

Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience

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INTRODUCTION

In 2013 the question of whether same-sex couples should be able to enter into a legal marriage was still a much-disputed societal issue at the forefront of legal discourse in many democratic countries belonging to the Council of Europe, as well as in numerous states in the United States.¹ This may come as a

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1. In the United States, the question remains of high priority in the political and judicial agendas of the states and of the federal government. This Article is current as of October 31, 2013, which is the date of the last substantive update to the article. As of October 31, 2013, fourteen states have legalized same-sex marriages (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington), as well as the District of Columbia and six Native American tribes. *See State Laws Stand, FREEDOM TO MARRY*, <http://www.freedomtomarry.org/pages/where-state-laws-stand>. Within the Council of Europe, the Netherlands legalized civil marriage for same-sex couples in 2001, which made it the first country in the world to do so. Nine other European states have followed so far: Belgium in 2003, Spain in 2005, Norway and Sweden in 2009, Portugal and Iceland in 2010, Denmark in 2012, and France and England and Wales in 2013. In addition, a fair number of states (as well as cities and autonomous communities, such as in Spain) have put in place some kind of registered partnerships: Denmark in 1989, Norway in 1993, Sweden in 1995, Iceland in 1996, the Netherlands in 1998, France in 1999, Belgium in 2000, Germany in 2001, Finland in 2002, Luxembourg in 2004, Andorra and the United Kingdom in 2005, the Czech Republic and Slovenia in 2006, Switzerland in 2007, Hungary in 2009, Austria in 2010, and Liechtenstein and Ireland in 2011. Croatia put in place unregistered cohabitation in 2003. *See Country-by-Country, INT'L LESBIAN, GAY, BISEXUAL, TRANS, AND INTERSEX ASS'N-EUROPE*, <http://www.ilga->

surprise in a time of liberalization of mores and desacralization of marriage that has seen the number of both *de facto* unions and divorces increase dramatically (although the situation varies from country to country). However, it is essential to recall that the criminalization of homosexual relations between consenting adults was only formally outlawed in 1981 at the Council of Europe level² and in 2003 for the entire United States.³ A report published by the European Union Agency for Fundamental Rights in 2011⁴ noted that negative attitudes towards lesbian, gay, bisexual and transgender (LGBT) persons manifest themselves in various ways, including abusive behavior and crime. These facts, coupled with the persistence of hate-motivated violence, remind us that the achievements during past decades to suppress discrimination based on sexual orientation remain fragile.⁵

The violent actions undertaken against same-sex couples in some European countries show that peaceful recognition of non-mainstream ways of life has yet to be fully achieved. Opposition to same-sex marriage does not stem exclusively from the streets; it also takes on legislative forms. In January 2013, for example, the lower house of the Polish parliament refused to legalize civil unions between same-sex partners.⁶ In June of the same year, the Russian Duma passed a law banning “gay propaganda” while similar legislation had already come into effect in several regions of Russia.⁷ The virulence of certain statements made at the French National Assembly in the context of the debates concerning “marriage

europe.org/home/guide_europe/country_by_country (for a summary country by country on the International Lesbian, Gay, Bisexual, Trans, and Intersex Association-Europe). *See also*, COUNCIL OF EUROPE, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION OR GENDER IDENTITY IN EUROPE: COUNCIL OF EUROPE STANDARDS, 91 (2nd ed. 2011).

2. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) 14, ¶¶ 61-63 (1981). *See also* Council of Eur. Parliamentary Assemb., *Recommendation on Discrimination Against Homosexuals*, Recommendation 924 at 7.i. (1981), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/tat81/EREC924.htm>.

3. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

4. E.U. Agency for Fundamental Rights, *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the E.U. Member States*, at 13 (2011), available at http://fra.europa.eu/sites/default/files/fra_uploads/1659-FRA-homophobia-synthesis-report-2011_EN.pdf. This European Union decentralized agency assists EU institutions and member states by providing independent, evidence-based advice on fundamental rights.

5. *See generally* AMNESTY INTERNATIONAL, EUROPE: BECAUSE OF WHO I AM: HOMOPHOBIA, TRANSPHOBIA AND HATE CRIMES IN EUROPE 2 (2013).

6. Political and legal developments are not necessarily linear; in 1932, Poland became the first country in 20th century Europe to decriminalise homosexual activity. THE OXFORD COMPANION TO POLITICS OF THE WORLD 308 (Joel Krieger ed., 2nd ed. 2001).

