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The legal regulation of the family in a liberal state often gives rise to controversy. It is also an area where conservative commitments to tradition and institutions are tested in the face of (proposed) innovations in family law and policy. How to deal with non-heterosexuality has been a particular source of tension within the body of postwar Conservatism, laying bare the authoritarian and libertarian dispositions at war in its members. This paper will first sketch out the Conservative Party’s record on homosexual law reform since the 1980s, and then go on to consider arguments around the legal recognition of same-sex relationships in relevant political thought. This discussion will then inform the examination of the Civil Partnership Act 2004 and the Marriage (Same Sex Couples) Act. The article concludes by observing that, while there were some similarities in the Party’s approach to the two Bills, conservative arguments in favour of the legal recognition of same-sex relationships were more readily articulated in the civil partnership debates chiefly because it was seen as an evolutionary innovation and there was no existing institution which would be the subject of change. How Conservatives perceived notions of change in the legislation was indicative of whether the Bills would attract their support (and vice versa), signifying the limited utility of a classical conservative understanding of change as a practical theory for supporting major social developments.

Introduction

One of the major social changes of the last fifty years has been the legal treatment of the intimate lives of gay (and, in part, lesbian) people – “from “odious crime” to “gay marriage”” as Cretney (2006) pithily puts it. The scale and pace of change has not been uniform over time, with periods of regression as well as those of breathtakingly rapid transition. How to deal with non-heterosexuality has been a source of tension within the body of postwar Conservatism, laying bare the authoritarian and libertarian dispositions at war in its members. Sometimes an authoritarian approach won the day (section 28 of the Local Government Act 1988 comes to mind), whereas at other times the ghost of J. S. Mill has prescribed a more permissive policy. Indeed, I shall argue in this paper that the latter approach was one feature of the official party line on the advent of civil partnerships and same-sex marriage. Before doing so, I will first sketch out the Party’s record on homosexual law reform since the 1980s, and then go on to consider arguments around the legal recognition of same-sex relationships in relevant political thought. This discussion will then inform my examination of the Civil Partnership Act 2004 and the Marriage (Same Sex Couples) Act. Throughout this paper I use the word ‘conservative’ (small ‘c’) to denote the political philosophy,
and ‘Conservative’ (big ‘C’) to refer to what the British Conservative Party says or does or to members of the parliamentary party.

The Conservative Party and Homosexual Law Reform

The postwar Conservative Party has had an ambivalent attitude towards the legal treatment of homosexuality. The party established the Wolfenden Committee which led, eventually, to the decriminalisation of certain homosexual offences; introduced s.28 of the Local Government Act 1988 (LGA); opposed gay adoption in the Adoption and Children Act 2002; supported the introduction of civil partnerships; and in coalition put same-sex marriage on the statute book. To some extent, explanations for each of these events lie in their various social and temporal locations, making unifying principles difficult to discern. This paper, however, seeks to discover what part conservatism, qua a body of political thought, played in the passage of two bills regulating the intimate lives of gay people.

John Major believed that the wartime generation of MPs often had a more tolerant inclination towards homosexuality but that many of the new intake held more ideological views (McManus, 2011). Similarly, Norton (1990) argues that attitudes towards homosexuality began to harden after the 1983 election which saw a change in the demographic of Conservative MPs. This shift towards social authoritarianism, combined with the AIDS crisis, was to set back the cause of gay rights by perhaps a decade. McManus observes that ‘[t]he tone of moral indignation was growing’ (Ibid., p.111) as seen in s.46 of the Education (No. 2) Act 1986, which, foreshadowing s.28 of the LGA, required sex education in schools to encourage pupils ‘to have due regard to moral considerations and the value of family life.’ Some Conservative MPs wanted to go further, particularly to deal with the infamous Jenny Lives with Eric and Martin library book issue, and proposed an amendment which would have given the Secretary of State the power to remove any sex education books which ‘are unsuitable or morally corrupting.’ (Peter Bruinvels MP, Hansard HC Deb. vol. 120 col. 1055, 21 October 1986). It was not long before the government did go further when it introduced what became section 28 of the LGA which prohibited local authorities from ‘intentionally promoting homosexuality’ or promoting ‘the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship’ (emphasis added). It was the final three words which proved particularly incendiary to opponents. Section 28 is emblematic of high-Thatcherite social policy; a populist authoritarian measure, justified by a conservative claim to the importance of defending the traditional, married, heterosexual family unit (Isaac, 1990; Durham, 1991). With hindsight it can be argued that the Conservatives scored a spectacular own goal with the introduction of this section because, first, there was little evidence that ‘promotion’ was going on on anything more than a tiny scale, and, two, it served as a very effective ‘recruiting sergeant’ for the gay cause and led directly to the founding of lobby group Stonewall (Stychin, 2006b).

The confluence of AIDS, s.28, and Conservative ‘Victorian values’ rhetoric was no accident. While each can be seen to be independent of the others, their coincidence provided synergistic energy to one of the defining social issues of the decade. The emergence of AIDS, which was first reported in 1981, was a double-edged sword for the gay rights movement. In one respect it was a huge setback, providing ammunition for some social conservatives - who saw it as a consequence of a promiscuous and hedonistic gay ‘scene’ - to argue for state-sanctioned measures to prevent attempts to normalise homosexuality (e.g. section 28). On the other hand, it was then but a small step of logic to contend that there is no better way to combat such selfishness and promiscuity than to offer same-sex couples formal legal
recognition for their relationships, but it would not be until the next millennium before this was realised (Cretney, 2006).

William Hague succeeded Major in June 1997. Despite occasional socially liberal notes, the overall tone of Hague’s leadership was designed to appeal to its core supporters and it did not deviate substantially from the attitudes towards gays and lesbians which had ossified during the 1980s (Hayton, 2010; Harris, 2011). Hague was possibly more socially liberal than much of his parliamentary party, but the message was conveyed with forked tongue, making any pro-gay overtones seem opportunistic at best. For example, Hague reportedly expressed support for equalising the age of consent, yet only eighteen Conservative MPs voted in favour of that measure in June 1998 (McManus, 2011). He purposefully courted the support of religious groups (Cohen, 2000), and thanked them for ‘fighting to retain Section 28’ (Hague, 2000). And when it came time to write the 2001 general election manifesto it contained these two painfully contradictory statements: ‘Tolerance is one of Britain's historic virtues. A strong society is built on respect for all people – whatever their race, religion, gender or sexual orientation.’ (Conservative Party, 2001, p.33); and, ‘We will also retain Section 28 of the Local Government Act.’ (Ibid., p.45). When the election resulted in an overall gain for the party of just one seat, Hague resigned.

Although the electorate largely rejected Hague’s ‘crude right-wing populism’ (Harris, 2011, p.510), it did not deter the Party from electing the Thatcherite Iain Duncan Smith to succeed him. So while expectations were understandably low, there were ‘very slight signs of softening’ in the Party’s approach to homosexual law reform during Duncan Smith’s tenure (McManus, 2011, p.245). During his leadership campaign Duncan Smith declared he would review the Party’s policy on section 28, but when it came to a vote he opted for its retention, as did David Cameron (Watt, 2009; McManus, 2011). They were in the minority overall and the section was finally repealed in 2003. The other issue of homosexual law reform arising under Duncan Smith’s leadership was that of adoption by gay couples in the Adoption and Children Bill. This is a good example of the rapidity with which public attitudes towards gay people changed. Cretney (2006) notes the British Attitudes Survey 1989 recorded 78 per cent of respondents against adoption by lesbians and 86 per cent against it for gay men, while in 2002 a MORI poll suggested 44 per cent in favour of gay and lesbian couple adoption, 36 per cent against, and 20 per cent undecided. Despite these data, the fact that such matters were often considered conscience issues, and that most of the parliamentary party agreed with the leadership anyway, Conservative MPs were whipped to oppose the Bill (McManus, 2011). Conservative opposition, though substantial, was not enough to stop the Bill becoming law. The Adoption and Children Act 2002 was to be strategically important in the advance towards civil partnership and same-sex marriage because it removed from the debate the clearly highly divisive issue of gay adoption (Harper, et al., 2005). But it was in the area of what became civil partnerships that there were signs of a more ameliorative attitude towards gay people.

