not) with children in the home.\footnote{17}

There are approximately 21,000 married same-sex couples in Canada, out of 6.29 million married couples. Same-sex couples (married and unmarried) constitute 0.8\% of all couples in Canada; 9.4\% of the 64,575 same-sex couples (including common-law and married) have children in the home, and 80\% of these are lesbian couples. By contrast, 47.2\% of heterosexual couples have children in the home. Canada stopped tracking divorce after 2008, and has never provided data on same-sex divorce.

What we can gather from these data is that same-sex marriage has not, contrary to arguments that it would, powered a resurgent marriage culture in Canada. Nor are there any census data (one way or the other) for empirical arguments tying the institutionalization of same-sex marriage to marriage stability.

Without empirical data on divorce rates (which are not forthcoming in Canada), we are left with conceptual arguments that must be evaluated on their merits. Here, the Canadian experience cannot provide much information. We are left with the question, does the institutionalization of same-sex marriage rest on a conception of marriage that places a premium on stability, as does the conjugal conception? If it does not, then we can reasonably believe same-sex marriage will speed up cultural acceptance of a conception of marriage—the adult companionate model—that has done much social damage over the past fifty years.

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Notes:

1. See, for example, the comments of Justice LaForme in Halpern v. Canada (AG), 2002 CanLII 49633 (On SC), paras. 242-43.
2. See, for example, Saskatchewan: Marriage Commissioners Appointed Under the Marriage Act (Re), 2011 SKCA 3.

4. See the remedy ordered by the Alberta Human Rights tribunal (later overturned on judicial review) in Lund v. Boissoin, 2012 ABCA 300.


7. Fred Henry, Bishop of Calgary, Alberta http://www.ccrl.ca/index.php?id=4917; note also the experience of Fr. Alphonse de Valk, editor of Catholic Insight, who spent $20,000 defending a human rights complaint that was eventually dismissed.


10. Ibid.