7. *See Russian Duma passes law banning ‘gay propaganda’*, BBC, June 11, 2013, <http://www.bbc.co.uk/news/world-europe-22862210>; Resolution of 13 June 2013 on the Rule of Law in Russia, Eur. Parl. Doc. B7-0290, at J. (2013); *See also* AMNESTY INTERNATIONAL, URGENT ACTION: DISCRIMINATORY LAW BACKED IN RUSSIA (2013), available at http://www.amnestyusa.org/sites/default/files/uaa34812_1.pdf; *Russia: Drop Homophobic Law*, HUMAN RIGHTS WATCH, June 11, 2013, <http://www.hrw.org/news/2013/06/10/russia-drop-homophobic-law>.

for everyone”⁸ shows the degree to which the same-sex marriage debate remains sensitive in a European state like France, which purports to be the cradle of fundamental freedoms and takes pride in the claims of the country’s supposed separation of political and religious affairs.⁹ Forty-five years after the civil uprisings of May 1968, which symbolizes among other things the struggle for emancipation and sexual liberation, the right to individual autonomy as part of the right to private life¹⁰ is still in the process of being fully realized. As the French example shows, the arguments against granting the right to marry to same-sex couples sometimes involve hints of homophobia, which call us to deconstruct this narrative in light of the right to non-discrimination.

Although legislative avenues to advocate for same-sex marriage have been and are still relevant in many countries,¹¹ as recently illustrated by the votes in the French National Assembly in favor of “marriage for everyone” during Spring 2013,¹² or those cast in the House of Commons in the United Kingdom,¹³ litigation remains of interest to many activists.¹⁴ Indeed, many of

8. This is a translation of how the bill was commonly referred to in the press and in public opinion in France. Its full name is “Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe” which can be translated as “Opening Marriage to Couples of Same Sex, Act No. 2013-404 (2013).”

9. See Eric Pateyron, *La contribution française à la rédaction de la Déclaration Universelle des droits de l’homme – René Cassin et la Commission consultative des droits de l’homme*, LA DOCUMENTATION FRANÇAISE (1998); see also Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419 (2004).

10. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, C.E.T.S. No. 5.

11. Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62 (2000); Susan Gluck Mezey & David Paternotte, *Pursuing Marriage Equality in Four Democracies: Canada, the United States, Belgium, and Spain*, 13 GLOBAL J. OF HUM. SOC. SCI. SOC. & CULTURE, July 2013. In Finland, after being turned down by the Parliament’s Legal Affairs Committee, a bill legalizing same-sex marriage is currently (as of summer 2013) being brought back to the Parliament as a citizens’ initiative. See *Citizen’s Initiative*, TAHDON 2013, <http://www.tahdon2013.fi/in-english/why-a-citizens-initiative/> (which provides more detail on the campaign).

12. On April 23, 2013, the National Assembly approved a bill allowing the recognition of same-sex marriage (331 voted in favor, 225 against, and 10 abstained). The French Constitutional Council was seized of the law and held that it was constitutional. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-669DC, May 17, 2013, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2013-669-dc-of-17-may-2013.137411.html> (Fr.) (cited to in the English translation).

13. The British House of Commons voted 400 to 175 on the Marriage Equality Bill on February 5, 2013. The bill passed its third reading in the House of Lords on July 15, 2013 and received Royal Assent on July 17, 2013. It should enter into force in 2014. See Marriage (Same Sex Couples) Act 2013 (Commencement No.1) Order 2013, available at http://www.legislation.gov.uk/uksi/2013/2789/pdfs/ukxi_20132789_en.pdf (enacted October 30, 2013). See also *Same Sex Marriage Becomes Law*, available at <https://www.gov.uk/government/news/same-sex-marriage-becomes-law>.

14. See Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT’L ORG. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526 (finding evidence that, among others,

the victories for LGBT equality have been achieved through judicial decisions.¹⁵ The judicial review (and invalidation) of current laws prohibiting marriage or any form of legal recognition of same-sex couples is a positive step, as judicial recognition can prevent the popular vote from becoming a “dictatorship of the majority.”¹⁶ Around the world the highest courts in a variety of countries are confronting these questions of equality in light of existing laws that prevent the recognition of same-sex marriages.

The ECtHR “has been considering whether same-sex couples should . . . be recognized as a family under the ECHR for over thirty years.”¹⁷ In 2010, the ECtHR issued its first judgment on the specific question of the right of same-sex couples to marry, ruling in the *Schalk and Kopf* case that contracting states are not obliged to grant same-sex couples access to marriage.¹⁸ However, incremental changes in the ECtHR’s case law are noticeable and the court went as far as holding that the right to marry is not necessarily limited to marriage between persons of the opposite sex.¹⁹ The 2013 case *X v. Austria*,²⁰ concerning the adoption of a child by the female partner of his biological mother, confirms the fact that the court seems open to evolution.²¹ Particularly in non-discrimination law, the ECtHR tends to make smooth transitions by signaling change prior to formally recognizing the right. Sometimes, it sends out an alarm signal by alluding to an emerging European consensus or an international trend

ECtHR judgments increase the likelihood that all European nations will adopt pro-LGBT reforms); Elizabeth Burleson, *International Human Rights Law, Co-parent Adoption, and the Recognition of Gay and Lesbian Families*, 55 LOY. L. REV. 791 (2009) (providing evidence on successful petitions and arguing that recognition of same sex-families is in the best interest of the child and should be facilitated in a timely manner by jurisdictions at all levels).

15. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 431 (2005). This does not deny that litigation has sometimes ignored grassroots efforts, proven counterproductive, or created backlash. *Id.* at 459. See also MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012).

16. See, e.g., *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (“Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement”).

17. Sarah L. Cooper, *Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights’ Jurisprudence on LGBT Rights*, 12 GERMAN L. J. 1746 (2011).

18. “The Court starts from its findings above, that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples.” *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 108 (2011). For an extensive commentary see Loveday Hodson, *A Marriage by Any Other Name?* *Schalk and Kopf v. Austria*, 11 HUM. RTS. L. REV. 170 (2011).

19. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 61 (2011).

20. *X v. Austria*, 57 Eur. Ct. H.R. 14 (2013). In *X v. Austria*, it was held that laws which exclude same-sex couples from second-parent adoption while affording that right to unmarried different-sex couples amount to discrimination in violation of the Convention. This case will be further discussed in later sections of this Article.

21. See *id.*, at ¶¶ 112-153.

although it dismisses the claimant *in casu*; sometimes it paves the way for a coming evolution though waiting for future cases to activate its potential.²²

This Article argues that three years after *Schalk and Kopf*, and amidst other courts' decisions and the current debate in the United States,²³ the ECtHR should recognize the right of same-sex partners to marry.²⁴ We argue that this is an unavoidable step to achieving legal consistency in accordance with "the doctrine of the [European] Convention [on Human Rights] as a living instrument and the principle of dynamic and evolutive interpretation."²⁵ Our argument is built so as to help the ECtHR decide future cases on same-sex marriage. But the arguments put forth in this article should also feed the efforts of civil society organizations striving for equality, whose goals and strategies are experiencing a growing transnationalization.²⁶

Two cases involving this issue are currently pending before the ECtHR: *Chapin and Charpentier v. France*²⁷ and *Ferguson v. the United Kingdom*.²⁸

22. As for transsexualism and civil status change, compare *Rees v. United Kingdom*, 9 Eur. Ct. H.R. 56, ¶¶ 37, 47 (1987), *Cossey v. United Kingdom*, 13 Eur. Ct. H.R. 622, ¶¶ 40, 42 (1991), and *Sheffield and Horsham v. United Kingdom*, 27 Eur. Ct. H.R. 163, ¶¶ 35, 60 (1999), with *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18, ¶¶ 74, 84-85, 92-93 (2002). Compare also *Fretté v. France*, 38 Eur. Ct. H.R. 21, ¶¶ 40-42 (2004) (including the dissenting opinion) (as to adoption by a single parent and sexual orientation), with *E.B. v. France*, 47 Eur. Ct. H.R. 21, ¶¶ 70, 94 (2008). In this line with respect to *X v. Austria*, see Nicolas Hervieu, *Un Long Chemin Européen vers la Reconnaissance des Familles Homoparentales*, in LETTRE "ACTUALITÉS DROITS-LIBERTÉS" DU CREDOF (2013).

23. The limits of a comparative approach are well documented. See Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights*, 40 COLUM. HUM. RTS. L. REV. 425 (2009). We are aware that, if anything, legal claims exacerbate the political character of the dispute and that activist strategies in practice move between cosmopolitan and communitarian discourses. See Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L. J. 951 (2004).

24. Without entering the debate, we do recognize that many scholars and activists, for various reasons, do not advocate or prioritize the goal of same-sex marriage. For a short overview of the critiques from the LGBT movement itself see Erez Ben Zion Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105 (2010); CRAIG RIMMERMAN, *LESBIAN AND GAY MOVEMENTS: ASSIMILATIONIST OR LIBERATIONIST STRATEGIES FOR CHANGE* (2009); for a response see Darren Rosenblum, *Queer Legal Victories*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW, 38, 47-48 (Scott Barclay et al. eds., 2009). See also Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

25. COUNCIL OF EUROPE COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT (STEERING COMMITTEE FOR HUMAN RIGHTS), JOINT PRELIMINARY COMMENTS ON THE DRAFTING OF PROTOCOLS 15 AND 16 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 2 (2012).

26. Ronald L. Holzhaacker, *Transnationalization of Civil Society Organizations Striving for Equality: Goals and Strategies of Gay and Lesbian Groups in Italy and the Netherlands*, (Eur. U. Inst. Robert Schuman Centre for Advanced Stud., Working Paper No. 2007/36, 2007); Kelly Kollman, *Same-Sex Unions: The Globalization of an Idea*, 51 INT'L STUD. Q. 329 (2007).