Section 1(1) of the Marriage (Same Sex Couples) Act reads: ‘Marriage of same sex couples is lawful’. These seven words proved to be amongst the most controversial in the history of family law making in the United Kingdom, as well in the history of the Conservative Party. Why were they such an issue? Why did the government’s pre-legislative consultation provoke more responses than any other before it (Government Equalities Office, 2013), and why did it so offend Conservative members that many apparently left the party (Holehouse, 2013)? I think Etelbrick and Sullivan can provide an answer. Marriage has the power to transform ‘outsiders’ to ‘insiders’ (Ettelbrick, 1989, p.123) – ‘It is the final acceptance, the ultimate affirmation of identity.’ (Ibid., p.126, emphasis added) Drawing a parallel with
marriage and the anti-miscegenation laws in America, Sullivan (2004) believes it is because same-sex marriage would signal wholesale acceptance of homosexuality in society. To go from ‘pretended family relationship’ to ‘ultimate affirmation’ in around two decades was a change of such a magnitude that it led inevitably to fault lines opening up within the Party. Before considering the lie of those fault lines, I will next examine how homosexual relationships, and their legal regulation, have been understood from various theoretical perspectives.

Conservatism and Homosexuality

Conservatism is often connected with contrarian arguments around same-sex marriage, chief among which are the New Natural Law theory of Finnis (1993; 1997) and Lee and George (1997), and the Hegelian offensive of Scruton (1986; 2006; 2013). Most ‘conservative’ arguments in favour seem to be either conservative/libertarian or are otherwise only partially theorised. The conservative/libertarian position rests on a classical liberal reading of Mill’s harm principle, and is one of the most common and compelling arguments for gay marriage. It is not, however, a conservative argument as I and others would see it (e.g. Carey, 1998). The other strand of conservative support for gay marriage tends to construct gay men in particular as the problem which can be fixed through assimilation into, and civilisation through, the institution of marriage, which in turn strengthens marriage (e.g. Rauch, 1996; 2004; Sullivan, 1989; 1995). This emphasises – as does Cameron (see below) - conservative family values such as commitment and stability. It has been an influential argument, but its success is in part due to its minimising of a conservative conceptualisation of change. This prompted me to attempt a synthesis of the conservative assimilationist position with a Burkean/Oakeshottian notion of change (a ‘classical conservative argument’), and this is developed further below.

The Objection from Natural Law Theory

Natural law theory is encountered in political, moral, ethical and legal thought. It is the universalist theory that law derives from nature, although it varies in the extent to which appeal is made to a divine source for such law. It is associated with the likes of Aristotle, Aquinas (especially), Hobbes, Locke and – more recently – with the ‘New Natural Law theorists’ Finnis, George and the Catholic philosopher Grisez. As the latter three have written particularly on contemporary sexual ethics, their work will inform my discussion here.

Finnis draws on Grisez’s work in moral theology when outlining his objection to homosexuality. In his work he sets out why homosexuality is wrong and why marriage alone is good and the only place in which sexual activity is acceptable (Finnis, 1994). He writes that, regardless of whether the marriage is fertile or sterile ‘the communion, companionship, societas and amicitia of the spouses – their being married – is the very good of marriage, and is an intrinsic, basic human good, not merely instrumental to any other good.’ (Ibid., p.1064). He then goes on to consider extra-marital sex (hetero- or homosexual) and argues that because it is not an experience of the ‘marital good...it can do no more than provide each partner with an individual gratification.’ (Ibid., p.1066, his emphasis) This leads him climactically to his controversial conclusion that ‘there is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it.’ (Ibid., p.1067) Finnis condemns the actor in these scenarios for using his/her body as an instrument, which leads to a dis-
integration of the self. Lee and George join Finnis in explaining why, for them, this dis-integration is so problematic: ‘The integration of the various aspects of the self in action or in the self-awareness is a basic human good, an intrinsic aspect of fulfilment, the lack of which is a privation.’ (1997, p.141, emphasis added) Only in marital intercourse is there full integration. Being gay is therefore rejected as an acceptable expression of the good life and the state is charged with ‘doing whatever it properly can…to discourage such conduct.’ (Finnis, 1994, p.1070, his emphasis).

The Conservative/Libertarian View

Political parties which are usually considered to be conservative parties (such as the US Republican party or the British Conservative Party) are also known for having a significant libertarian grouping within their ranks (especially in America), yet it is questionable the extent to which conservatism and libertarianism are compatible. At its simplest libertarianism is a political philosophy which espouses liberty as the ultimate political end. Libertarianism, particularly as it is understood in the United States, is akin to classical liberalism in that they both claim Mill's harm principle as their 'golden rule'. Assuming for a moment that such a view is valid, conservative libertarianism would emphasise, and seek to balance, freedom and individual liberty with a respect for virtue, tradition and order. However, thus expressed it is easy to see how Kirk concludes it is inconceivable that there could be a coalition between conservatives and libertarians (Kirk, 1998; see also Hospers, 1998). The terrain of this schism is mapped out by Nisbet as follows:

’On balance, I would hazard the guess that for libertarians individual freedom, in almost every conceivable domain, is the highest of all social values – irrespective of what forms and levels of moral, aesthetic, and spiritual debasement may prove to be the unintended consequences of such freedom. For the conservative, on the other hand, freedom, while important, is but one of several necessary values in the good or just society, and not only may but should be restricted when such freedom shows signs of weakening or endangering national security, of doing violence to the moral order and the social fabric.’ (Nisbet, 1998, p.50)

It is the libertarian’s acontextual privileging of liberty, and the concern it raises that libertarianism is only a small step from libertinism, that are so objectionable to conservatives (Hospers, 1998; Kirk, 1998). For the conservative, freedom is never abstract (freedom to do what?) and must be located within the restraints of social and moral authority. So, whilst I reject the claim that libertarianism is compatible with conservatism as I understand it, it is still important to state the libertarian argument in favour of the legal recognition of homosexual relationships because it is one which has featured in the parliamentary discourse. Put simply, the libertarian/classical liberal argument holds that civil partnership and gay marriage should not be forbidden absent proof that they would cause harm to others.

The Conservative Assimilationist Argument

One of the most prominent discursive strategies in England’s journey towards civil partnership and same-sex marriage has been to describe gay and straight domestic relationships as functionally similar. They are thus characterised by a core of mutual love, out of which flows care, support, and a general sharing of lives. This is evident in cases such as Fitzpatrick v Sterling Housing Association [1999] 4 All ER 705 and Ghaidan v Mendoza [2004] 3 All ER 411 (Glennon, 2000; Diduck, 2001), and in
media and parliamentary discourse around the Act (Finkelstein, 2011; Montgomerie, 2012). Both former Conservative Party insiders, Finkelstein thought gay marriage was a ‘profoundly conservative idea’, and Montgomerie, citing the influence of Sullivan, saw marriage as ‘conservatising’ and ‘so beneficial an institution it should be enlarged rather than fossilised.’ The success of this strategy has resulted from its emphasis on the essential sameness of gay and straight relationships; the gay ‘other’ being assimilated within the dominant heterosex paradigm.

The conservative assimilationist argument for same-sex marriage is often associated with Eskridge (1996), Rauch (1996, 2004) and Sullivan (1989, 2004). As conservatism is (perceived to be?) most commonly deployed to refute same-sex marriage claims, the advancement of an affirmatory conservative case prompted Sullivan to call it ‘one of the earliest twists’ in the short history of agitation for gay marriage (Sullivan, 2004, p.146). The argument comprises the following elements: marriage will civilise gays; it would support the institution of marriage by an extension of ‘family values’ through society; and it is preferable to marriage-like (or –lite) reforms such as civil partnership, which might serve to undermine marriage. These are all explored further below.