27. *Chapin and Charpentier v. France*, Eur. Ct. H.R. Appl. No. 40183/07, filed Sept. 6, 2007, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113081>.

28. *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011. See

The first, known as the “Bègles gay couple case,” is named for a municipality of the French department of Gironde, where the mayor, in the spirit of civil disobedience, performed the marriage ceremony of M. Chapin and M. Charpentier. This marriage was later annulled and the French Cour de Cassation confirmed that “according to French law, marriage is the union of a man and a woman.”²⁹ The second case, highly publicized in the Equal Love Campaign organized by the LGBT organization Outrage!,³⁰ was filed by sixteen people (four opposite-sex couples and four same-sex couples) in the United Kingdom with the help of Robert Wintemute, professor of Human Rights Law at King’s College London and a well-known defender of LGBT rights. This case, which was directly taken to the ECtHR,³¹ is slightly different from *Chapin and Charpentier*. As Professor Wintemute argued: “Our case is that the combination of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 creates a system that segregates couples into two separate legal institutions, with different names but identical rights and responsibilities.”³² The segregation argument is made in strong terms:

Same-sex couples are excluded from marriage, which is the universal system for legally recognizing a loving, committed, sexual relationship between two adults. This legal segregation is similar to having separate beaches and drinking fountains for white and black people, as existed in South Africa under apartheid. It is comparable to having a system of marriage for Christians and civil partnership for non-Christians.³³

As the *Chapin and Charpentier* and *Ferguson* cases both concern countries that legalized same-sex marriage in 2013, the ECtHR could easily evade the broader issue of the right of same-sex partners to marry and instead rule on the specific facts of each case. However, in *Ferguson*, the ECtHR will at a minimum need to address whether barring heterosexuals from accessing civil partnerships is discriminatory. Regardless, in time, the ECtHR will be pressed to tackle the question of equal rights for opposite-sex and same-sex couples.

also Vallianatos v. Greece, Eur. Ct. H.R. Appl. No. 29381/09, filed May 6, 2009, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113205>; C.S. v. Greece, Eur. Ct. H.R. Appl. No. 32684/09, filed May 25, 2009, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113205>. These pending cases concern the access of same-sex couples to registered partnerships that are presently limited to heterosexual couples.

29. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Mar. 13, 2007, Bull. Civ. I, No. 511 (Fr.). The French Cour de cassation dismissed the appeal against the decision taken by the Cour d’appel on Apr. 19, 2005, which validated the annulment which was ordered by the Tribunaux de grande instance of Bordeaux on July 27, 2004.

30. See generally EQUAL LOVE, <http://equallove.org.uk/> (last visited Oct. 16, 2013).

31. See *The Legal Case*, EQUAL LOVE, <http://equallove.org.uk/the-legal-case/> (last accessed October 16, 2013) (for the explanation of Robert Wintemute on how and why this case was directly taken to the ECtHR).

32. *Id.*

33. *Id.*

Without entering into the larger debate on judicial dialogue and citations to foreign law,³⁴ we are of the opinion that courts can turn to foreign discussions and decisions for information and guidance (and also to become aware of paths to avoid). This Article contributes to the circulation of arguments and reasoning across courts by highlighting aspects of the American situation that could assist the ECtHR.³⁵ Various scholarly articles undertake a similar exercise, but they are directed to US courts and scholars.³⁶ A look at the debates and cases in relation to recent US judgments can provide a roadmap for litigation strategies and judicial interpretation that might be employed by advocates and judges, respectively, at the ECtHR. Arguments discussed in the American context can fuel the ongoing reflection held in legislative bodies, among activists, and in courts in Europe.³⁷ Indeed, the reasoning deployed in recent US cases could inspire the respective courts in Europe.³⁸

34. See e.g., THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed. 2011); Cheryl Saunders, *Judicial Engagement With Comparative Law*, in COMPARATIVE CONSTITUTIONAL LAW, 571 (2011); Jean-François Flauss, *La Présence de la Jurisprudence de la Cour Suprême des Etats-Unis d'Amérique dans le Contentieux Européen des Droits de l'Homme*, REV. TRIM. DR. H., at 313 (2005).

35. These external sources are not binding. We also recognize that “decisions hostile to same-sex relationship rights may also form part of the global conversation.” Kenji Yoshino & Michael Kavey, *Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1079 (Michel Rosenfeld & András Sajó eds., 2012).

36. See, e.g., Robert Wintemute, *The Massachusetts Same-Sex Marriage Case: Could Decisions from Canada, Europe and South Africa help the SJC?*, 38 NEW ENG. L. REV. 505 (2004); Anjuli W. McReynolds, *What International Experience Can Tell U.S. Courts About Same-sex Marriage*, 53 UCLA L. REV. 1073 (2006); Yoshino & Kavey, *supra* note 35.

37. Observers have already mentioned that the two recent US Supreme Court rulings “have the potential to influence the jurisprudence of courts around the world.” Matthew Flinn, *US Supreme Court Opens Door to Marriage Equality, UK Coming Next*, UK HUMAN RIGHTS BLOG, (June, 29, 2013), <http://ukhumanrightsblog.com/2013/06/29/us-supreme-court-opens-door-to-marriage-equality-uk-coming-next/>.

38. In fact, there have already been “cross-references” in the briefs on both side of the Atlantic. The European case of *Schalk and Kopf* was mentioned a few times during the *Perry* litigation at the Supreme Court level. See Brief of Petitioners at 61, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.); Amicus Curiae Brief of International Jurists and Academics in Support of Petitioner Hollingsworth and Respondent Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 8, 26-27, 30, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.); Amicus Curiae Brief of the American Civil Rights Union in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 17-18, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.); Brief for Foreign and Comparative Law Experts Harold Hongju Koh, Sarah H. Cleveland, Laurence R. Helfer, and Ryan Goodman as Amici Curiae Supporting Respondents at 31, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.); Brief of International Human Rights Advocates as Amici Curiae in Support of Respondents at 35, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.). See also Sarah L. Cooper, *A Review of the Concurrent Debates about the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States*, 5 PHOENIX L. REV. 39, 41 (2011); Helfer & Voeten, *supra* note 14. Similarly, the application in *Ferguson* devotes various sections at exposing American decisions. *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011.

In addition, it is an appropriate time to inform questions of same-sex marriage in Europe through engagement with the US debate. Although not binding precedents for the ECtHR, the decisions rendered in the United States as well as the arguments developed by US parties can provide insights for adjudicating the cases pending before the ECtHR. The United States Supreme Court recently decided two cases involving the right for same-sex couples to marry:³⁹ *Hollingsworth v. Perry*⁴⁰ and *United States v. Windsor*.⁴¹ The first case involved Proposition 8, a California state ballot initiative amending the state constitution to restrict the recognition of marriage to opposite-sex couples.⁴² The second case challenged the Defense of Marriage Act (DOMA), a federal act defining marriage as the union between a man and a woman.⁴³ The California case, *Perry*, was disposed of on narrow procedural grounds,⁴⁴ and while the Court said nothing about the constitutionality of Proposition 8, the ruling had the effect of finalizing the 2010 US district court decision nullifying the measure.⁴⁵ The district court judgment, which included some eighty findings of fact based upon lengthy review of detailed evidence,⁴⁶ ruled that Proposition 8 violated several constitutional provisions and doctrines, principally the Due Process Clause and the Equal Protection Clause.⁴⁷ In the second case the US Supreme Court struck down the central section of DOMA because it was contrary to the Fifth Amendment of the US Constitution. Writing for a five-to-

39. Previously, the Court had heard arguments in four significant cases on LGBT civil rights, but none of them directly touched upon the marriage issue: *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Romer v. Evans*, 517 U.S. 620 (1996); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Lawrence v. Texas* 539 U.S. 558 (2003). For next year's term, the Court has denied petition to hear a case from Arizona that raised the issue of domestic partner benefits of state employees. *See Brewer v. Diaz*, 656 F.3d 1008 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 2884 (2013). One can observe a wave of lawsuits in other courts across the country.

40. *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.).

41. *United States v. Windsor*, 570 U.S. ____ (2013) (No. 12-307) (slip. op.).

42. *See Hollingsworth v. Perry*, 570 U.S. ____, at 2 (2013) (No. 12-144) (slip. op.). The issue presented to the parties was "[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman."

43. *United States v. Windsor*, 570 U.S. ____, at 2 (2013) (No. 12-307) (slip. op.). In addition to procedural questions of standing, the main issue was "[w]hether Section 3 of the Defense of Marriage Act (DOMA) violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State."

44. *Hollingsworth v. Perry*, 570 U.S. ____, at 17 (2013) (No. 12-144) (slip. op.). State officials had refused to defend the Proposition or recognize that it was unconstitutional. The district court permitted the original proponents of Prop 8 to intervene and the Ninth Circuit found they had standing after asking the California Supreme Court whether they were authorized to represent California under state law. The US Supreme Court disagreed.

45. Lyle Denniston, "*Proposition 8*" *issue now ready* (FURTHER UPDATED), SCOTUSBLOG (Aug. 3, 2013, 10:20 PM), <http://www.scotusblog.com/2013/08/proposition-8-issue-now-ready/>.