The fundamental premise of the ‘civilising’ argument is not new: It has long been understood that one of marriage’s functions has been as a means of socialising tendentially anti-social young males (e.g. Rauch, 1996; Josephson and Burack, 1998). Some conservatives, contrariwise, argue that gay marriage would pollute the virtuous heterosexual model, i.e. that causes arising in gay marriage result in effects in straight marriage. Sullivan and Rauch reject this supposition. Rather the conservative response should be to incentivise gay people, through a more inclusive notion of marriage, to conduct their relationships with monogamy and fidelity. The commitment required in marriage will act to stabilise and settle the otherwise flighty lifestyles of gay libertines and bring with it improvements in the health and general welfare of homosexual people. But these are untested assumptions (Wilson 1996), or, one might say, they were untested at the time they were written. (Following the legal recognition of gay and lesbian relationships in many states, it might now be possible to test whether this hypothesis is valid.) It is worth noting that the civilising argument is predicated on a gay male subject, lesbians tend not to be conceived of as problematic, and are largely invisible in the discourse.

Second, gay marriage would lead to the diffusion of family values throughout society, thereby further accentuating the benefits of marriage as an institution. Not only does Sullivan believe that the traditional family can serve as a model for homosexual family life but that there can be beneficial counterflows too: ‘If constructed carefully as a conservative social ideology, the notion of stable gay relationships might even serve to buttress the ethic of heterosexual marriage, by showing how even those excluded from it can wish to model themselves on its shape and structure.’ (Sullivan, 2004, p.155) It would also provide reliable caregivers, especially in old age, which would be particularly useful for same-sex couples who are less likely to have had children (Rauch, 1996; Wax, 2005).

Turning to the third point, Rauch also argues that it is better for the institution of marriage to permit same-sex marriage rather than provide a marriage-like alternative such as civil partnership. His logic is simple: legal forms which compete with marriage can only undermine marriage; the best way to support marriage as an institution is to preserve its exclusive status as the only legally recognised and socially privileged relationship form (Rauch, 1996.; Wax, 2005). Moreover, rather than establishing quasi-marriage institutions, some argue that if conservatives really believe that marriage is all they claim it is then they should go further and insist on
gay marriage for those who claim to love and be committed to each other (Brooks, 2003).

One of the limitations of the conservative functionalist, assimilationist argument is that it has not yet been developed at a particularly high level of abstraction of conservative political thought. Rauch (1996, 2004) does briefly discuss Hayek and Burke, particularly the conservative caution around radical revision of existing institutions, and he rightly points out that there is a direct relationship between the good which might be produced by a change and the risks associated with that change (e.g. it might be argued that as gay marriage would remedy a substantial injustice it is worth taking the risk that it might harm the existing institution). He also accepts the Burkean/Oakeshottian maxim that the burden of proof falls on him as the advocate of change, while observing that predictions of social catastrophe following earlier homosexual law reforms have not materialised. However, his discussion of the conservative problem of change from a Hayekian perspective is limiting. As Wax (2005) argues, Hayek is less apposite here because there is nothing he says which Burke and Oakeshott do not cover more fully and with a broader socio-economic vista. What is needed, I contend, is a more deeply theorised discussion around same-sex marriage – particularly regarding the issue of change - grounded in conservative thought, and it is to this I now turn.

**Going Further - A Classical Conservative Argument**

Conservatism, in both theory and practice, is often associated with a defence of the family, usually the married, heterosexual family. However, I would argue that the Conservative focus on family form over function is a departure from the root of the conservative commitment to the family which is because ‘it is the vehicle for the transmission of values and civilities which make it possible for us to get along together in society’ (David Willetts MP quoted in Barton and Douglas, 1995, p.237). So, if it is being true to its ontological roots, conservatism does not value family for any normative reasons but because of its importance as an institution. O’Hara (2011, p.172) agrees that it is a ‘misperception that conservatives must favour traditional family structures over newly emerging forms’. A classical conservative argument for same-sex marriage would not be driven by naked appeals to universal principles of equality and fairness, but viewing the family primarily from a functional perspective, would state that if a gay family functions like a ‘normal’ family then it should be given equal recognition. In this respect, the classical conservative position is not only consonant with the conservative argument outlined above, they are the same. I would argue where they differ, however, is in the former’s principled treatment of change.

Conservatism is concerned with the *management* of change and how change can be reconciled with established societal structures (Andreasson, 2014).

‘Conservatism as an ideology, then, is characterized, in the first instance, by opposition to the idea of total or radical change, and not by the absurd idea of opposition to change as such, or by any commitment to preserving all existing institutions.’ (O’Sullivan, 1976, p.9)

A critical distinction is drawn between organic and artificial change. Organic change is bottom-up, demand-driven; whereas artificial change is top-down and supply-driven. From a conservative viewpoint, benefits are more likely to come from the former model because it emerges naturally from the infinitudinal interactions of a complex society, rather than the a *priori* assumptions of decision-makers (O’Hara,
Conservatives who oppose, or seek to reverse, organic change act in a way which is ‘futile, wrong-headed and ultimately counterproductive.’ (O’Hara, 2011, p.97) As much societal change happens almost imperceptibly slowly, the challenge for the conservative is to know when to cease his opposition and to embrace the change. The early manifestations of change will often be resisted because, at this stage, it is not known if continued opposition may be effective in killing off the embryonic development. It might transpire that the seed of change will not ‘take root’, evidencing its apparent societal rejection. But identifying the point - the ‘threshold’ (O’Hara, 2011, p.58) - when a conservative should support a change and ‘go with the grain of human nature’ is a perennial puzzle for those of a conservative disposition. So how can it be determined which change is desirable and which should be resisted? A reading of conservatism’s most influential thinkers elicits the following guiding principles.

First, the burden of proof is on the innovator to show that the benefits of the change outweigh its costs (Oakeshott, 1991; O’Hara, 2011). Second, the change must be in response to a felt need, rather than in pursuit of a utopian vision (Oakeshott, 1991). Third, in terms of scale and rate of change, the change should be incremental and evolutionary (Burke, 2004). Fourth, the change should be rigorously evaluated before the next incremental step. Support for this is found in O’Hara (2011) and in Burke (2004, p.281): ‘By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first, gives light to us in the second’. So, for example, in evaluating a proposal to allow same-sex marriage, a British conservative might examine the impact on families of legislation covering gay adoption and civil partnerships. A conservative in favour of the change must show at least that institutional harm has not resulted, although they would be faced with perhaps insurmountable empirical challenges in doing so. And fifthly, change should be reversible where possible (O’Hara, 2011). This is a development of the previous principle. If, on evaluation, it transpires that the change has been a mistake then ideally there should be a way to return to the status quo ante. The reality is, of course, that in a liberal society once a freedom has been granted it is difficult to reverse. It is inconceivable that the permissive legislation of the 1960s relating to abortion, divorce and homosexuality could be repealed in an attempt to return to an earlier moral settlement. And this would surely be the case with the legalisation of same-sex marriage, as it would confer the legally, fiscally, socially privileged status of marriage. Once released, the genie could not be put back in the bottle.