46. Flinn, *supra* note 37.

47. Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 917 (2011).

four majority, Justice Kennedy argued that DOMA's "principal purpose is to impose inequality"⁴⁸ and found that no sufficient justification was provided to sustain this "deprivation of liberty."⁴⁹

Our argument for the ECtHR and for advocates unfolds in seven points. First, the ECtHR needs to recognize that the right to marry is gender neutral (point one), and that same-sex relationships fall into the ambit of family life, protected by the European Convention on Human Rights⁵⁰ (point two). Following the traditional reasoning applied by the ECtHR in cases raising discrimination issues, we then show that same-sex relationships are comparable to heterosexual relationships with respect to the need for legal recognition (point three). Along with many authors, we urge the ECtHR to apply strict scrutiny (point four), and to stop deferring to the "European consensus" in its assessment of the discrimination (point five). We then discuss which potentially serious reasons could be invoked to justify the difference in treatment (point six). Following these analyses, we conclude that the exclusion of same-sex couples from marriage is discriminatory because it does not meet the justification requirements of non-discrimination under Article 14 of the ECHR.

This leads us to review the concrete options available to the ECtHR to deliver a judgment that meets the demands of equality while taking into account political realities (point seven). As Jonas Christoffersen explains, "[t]he development and elucidation of general standards sits ill with the [ECtHR]'s general reluctance to intervene in domestic matters, just as there are limits to how far the [ECtHR]'s legitimacy can carry it into the field of dynamic interpretation."⁵¹ The ECtHR must indeed be careful when promoting new human rights standards.

I.

THE RIGHT TO MARRY IS GENDER NEUTRAL

Article 12 of the Convention provides as follows: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."⁵² Although Article 12 does not clearly address whether this right can be regarded as gender neutral, the

48. *United States v. Windsor*, 570 U.S.____, at 26 (2013) (No. 12-307) (slip. op.).

49. *Id.* at 25.

50. Throughout this Article, "ECHR" and "the Convention" will be used interchangeably to refer to the European Convention on Human Rights.

51. Jonas Christoffersen, *Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 189 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

52. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 12, C.E.T.S. No. 5.

ECtHR, in the *Schalk and Kopf* decision opened the door—albeit just a crack—to the possibility that the right to marry might be gender neutral.⁵³

At the time of the *Schalk and Kopf* decision the ECtHR had already broken the first barrier in a case concerning the rights of transsexual persons. In the 2002 *Goodwin v. United Kingdom* case, the ECtHR held that “the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing the right to marry.”⁵⁴ However, this finding was not in itself sufficient to grant the right to marry to same-sex couples. The *Schalk and Kopf* case gave the ECtHR the opportunity to break down a second barrier without completely opening the door to the recognition of same-sex marriage. Focusing on a reading in light of present-day conditions,⁵⁵ the ECtHR held somewhat ambiguously that it “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.”⁵⁶ To reach this conclusion, the ECtHR referenced an external source not legally binding in the ECHR framework.⁵⁷ Specifically, the court in Strasbourg invoked an open formulation of Article 9 of the Charter of Fundamental Rights of the European Union, which deliberately dropped the reference to “men and women.”⁵⁸ The ECtHR’s reference was two-fold. On one hand, the ECtHR deduced that Article 12 of the ECHR should be interpreted as “gender neutral” from now on. But, on the other hand, it used the reference to national laws contained in Article 9 of the Charter to justify allowing a margin of discretion to member states in the absence of a European consensus on this issue.⁵⁹

In the United States, Judge Walker used similar reasoning in *Perry v. Schwarzenegger* when he stated that “[g]ender no longer forms an essential part of marriage; marriage under law is a union of equals.”⁶⁰ Similarly, the California Supreme Court defined the right to marry—without reference to

53. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 55 (2011).

54. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18, ¶ 98 (2002).

55. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 57 (2011). In any case, the applicants did not rely mainly on the textual interpretation of Article 12. In essence they relied on the court’s case law according to which the Convention is a living instrument which is to be interpreted in present-day conditions. *See E.B. v. France*, 47 Eur. Ct. H.R. 21, ¶ 98 (2008) and *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18 at ¶ 74-75 (2002).

56. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 61 (2011).

57. *Id.* at ¶¶ 24-25.

58. Article 9 of the Charter of Fundamental Rights of the European Union provides: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” *See also* The EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 98-104 (June 2006).

59. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 60 (2011). *See also* point 4, *infra*.

60. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010).

gender—as “the right to enter into a relationship that is ‘the center of the personal affection that ennoble and enrich human life.’”⁶¹

By taking a non-gendered approach to marriage in *Schalk and Kopf*, and by harmonizing the interpretation of Article 12 of the ECHR and Article 9 of the Charter of Fundamental Rights of the European Union, the ECtHR paved the way for future developments in same-sex marriage claims. Because marriage between same-sex persons falls “within the ambit” of Article 12 of the ECHR, the refusal to recognize same-sex marriage can therefore be examined from the viewpoint of Article 12 of the ECHR (right to marry), combined with Article 14 of the ECHR (prohibition of discrimination).⁶²

II.

SAME-SEX RELATIONSHIPS ARE PROTECTED AS PART OF THE RIGHT TO RESPECT FOR FAMILY LIFE⁶³

Assuming that the ECtHR continues to refuse equal access to marriage, the concept of family life and the question of its scope must be addressed. Article 8 of the ECHR provides that everyone has the right to respect for his private life and family life.⁶⁴

In established case law, the ECtHR has held that “in respect of different-sex couples . . . the notion of family under [Article 8 of the ECHR] is not confined to marriage-based relationships and may encompass other *de facto* ‘family’ ties where the parties are living together out of wedlock.”⁶⁵ However, for lack of a European consensus on the legal recognition of stable relationships between same-sex persons, the ECtHR had—until recently—considered the relationships of same-sex couples exclusively from the viewpoint of the right to respect for private life but not from that of the right to respect for family life.⁶⁶ The *Schalk and Kopf* case was a step forward in that regard. Appreciating the “rapid evolution of social attitudes towards same-sex couples in many [M]ember States,” and certain provisions of EU law reflecting the “growing tendency to include same-sex couples in the notion of ‘family,’”⁶⁷ the ECtHR held that a stable relationship between same-sex partners falls within the scope of the

61. In Re Marriage Cases, 43 Cal.4th 757, 827 (2008).

62. *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011, ¶ 153.

63. See generally Nicholas Bamforth, *Families But Not (Yet) Marriages? Same-Sex Partners and the Developing European Convention ‘Margin of Appreciation’*, 23 CHILD AND FAM. L.Q., 128 (2011).

64. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 10.

65. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 91 (2011).

66. *Id.* at ¶ 92.

67. *Id.* at ¶ 93. See also, G. Willems, *La Vie Familiale des Homosexuels au Prisme des Articles 8, 12 et 14 de la Convention Européenne des Droits de l’Homme: Mariage et Conjugalité, Parenté et Parentalité*, 24 REV. TRIM. DR. H. 65 (2013).

concept of family life just like a stable relationship between opposite-sex persons.⁶⁸ This position was restated by the same First Section Chamber in 2010 in *P.B. v. Austria*,⁶⁹ and was confirmed by the Grand Chamber in 2013 in *X v. Austria*.⁷⁰ In *X v. Austria*, “the Court reiterates that the relationship of a cohabiting same-sex couple living in a stable *de facto* relationship falls within the notion of ‘family life’ just as the relationship of a different-sex couple in the same situation would.”⁷¹

By acknowledging that family models vary and are not exclusively built around a heterosexual relationship, the ECtHR is acknowledging societal developments and taking into account the realities of contemporary family life in Europe.⁷² Besides the symbolic value of such an acknowledgment, its impact on the opening of marriage to same-sex persons is two-fold. First, it supports the claim that situations of cohabiting couples living in stable *de facto* relationships, whether they are opposite-sex or same-sex, are comparable.⁷³ Second, the acknowledgment that the stable relationship of a same-sex couple falls within the notion of family life can be used to deduce that states have a positive obligation to legally recognize these different family models.⁷⁴ The latter point was highlighted in the dissenting opinion in *Schalk and Kopf*.⁷⁵ The dissent argues that, as soon as the ECtHR held that a same-sex relationship “falls within the notion of ‘family life,’” it should have drawn inferences from this finding and deduced a “positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.”⁷⁶

Still, a number of uncertainties remain. First, acknowledging that there are various family makeups does not necessarily imply that a positive obligation to open marriage to same-sex persons is comprised in Article 8 (the right to respect for family life) and Article 14 of the ECHR (the prohibition of discrimination). When the dissenting judges refer to a “satisfactory framework” intended to protect the family life of stable same-sex couples, they do not specify which type of legal recognition would be judged compatible with the requirements of

68. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 94 (2011).

69. *P.B. v. Austria*, 55 Eur. Ct. H.R. 31, ¶¶ 27-30 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100042>.

70. *X v. Austria*, 57 Eur. Ct. H.R. 14 (2013).

71. *Id.* at ¶ 129. In its earlier case-law, the ECtHR had already underlined that “the relationship of a couple, including a same-sex couple” is “qualitatively of a different nature” to “relationship between two sisters living together.” *Burden v. United Kingdom*, 2008-III Eur. Ct. H.R. 49, 75.

72. *X v. Austria*, 57 Eur. Ct. H.R. 14 at ¶ 139 (2013).

73. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 108 (2011).

74. Hervieu, *supra* note 22. See also Cooper, *supra* note 38, at 63-65.

75. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 26 (2011) (J. Rozakis, Spielmann & Jebens, dissenting).

76. *Id.*

the ECHR. Although it appears that the absence of any legal recognition should be condemned, it does not clearly follow whether, and under which conditions, a registered partnership could be judged satisfactory. “Furthermore . . . no real guidance was offered [by the ECtHR] as to the characteristics which a couple must display in order to count as a ‘family’ rather than merely a ‘private’ relationship.”⁷⁷

III.