Before moving on, a few words about the important distinction between conservatism and orthodoxy. Orthodoxy defends institutions because of ‘a belief in their correspondence to some ultimate truth’ (Muller, 1997, p.4), which may rest on religious or secular foundations but either way it transcends merely historical or contingent justifications. And it is such justifications which are the hallmark of conservatism proper: institutions (e.g. monarchy, church, family) are defended because they have proved themselves over time and too great a risk is posed by their diminution or destruction. Arguing that conservatism is actually a creature of the Enlightenment, Muller (1997, p.5) writes ‘What makes social and political arguments conservative as opposed to orthodox is that the critique of liberal or progressive arguments takes place on the enlightened grounds of the search for human happiness, based on the use of reason’ (his emphasis). It is apparent that orthodoxy looms large in much Conservative argument over same-sex marriage. I therefore classify below arguments from Conservative MPs as orthodox (and not therefore conservative) those which argue against same-sex marriage based on a metaphysical appeal to the inviolability of the heteronormativity of marriage, without more.
‘Commitment Rewarded’ - The Civil Partnership Act 2004

When the Bill was published in 2004 The Times welcomed its publication with a conservative assimilationist argument in an editorial entitled ‘Commitment Rewarded’, although its prediction that the Bill ‘would have a relatively easy passage through Parliament’ was not its most prescient (Times, 2004).

The Bill was in poor shape when it began its parliamentary journey, evidenced by the hundreds of government amendments tabled during its passage. Christopher Chope’s comment (Hansard HC Deb. vol.425 col.213, 12 October 2004) that it was ‘a buggers’ muddle’, while more suited to a junior common room debate than the UK’s primary legislative chamber, did therefore have an element of truth about it. The final Act – which runs to 442 pages, 264 sections and 30 schedules – essentially translates ‘the entire package of rights and responsibilities, and benefits and detriments, of marriage into a same-sex context.’ (Stychin, 2006a, p.79).

The Conservative Party leadership’s support of the Civil Partnership Bill is significant because it is the first time it moved ‘beyond grudging tolerance of same-sex relationships.’ (McManus, 2011, p.280). McManus calculates that 74 Conservative MPs voted for the Bill at Second or Third reading but never against it, whereas 49 voted against in those sessions but never for it. He makes the point that the Bill was supported by Conservatives in the lower house by about three to two, but it was opposed to the last by a majority of Conservative peers.

The Official Conservative Position – Conservative and Libertarian Strands

Despite strong support for the Bill from Party leader, Michael Howard (Daily Mail, 2004; Watt, 2004), and the advent of gay adoption following the Children and Adoption Act 2002, the official message remained ‘that the best environment for bringing up a child is with two loving, married parents.’ (Wilcox, Hansard HL Deb. vol. 660 col. 394, 22 April 2002; Duncan, HC Deb. vol. 425 col. 187, 12 October 2004). Here then was a classical conservative perception of change as continuity; as Duncan put it (Ibid.), ‘we have always accepted that ordered change is the best way to conserve those things that we value.’ There was an acceptance that families are changing and a recognition that public attitudes had shifted. It was also easy to see the Bill as the next logical step, an incremental change which arose from an Oakeshottian ‘felt need’ that justice required legal recognition of same-sex unions. One of the Bill’s most articulate and enthusiastic supporters, John Bercow, claimed (Hansard HC Deb. vol. 426 col. 756, 9 November 2004) that the Bill could be supported form socialist, liberal and conservative standpoints, and that ‘the principles of civil partnership for gay couples are eminently defensible in and can be expressed as part of Conservative philosophy.’

Conservative (small ‘c’) arguments in favour (like support for the Bill generally) were constructed largely in analogous and assimilationist terms. Marriage was held up as an exemplar which instructs us as to what civil partnerships could and should look like. The Conservative (and conservative) case rested on two main contentions: that civil partnerships would, by analogy, bring marriage-like benefits to the parties and to society, and that civil partnerships would not undermine marriage. As discussed above, both of these points are well established in the literature.

Stychin observes that the parliamentary debates are permeated with assimilationist discourse, with no mention of the feminist critiques of marriage and the possibility of alternative legal forms of relationship being made available to gays or straights:
‘Inclusion, rather than social change, is the message.’ (Stychin, 2006, p.81). The elimination of the ‘otherness’ of gays and lesbians was central to the conservative case. For gay people to be accepted, and acceptable, difference had to be suppressed and sameness accentuated. As Barker (2012, p.168) argues, the law ‘would not recognize a same-sex relationship which was not analogized to a heterosexual relationship.’ This was acceptance by analogy.

The emphasis on family function over form had another aspect to it. This aspect was founded on a Burkean understanding of institutions and can be observed in the pragmatic, non-ideological support for marriage in contributions such as this one: ‘Our support for marriage therefore stems not from dogma or religious values…our support for marriage stems from the increasingly available evidence that marriage has significant benefits for present and future generations.’ (Buscombe, Hansard HL Deb. vol. 660 col. 410, 22 April 2004) Burke’s idea of the intergenerational social contract (‘benefits for present and future generations’) is also discernible here. Not only was marriage held up as an unquestionable social good, but the Conservative leadership persistently asserted that the Bill would not undermine marriage but would encourage commitment and family values: ‘Far from undermining marriage the Bill will, we hope, encourage the long-term commitment and mutual support that makes marriage such a benefit to society.’ (Wilcox, Hansard HL Deb. vol. 660 col. 394, 22 April 2004).

There was also extensive appeal to a notion of ‘justice’ by Conservatives (‘This Bill is about justice.’ (Key, Hansard HC Deb. vol. 425 col. 206, 12 October 2004); ‘The Bill is about fairness and justice.’ (Hendry, ibid, col. 230)). Alan Duncan, opening the case for the official opposition at Second Reading, frames his argument with reference to both justice and assimilation narratives:

‘The need for the Bill is obvious to anyone who has seen and felt some of the heart-rending injustices that can occur when a committed gay couple are denied the basic rights that a married heterosexual couple would take for granted. Despite sharing their lives together, too many of these people find that their mutual love and commitment count for absolutely nothing in the eyes of the law.’ (Hansard HC Deb. vol. 425 col. 183, 12 October 2004)

And a little further on he says:

‘If we preach that the values inherent in marriage – love, mutual commitment and responsibility – strengthen and enrich society, how can we claim that the replication of such values for gay couples will cause damage? Imitation is, after all, the sincerest form of flattery…The Bill does not undermine or compete with marriage.’ (Ibid. col. 184, and a similar point is made by Robert Key at col. 207)

Conservatives also backed the Bill on libertarian grounds. Baroness Wilcox, quoting Michael Howard, justified her Party’s support thus: ‘It is to recognise and respect the fact that many people want to live their lives in different ways. And it is not the job of the state to put barriers in their way.’ (Hansard HL Deb. vol. 660 col. 395, 22 April 2004). Similarly, the Earl of Onslow supported the Bill ‘because it is really a matter of liberty.’ (Ibid., col. 416). However, a libertarian argument does not necessarily direct a particular outcome here. It could be used to support or oppose a claim for the legal recognition of same-sex relationships. While Hendry, for example, did use it to express approval (‘Governments should not become involved in such decisions [about how to live] unless they have a negative impact on other people. (Hansard HC Deb. vol. 425 col. 234, 12 October 2004)), Widdecombe used it to oppose (‘As I said..."
earlier—and I think that most Conservative Members will agree—it is inappropriate for Government to intervene in people's exercise of choice.' (Ibid., col. 203)). Her point was that there was nothing stopping gays and lesbians forming relationships and living together. She seemed to be saying that government should not be in the business of regulating people's intimate lives, yet she did not extend this logically to include the state withdrawing from the regulation of marriage.

In summing up the case for the Official Opposition, Duncan identified libertarian and authoritarian strands of thought in the debates, in the process referring to the Hart/Devlin debate and J.S. Mill (Hansard HC Deb. vol. 426 col. 799, 9 November 2004). He concluded with an essentialist argument for legal recognition ('[B]eing gay is not a matter of choice. A natural disposition, which does no harm to others, cannot be immoral, however much it might be intensely despised by some.' (Ibid., col. 801)), and a classical liberal appeal: 'The role of the state is to intervene when two people are doing harm to each other, not when they just happen to love each other.' (Ibid.)

### The Conservative Dissent

It is fair to say that both supporters and opponents of the Bill covered their arguments with a degree of obfuscation. The fact that the Labour government's strategy was to avoid the label of 'gay marriage' attaching to the Bill, and the opposition's was to try to make it stick, implies that they both understood the totemic significance of 'marriage'. Public and parliamentary opinion had come round to the view that justice required a legal form for same-sex couples, but one which was formally separate from marriage, even if it was not substantially distinct. For the Bill to succeed 'gay marriage' had to be kept safely locked up in a box – for now at least.

Conservative opponents were dogged in their attempts to 'expose' the Bill as creating gay marriage, which, presumably, they felt would then rally sufficient opposition for the Bill to fail. Baroness O'Cathain was considered to be the spiritual successor to Janet Young, who died in 2002, and she was the Bill's most vociferous enemy (McManus, 2011). Her first contribution to the debates opened with a plain statement: ‘I firmly believe that this Bill creates gay marriage. This is a gay marriage Bill. The Government may call it civil partnership but in reality it is a form of marriage for same-sex couples.’ (Hansard HL Deb. vol. 660 col. 403, 22 April 2004). During the Committee Stage she was metronomic in her attempts to get the 'gay marriage' label to adhere to the Bill (Hansard HL Deb. vol. 661, cols. GC44, GC54, GC57, GC135, GC177, GC178, 10-25 May 2004). This tactic continued during the Commons stages. Edward Leigh thought it would be fairer to the House ‘if the Government came clean and announced that they support gay marriage. Why will they not do so?’ (Hansard HC Deb. vol. 425 col. 177, 12 October 2004). Ann Widdecombe also pressed the government for an admission that civil partnership is gay marriage in all but name, which enabled her then to shift the debate and ask, ‘do we think that homosexual marriage is right?’ (Ibid., col. 201). At Report Stage Leigh set a trap for the government saying that he would withdraw his amendment (to allow siblings to form civil partnerships) if the minister said that it was inappropriate because the Bill is about creating gay marriages (Hansard HC Deb. vol. 426 col. 734, 9 November 2004). Jacqui Smith saw what was behind these attempts to conflate ‘gay’ and ‘marriage’ in the public consciousness: '[The] reason for wanting to call this new relationship a gay marriage was precisely to provoke protest out in the country.' (Ibid., col. 776). She did later acknowledge that civil partnerships are ‘akin’ to civil marriage (Ibid.), so it may be too strong to accuse the government of obfuscation, but ministers did present a united front in stressing the distinctiveness of civil partnerships.
The opposition tactics certainly deserve being imputed with obfuscatory motives. I contend that opponents mainly objected to the legal recognition of same-sex relationships on moral grounds, but were unable to express their full-throated condemnation because of the opprobrium it would have attracted and the damage it would have inflicted on the Party’s tentative steps towards rebranding. Perhaps Howarth let the cat out of the bag will his Second Reading speech, revealing the true nature of much of the Conservative opposition to the Bill. He expressed concern that civil partnerships will send out the message that heterosexual and homosexual lifestyles are equally valid and ‘encourage the proliferation of homosexuality’. (Hansard HC Deb. vol. 425 col. 217, 12 October 2004). He expanded on this a little later on, ‘I take the view that this is an overwhelmingly Christian country, that our laws must be founded on the Christian faith.’ (Ibid., col. 239) and that civil partnership would also send out a ‘false signal’ that ‘a homosexual relationship is an equally valid lifestyle.’ (Ibid., col. 241) All of which was semantically only a hair’s breadth away from the ‘pretended family relationship’ of section 28. Similarly Chope opined: ‘I do not believe that such a [same-sex] relationship is a valid one under the laws of God.’ (Hansard, SC D, col. 32, 19 October 2004). These arguments can perhaps be located under Muller’s broad orthodox category and the New Natural Law theory of Finnis et al.

So instead of full-frontal moral condemnation, opponents set up a sort of Aunt Sally (an object which is designed to attract negative attention and waste an opponent’s energy), which came to be known as the ‘spinster sister’ problem. The argument went as follows. Many family members live together in the same household, often playing a caring role, sometimes over many years. When one of them dies the survivor is liable to pay inheritance tax (IHT) on their estate, which can sometimes only be paid through the sale of the home they occupied, causing upset and hardship. This situation would not arise for same-sex civil partners under the Bill (because they would be covered by the same exemption available to married couples), and therefore the Bill causes this injustice. Opponents claimed the Bill would therefore ‘create another enormous inequality’ (Tebbit, Hansard HL Deb. vol. 661 GC13, 10 May 2004) and that ‘ordinary people will lose out under the Bill if enacted’ (Kilclooney, Hansard HL Deb. vol. 662 col. 1378, 24 June 2004), which should be remedied through extension of the Bill’s privileges to carers and home sharers. The inequality discourse became more audacious, even to the point of turning the thing on its head so that opponents of scope-widening (i.e. those who supported the Bill on grounds of justice and equality!) and even gay people themselves were characterised as mean-spirited. Judith Wilcox, speaking for the Conservative party, declared:

‘It is wrong for gay people, who have suffered for too long from discrimination, to secure for themselves what this Bill gives and to resist it for others, who are equally loving, equally committed and equally debarred from the ability to marry.’

‘It grieves me that those who have fought so long and nobly for this Bill turn their backs on the cry for justice from others who are equally deserving. Bluntly, this is what all those who oppose the noble Baroness’s [O’Cathain] amendment will be doing.’ (Ibid., col. 1382)

A concept of justice was deployed by supporters and opponents, but for opponents it was often conceived of as a finite resource – a zero sum game in which if justice is given to same-sex couples then familial cohabitants must necessarily be deprived of it. A similar tactic emerged in the later stages of the Marriage (Same Sex Couples)
Bill in relation to a Conservative amendment to extend civil partnerships to opposite-sex couples.

Baroness O’Cathain led the contrarians in the Lords and her amendment at Report Stage to widen the scope of the Bill was successful (Contents, 148; Not-contents, 130). The amendment made the Bill a nonsense, apparently incompatible with the European Convention on Human Rights, and likely to cost the Treasury £2.8 billion per year (Hansard HC Deb. vol. 425 col. 198, 12 October 2004). Despite the spinster sister/IHT issue never having been raised before by Conservatives in Finance Bill debates, no one denied it was a valid concern and one which should be remedied. The Conservatives even appeared to promise they would resolve it if they got into power (see Hansard HC Deb. vol. 426 col. 727, 9 November 2004), but this was quietly dropped when it came time to write the manifesto for the 2005 general election. Yet advocates of the amendment knew it was unaffordable (Leigh, Hansard HC Deb. vol. 425 col. 211, 12 October 2004), and all the evidence pointed to it being a wrecking amendment (see Bercow’s blatant indiscretion in Committee, col. 17, 19 October 2004).

We considered above that conservatism is cautious towards change because, inter alia, its consequences are often difficult to foresee and change thereby presents a risk to the stability of the socio-political order. Compared to the Conservative parliamentary discourse around the Marriage (Same Sex Couples) Bill, there was very little concern expressed about ‘change’ in the civil partnership debates: civil partnerships were perceived as an innovation, as contrasted with gay marriage being the transformation of an existing and longstanding institution. As we will see in the next section, one of the consequences of civil partnership was that, once the law extended marriage to same-sex couples, opposite-sex couples were then at a disadvantage. If a heterosexual couple wanted legal recognition of their relationship they only had the option of marriage open to them, whereas same-sex couples had a choice. Conservatives who argued for civil partnership and gay marriage often did so in the belief that the institution of marriage would be thereby ‘strengthened’. Many of these same people opposed the idea of extending civil partnership to straight couples because they perceived this would act in competition with marriage and thereby undermine it. Although it was not unforeseeable that civil partnership would lead to calls for its extension to opposite-sex couples, with the negative consequences this may have for marriage, I contend that the possibility was not sufficiently proximate to be of much concern to Conservative legislators, and certainly not of sufficient concern to warrant rejecting the Bill on that basis.

It is clear from the ensuing Marriage (Same Sex Couples) Bill debates that some Conservative MPs took a strategic line in supporting civil partnerships (or perhaps there was some revisionism going on), believing that by so doing that would ‘be the end of the story’ (Jenkin, Hansard HC Deb. vol. 558 col. 160, 5 February 2013). Edward Leigh even claimed later that he ‘was given solemn assurances on the Floor of the House, including by some sitting on the Opposition Benches now, that the Civil Partnership Act would not lead to full same-sex marriage.’ (Ibid., col.160) However, a careful reading of the debates evinces no such ‘assurances’, although comments such as the government spokesman Lord Filkin’s were not uncommon: ‘We do not see [the Bill] as a drift towards gay marriage.’ (Hansard HL Deb. vol. 661 col. GC179, 12 May 2004) Regardless of what was said and intended, these complaints betray a weak grasp of the realities of parliamentary supremacy and a naivety about the mechanisms of social change (on which, see Waaldijk, 1994).

The main Conservative opponents to the Bill predicted that it would lead to gay marriage (O’Cathain (Hansard HL Deb. vol. 661 col. GC178, 12 May 2004) and Leigh
(Hansard HC Deb. vol. 425 col. 243, 12 October 2004)); if others thought so too, they kept quiet about it. From the moment Baroness Scotland introduced the Bill and said it was 'a secular solution' (Hansard HL Deb. vol. 660 col. 388, 22 April 2004), there was, in my view, an inevitability that in time there would be a movement calling for access for same-sex couples to the religious (and civil) institution of marriage. What was not inevitable, or even reasonably foreseeable, was that it would be a Conservative-led coalition which would champion the cause of same-sex marriage.

From Civil Partnership to Gay Marriage

‘Our achilles heel, though, has been our social attitude. Censorious judgmentalism from the moralising wing, which treats half our own countrymen as enemies, must be rooted out. We should take JS Mill as our lodestar, and allow people to live as they choose until they actually harm someone. If the Tory Taliban can't get that, they'll condemn us all to oblivion. Thank heavens for the new intake of MPs who do.'

(Duncan, 2005, emphasis added)

While it is clear that the Party had changed (Angela Eagle had magnanimously acknowledged that during the CPA Third Reading (Hansard HC Deb. vol. 426 col. 802, 9 November 2004), as had Ben Summerskill and Peter Tatchell (McManus, 2011)), it was clear that its ‘moralising wing’ remained strong and influential. By the time the Marriage Bill was introduced, there were around fourteen openly gay Conservatives in parliament, including the first Conservative out lesbian (Margot James), curiously probably more than in any other party (McManus, 2011; Davis, 2012). Crucially, Duncan's analysis of the Conservatives’ achilles heel was shared by David Cameron. From the outset Cameron sent inclusive messages to the gay community: 'And by the way, [commitment] means something whether you're a man and a woman, a woman and a woman or a man and another man...That's why we were right to support civil partnerships, and I'm proud of that.' (Cameron, 2006).

A survey of prospective parliamentary candidates carried out around the same time showed that 62 per cent said that same-sex couples should be given the same benefits as married couples (Montgomery, 2009). Only weeks before that, a Populus poll revealed 68 per cent of voters expressed support when asked a similar question, with 61 per cent in favour of gay marriage specifically (Populus, 2009). If the Party believed in working ‘with the grain of human nature’ – as the 1979 manifesto claimed – then here was just such an opportunity.

For such a radical piece of legislation it could be said that the Marriage (Same Sex Couples) Bill almost ‘rose without trace’. There was no mention of the reform in the 2010 general election manifestoes of either the Conservative or Liberal Democrat parties which went on to form the coalition government, and the subsequent Coalition Agreement was also silent on the matter. The Bill was given its First Reading in the House of Commons on 24 January 2013 and completed its Commons stages on 21 May 2013. The House of Lords First Reading was on the same day and it finished its Lords stages on 10 July 2013, before receiving Royal Assent on 17 July 2013. Many of the discursive themes in the debates echoed those from the Civil Partnership Bill in 2003-4.
Main Features of the Marriage (Same Sex Couples) Bill

The Bill ran to eighteen sections and seven lengthy schedules, which mostly concerned amending existing legislation or setting out the position regarding religious rites and same-sex marriage. Perhaps the main area of tension was, given the often religious nature of marriage ceremonies, the position of religious bodies to conduct, or not, gay weddings. So concerned was the government to uphold religious conscience that it devised the so-called ‘quadruple lock’. This meant that, (1) no religious organisation or minister could be compelled to marry same-sex couples or to permit such a marriage on their premises; (2) religious organisations which wanted to conduct same-sex marriages would have to opt-in in order to do so; (3) the Equality Act 2010 would be amended so that (1) was not unlawful; and (4) there was no duty on the Church of England to marry gay couples under canon law.

Analysis of the Debates

In this section I will give an overview of the discursive terrain. The House of Commons Second Reading was taken up with debate over the merits and impact of same-sex marriage and the robustness of the quadruple lock and whether it would withstand legal challenge under human rights law. The Public Bill Committee comprised 21 MPs, of which only four voted against the Bill at Second Reading (Burrowes, Kwarteng, Loughton, Shannon). The proposed amendments in Committee were largely of a probing nature and covered changing the word ‘marriage’ to ‘union’ (Hansard HC Deb. col. 425, 7 March 2013), and including statements on the moral purpose of marriage (Hansard HC Deb. col. 187, 26 February 2013). The Bill completed the Committee Stage unamended. By the time the Bill was back before the full House on Report the concerns over religious liberty at an institutional level appear to have been largely assuaged, but some amendments were tabled covering individual religious liberties which would have allowed registrars, for example, to conscientiously object to conducting same-sex marriages (Hansard HC Deb. vol. 563 col. 926, 20 May 2013). A new strategy also emerged at this stage: one of the Bill’s longstanding opponents, Tim Loughton, was overwhelmed by a spirit of egalitarianism and tabled an amendment which extended civil partnership to different-sex couples (Ibid., col. 990). The world then momentarily turned upside down with the Daily Telegraph calling it a wrecking amendment (Hodges, 2013), while Peter Tatchell came out in support (Eaton, 2013). The amendment was heavily defeated but the matter was clearly not going to go away (the Act contains a government commitment to review the CPA). Many of the Third Reading speeches were either euphoric (e.g. Abbott, Hansard HC Deb. vol. 563 col. 1167, 21 May 2013) or portentous (e.g. Donaldson, Ibid., col. 1160), capturing the historic nature of the occasion.

The Bill was sponsored in the Lords by Baroness Stowell who stated her belief that the institution of marriage will be strengthened the more ‘it reflects modern society’ (Hansard HL Deb. vol. 745 col. 939, 3 June 2013). Her speech echoed the assimilationist tones of her Commons counterpart; the love and commitment of gays and lesbians was ‘no different from that of opposite-sex couples’ (Ibid., col. 941; also vol. 746 col. 47, 17 June 2013; vol. 747 col. 32, 8 July 2013). The arguments at Second Reading covered much the same ground as in the Commons but there was a sense that resistance was futile (and unconstitutional) given the overwhelming support the Bill received in the lower chamber. In Committee there were a number of proposed creative suggestions or amendments to change reference to ‘marriage’ in the Bill to ‘union’ (Hansard HL Deb. vol. 746 col. 11, 17 June 2013), ‘espousal’ (Ibid., col. 14), ‘matrimony’ (Ibid., col.15), ‘matrimonial marriages’ (Ibid., col. 17), ‘marriage
(same sex couples)' (Ibid., col. 23), ‘traditional marriage/same sex marriage’ (Ibid., col. 28), or ‘ancient marriage/modern marriage’ (Ibid.) – all of which ultimately fell away, but they stand as evidence of a discursive strategy to prevent the (mis)appropriation of the word ‘marriage’ by those seeking to extend its compass. When the Lords did divide on the Bill, it attracted overwhelming support (e.g. Hansard HL Deb. vol. 745 col. 1109, 4 June 2013).

The Centrality of Religion in the Debates

Before proceeding to a discussion of the arguments put forward by Conservatives on both sides of the debate, it is worth mentioning the influence of religious belief. During the Commons Second Reading the words ‘Christ’, ‘Christian’, ‘Christianity’ and ‘God’ occurred 77 times, 28 times by Conservatives and 49 times by others (but this includes the Northern Irish MPs who significantly inflated the figure!). Occasional reference was made to other faiths such as Islam and Judaism, but Christianity dominated. A religious narrative permeated the Bill’s entire passage, although it was an unreliable indicator of a speaker’s party allegiance or voting behaviour: Christianity was prayed in aid by members of all main parties and by the Bill’s supporters and opponents alike. The words ‘free’ and ‘freedom’ were used 83 times, and ‘liberty’ 10 times, mostly by Conservatives, and almost always when voicing concern over the Bill’s perceived threat to religious liberty, i.e. almost never as an argument for gay marriage (‘equal’/’equality’ did the work there). This supports the view that Conservatives opposed the Bill for two main reasons: one, it would harm the institution of marriage and, two, restrict religious freedom to speak out against same-sex marriage and of ministers and churches to refuse to conduct same-sex marriage ceremonies.

Conservatives and Conservatism in the Commons Second Reading

The remainder of the paper focuses on the House of Commons Second Reading which ran for six hours on 5 February 2013. I have focussed on this debate because, first, the speeches tended to be more concerned with the broad themes of the Bill (particularly arguments pro and contra gay marriage) rather than with specific detail, and as such I believe that the speakers’ ideas and beliefs are made plainer; and second, the Commons, as an elected chamber, has a more party political character and contains a higher concentration of Conservatives, making it a superior ‘sample’ to one drawn from the House of Lords. I divided my detailed analysis into two and considered the arguments of Conservative MPs in favour of the Bill and those against. A total of 115 members of parliament spoke in the debate, of which 56 were Conservative. Speeches were limited to four minutes, which typically amounted to about 600 words of text. At the end of the debate the house voted – it was a free vote - in favour 400 to 175, with Conservatives voting 136 against, 127 in favour, and 40 abstentions.

Conservative Support for the Bill

We have noted that a large minority of Conservative MPs voted in favour of the Bill. Analysis of this group shows that the majority were female and that younger MPs and those elected to parliament in 2010 were also more likely to support the Bill. Conservatives used the word ‘institution’ (in relation to marriage) on 34 occasions (non-conservatives: 21 occasions) and ‘tradition’/’traditional’ on 20 occasions (non-conservatives: 21 occasions). Non-conservative MPs made 67 references to the
words ‘equal’, ‘equally’ and ‘equality’ in their arguments in favour of the Bill, whereas 41 mentions were made by Conservative supporters. The former group used ‘fair’ or ‘fairness’ only twice but the latter made 7 references to it. This is a crude indicator of the discursive strategies employed in parliament, but it does give a sense that Conservatives used a broadly similar lexicon in framing their arguments, although perhaps an argument could be made that they were less concerned with notions of equality and more focussed on the place of marriage as institution.

The Second Reading motion was moved by the Conservative minister, Maria Miller. Her speech was a hybridised defence of the Bill’s central provision, drawing on conservative and liberal ideas. She begins by seeming to plant her flag firmly on liberalism’s lawn (‘Parliament should value people equally in the law, and enabling same-sex couples to marry removes the current differentiation and distinction.’ (Hansard HC Deb. vol. 558 col. 125, 5 February 2013)), but then moves into familiar conservative territory with a Burkean argument that marriage has evolved over time.

‘Some say that the Bill redefines marriage, but marriage is an institution with a long history of adaptation and change...Suggestions that the Bill changes something that has remained unchanged for centuries simply do not recognise the road that marriage has travelled as an institution.’ (Ibid., col. 126)

She draws again on both political traditions in the conclusion to her speech, although she makes no attempt to adduce any evidence to establish her claim about the Bill supporting marriage.

‘[T]his Bill is about one thing – fairness. It is about giving those who want to get married the opportunity to do so, while protecting the rights of those who do not agree with same-sex marriage. Marriage is one of the most important institutions we have; it binds families and society together, and it is a building block that promotes stability. This Bill supports and cultivates marriage, and I commend it to the House.’ (Ibid., col. 133)

Others seem to misunderstand how change is understood within the conservative ontology. John Howell switches the burden of proof and places it on those opposing same-sex marriage: ‘No compelling case has yet been made against the change’ (Ibid., col. 216). But to his (limited) credit he then goes on to mention Spain’s introduction of gay marriage in 2005 and his view that since then ‘life has gone on as normal’, although this mere assertion hardly passes as sound empirical data.

On the other hand, some contributors demonstrated an accurate understanding of the inevitability of change and the conservative imperative that change should also be continuity as far as possible:

‘I am by nature a small “c” conservative. I do not like change...For conservatism to work, we have to accept that the world changes. If we do not, we become an anachronism. What we have to do as Conservatives is to shape that change and try to preserve the best of what we inherited.’ (Barwell, ibid., col. 218)

Nick Herbert highlights how today’s heresy is often tomorrow’s orthodoxy with a statement which also belongs to the evolutionary conservative school:

‘I believe that many who do not share that view nevertheless have a principled concern that gay marriage would mean redefining the institution for
everyone, yet Parliament has repeatedly done that. If marriage had not been redefined in 1836, there would be no civil marriages. If it had not been redefined in 1949, under-16-year-olds would still be able to get married. If it had not been redefined in 1969, we would not have today’s divorce laws. All those changes were opposed.’ (Ibid., col. 155)

How conservatives understood the magnitude of a proposed change on a revolutionary/evolutionary scale is an indicator of whether they would go on to support it. For those MPs who perceived same-sex marriage as a positive broadening of the marriage franchise which would increase the sum total of human happiness, it was then a small step for them to endorse the measure, and even more so if they were satisfied that no damage would ensue to opposite-sex unions. The following two contributions demonstrate this point:

‘My starting point in this debate is that if we can extend to some people rights that will bring them great joy and happiness, without damaging the rights of other people or institutions, that is a good thing. I believe that that is what the Bill sets out to do.’ (Ellison, ibid., col. 206)

‘Essentially, we are asking whether we can remove the barriers that stop same-sex couples enjoying the commitment—the “at one” meaning—of marriage. That is what the Bill comes down to. It does not redefine marriage; it just takes away barriers.’ (Bottomley, ibid., col. 212)

It was unusual for parliamentarians – especially Conservative ones - actually to make explicit reference to political philosophers, and even rarer for them to quote them. Given conservatism’s antipathy towards liberalism, it was perhaps surprising that Andrea Leadsom (who abstained) quoted Mill’s harm principle and esteemed him as one of her political heroes (Ibid., col. 221). There are numerous examples of other supporters making naked appeals to liberal values in their arguments, with little or no attempt to place them in a conservative framework. Mike Freer, reflecting on his own civil partnership, said:

‘I am not asking for special treatment; I am simply asking for equal treatment… I ask my colleagues, if I am equal in this House, to give me every opportunity to be equal. Today, we have a chance to set that right and I hope that colleagues will join me in voting yes this evening.’ (Ibid., col. 179)

More evidence that this was conceived as a liberal reform can be deduced from the government’s insistence that ‘this is not about numbers’ (Maria Miller, ibid., col. 127), i.e. the government was aware that the (Christian) Coalition for Marriage online petition obtained about ten times the support of the Coalition for Equal Marriage, yet this was about the advancement of minority rights.

At best, speeches made in support of the Bill sometimes contained a partial appeal to conservative principles, but there were no examples of the wholesale deployment of a classical conservative argument which evinced, particularly, a sound grasp of the change management imperative.

**Conservative Opposition to the Bill**

Conservative principles were more apparent in the discourse of those MPs who spoke against the Bill, and some MPs in particular articulated them with clarity and precision. However, there were a number of examples of the error Muller identifies in
his discussion of conservatism and orthodoxy. It is sometimes a fine line in practice between tradition and orthodoxy, but Muller is clear that ‘The orthodox theoretician defends existing institutions because they are metaphysically true’ (Muller, 1997, p.4). An example of an orthodox, rather than a conservative, defence of marriage can be seen in Sir Roger Gale’s contribution.

'It is not possible to redefine marriage. Marriage is the union between a man and a woman. It has been that historically and it remains so. It is Alice in Wonderland territory—Orwellian almost—for any Government of any political persuasion to try to rewrite the lexicon. It will not do.’ (Ibid., col. 152)

Others thought that it was ‘impossible’ for the sponsoring minister to change the meaning of the word ‘marriage’ through legislation (Gillan, ibid., col. 174; see also Leigh, ibid., col. 161 and Howarth, ibid., col. 185). These are all at root semantic arguments about the immutability of the word ‘marriage’, which are founded neither on the reality of parliamentary supremacy nor on conservative doctrine.

Turning to consider examples of well framed conservative arguments, conservatism’s concern to preserve the wisdom embodied in traditional institutions was evident in Edward Leigh’s speech.

‘We must get away from the idea that every single thing in life can be forced through the merciless prism of equality. I am a Conservative. I believe we should be concerned with equality, but not at the expense of every other consideration—not at the expense of tradition. We should be in the business of protecting cherished institutions and our cultural heritage. Otherwise, what is a Conservative party for?’ (Ibid., col. 161)

And he concludes with ‘I will vote tonight to proclaim my support for the future of our children and for the essence of traditional marriage.’ These words are reminiscent of Burke’s social contract theory. Burke rejected Rousseau’s theory but believed in a social contract based on the enduring link of intergenerational responsibility: ‘[A] partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born’ (Burke, 2004, p.194).

Aspects of a conservative conceptualisation of change are clear in this excerpt from Angie Bray’s speech: ‘I would like to make it clear that, although I am not implacably opposed to change, I need to be convinced that it is necessary and has been properly thought through.’ (Ibid., col. 174) She insists that change must arise from a felt need and its likely effects evaluated prior to implementation. Sir Gerald Howarth also questions the mandate for ‘this massive social and cultural change’ (Ibid., col. 130).

Democratic Unionist MP Ian Paisley (conservative, but not Conservative), took a similar, but more detailed line, although he was stymied by the challenges of showing causation between legalisation of same-sex marriage and a decline in marriages.

‘[T]he facts paint a very different picture. Since same-sex marriages were introduced in Portugal, Spain and the Netherlands, the number of mixed-sex marriages has decreased considerably—indeed, by tens and tens of thousands—[Interruption.] The facts are clear. When they were introduced in Spain, 208,000 people were married in mixed-sex marriages, whereas last year 161,000 people were married in mixed-sex marriages, so the numbers are declining, not increasing.’ (Ibid., col. 136)
Hirschman (1991) identified three principal conservative stances towards change: the perversity thesis (action to improve an aspect of social life will only make that aspect worse), the futility thesis (the proposed change will not work), and the jeopardy thesis (the change threatens to harm a previous, precious accomplishment). The jeopardy thesis, in particular, was evidenced in the oft-heard argument that same-sex marriage would undermine opposite-sex marriage. It is not worth quoting examples of this claim from opponents because it was never developed beyond a mere assertion. The claim was, however, countered in a rather mocking fashion by a number of the Bill’s proponents:

‘The other argument against the Bill is that it would undermine marriage. Mrs Barwell suffers enough as a result of my job, and if I thought it likely that I would go home tonight only to be accused of undermining my marriage by voting for the Bill, I would not vote for it. However, no one has yet come up with a credible explanation of how it would undermine marriage.’ (Barwell, ibid., col. 218)

Concluding Remarks

There are some obvious similarities between the Conservative Party’s treatment of the two Bills considered above: both Bills polarised opinion within the parliamentary and voluntary Party; the Party leadership came out clearly in support of both Bills; and in both Bills Conservatives were permitted a free vote on central matters.

There were, however, some significant differences. First, conservative arguments in favour of the legal recognition of same-sex relationships were more readily articulated in the civil partnership debates chiefly because it was seen as an evolutionary innovation and there was no existing institution which would be the subject of change. There was generally no concern that marriage would be threatened – unless civil partnership was extended to straights – and opposition was therefore conceptualised in the obfuscatory terms of the sister sibling argument. There is evidence that some Conservatives accepted civil partnerships in order to remove pressure for calls for gay marriage – a good example of a Burkean approach – but it didn’t work out that way.

Second, in the same-sex marriage debates it was clear that marriage was being redefined; an existing institution was being changed. How a Conservative perceived the change affected the likelihood that they would support and promote it (Gilbert, 2014). Does same-sex marriage change the concept of opposite-sex marriage, or do they just exist alongside each other, with each one catering for the needs of a different constituency? I would argue that where on a revolutionary/evolutionary scale of change a Conservative MP perceived the legalisation of same-sex marriage affected how willing they were to support the Bill (or perhaps causation was flowing the other way?). For example, Edward Leigh (Hansard HC Deb. vol. 558 col. 161, 5 February 2013), ‘The Minister claims that marriage has always evolved. The Bill is not evolution, but revolution.’; Gerald Howarth (Ibid., col. 183), ‘This is a massive change.’; David Burrows (Ibid., col. 197), ‘This is indeed an historic change.’ Compare with Peter Bottomley (Ibid., col. 212), ‘It does not redefine marriage; it just takes away barriers.’ Those who constructed it as a radical change – a redefinition of marriage – tended to oppose it (e.g. Leigh, Howarth, Burrows), whereas others who saw it as merely extending the marriage franchise to gay couples, approached it as an evolutionary change which could be accommodated within their conservative mindset (e.g. Bottomley). Either way, applying a purely classical conservative theory of change would not have permitted Conservatives to support the Bill because the
Oakeshottian insistence on proof that change would bring a net societal benefit could not be satisfied as the changes had not yet happened. Wax identifies this probative problem as ‘a war that conservatives are destined to lose’ (Wax, 2005, p.1083). This effectively means that in many policy areas conservatism lacks a practical theory of progressive change. My analysis of the 2013 debates indicates that conservative ideology was more readily articulated in opposition to the Bill, rather than in favour of it. This is perhaps unsurprising, given that conservatism is more easily deployed as a politics of opposition and stasis.

Other grounds to support the Marriage Bill therefore had to be found. Conservative MPs in favour almost all conceptualised their support (in so far as they did conceptualise it) in hybridised terms, drawing from liberal or post-liberal (communitarian?) ideas and the conservative assimilationist arguments outlined in this paper. They tended not to construct their support exclusively from conservative political theory, in an apparent departure from their Party leader’s boast that he was a supporter of gay marriage because he is a conservative (Cameron, 2011). The findings of this study do not go as far as Barnes’ conclusion that conservative ideology ‘arguably plays very little part in shaping the way the party actually operates’ (Barnes, 1994, p.318), but conservatism’s influence is certainly diluted. This is nothing new: the Conservative Party has never been simply a conduit through which the pure ideological waters of conservatism flow. Perhaps it is too much to seek intellectual coherence in the Conservative Party’s approach towards the legal regulation of same-sex relationships. And perhaps its support for civil partnership and its trailblazing of same-sex marriage are merely further expressions of its raison d’être ‘to acquire and exercise power’ (Harris, 2011, p.4).

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