SAME-SEX RELATIONSHIPS ARE COMPARABLE TO HETEROSEXUAL RELATIONSHIPS

In discrimination cases, a classic question is whether the complainant is in a relatively similar or analogous situation with another group of persons who are treated more favorably (the “but for” test). Problematically, in the ECtHR case law, this analysis is often missing or inconsistent in cases involving sexual orientation.⁷⁸ Nevertheless, the way the ECtHR tackles this issue is evolving and depends on the question at stake.

With respect to economic benefits, the ECtHR considered that same-sex couples who have entered into civil partnerships are in a similar situation to married heterosexual couples in the United Kingdom. Yet, the ECtHR ultimately ruled in the Grand Chamber that:

[r]ather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature . . . [T]here can be no analogy between married and Civil Partnership Act couples, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand.⁷⁹

As to adoption and parental rights, one paradoxical effect of the ECtHR’s non-discriminatory approach is that, until recently, it has been more supportive of single homosexuals adopting a child⁸⁰ than of same-sex couples adopting a child. For instance, in *Gas and Dubois*, the ECtHR considered an application by two women in a long-term registered partnership where, although both provided full-time care for one party’s biological child, the non-biological parent was unable to legally adopt the child.⁸¹ The specific status of marriage in French society, defined at the time as a union between a man and a woman, led the ECtHR to determine that the applicants were not in a situation comparable to

77. Bamforth, *supra* note 63, at 137.

78. With respect to the Court’s case law related to sexual orientation, see PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS*, 124-25 (2012).

79. *Burden v. United Kingdom*, 2008-III Eur. Ct. H.R. 49, ¶ 65.

80. See *Fretté v. France*, 38 Eur. Ct. H.R. 21, ¶ 41 (2004); *E.B. v. France*, 47 Eur. Ct. H.R. 21, ¶ 49 (2008).

81. *Gas v. France*, 2012-II Eur. Ct. H.R. 215 (2012).

that of a married couple.⁸² Regarding the difference in treatment between the same-sex applicants and a heterosexual couple in a registered partnership,⁸³ there is, according to the ECtHR, neither direct discrimination (in both cases, the simple adoption was denied) nor indirect discrimination (no conventional obligation weighing on France to open marriage to same-sex couples).⁸⁴ However, the ECtHR went a step further in *X v. Austria*:

observ[ing] that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple. Indeed, the Government did not dispute that the situations were comparable, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples. The Court accepts that the applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to a different-sex couple in which one partner wished to adopt the other partner's child.⁸⁵

If we turn now to the issue of access to marriage, the ECtHR expressly admitted in *Schalk and Kopf* that “same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple with regard to their need for legal recognition and protection of their relationship.”⁸⁶

In our view, equating same-sex and different-sex couples is the only tenable position after having acknowledged that family models are not exclusively built around heterosexual relationships. At present, the ECtHR's case law clearly suggests that situations of cohabiting couples living in a stable *de facto* relationship, whether they are heterosexual or homosexual, are comparable in their need for legal status and legal protection.

82. *Id.* at ¶¶ 65-68. This somewhat tautological reasoning of the ECtHR on the non-comparability of couples in registered partnerships with married couples stands in contrast to the perspective adopted by the Court of Justice of the European Union. *See* Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R. I-01757 and Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*, 2011 E.C.R. I-03591. While leaving the final word to the national court, the European Union Court of Justice suggested that the same-sex life partnership in Germany was comparable to marriage, at least concerning survivor's benefits granted under an occupational pension scheme, and concluded that there was a direct discrimination based on sexual orientation.

83. The so-called ‘PACS’ in France (for ‘pacte civil de solidarité’).

84. *See* *Gas v. France* 2012-II Eur. Ct. H.R. 215, ¶¶ 69-71 (2012). For more explanation, *see* Emmanuelle Bribosia and Isabelle Rorive, *Droit de l'égalité et de la non-discrimination*, 2 JOURNAL EUROPÉEN DES DROITS DE L'HOMME/EUR. J. HUM. RTS. 125, 134 (2013).

85. *X v. Austria*, 57 Eur. Ct. H.R. 14, ¶ 112 (2013).

86. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 99 (2011).

IV.

THE EUROPEAN COURT OF HUMAN RIGHTS SHOULD TAKE THE SUSPECT
CRITERIA SERIOUSLY

A legal system that refuses to grant same-sex persons access to marriage leads to a difference in treatment that is directly based on sexual orientation.⁸⁷ While discrimination based on sexual orientation is not explicitly on the list of grounds contained in the ECHR Article 14, the ECtHR has long held that discrimination based on sexual orientation is covered by this provision.⁸⁸

Moreover, throughout its case law on this matter, the ECtHR has highlighted the particularly suspect nature of differential treatment based on sexual orientation.⁸⁹ Recently, the ECtHR emphasized that it “has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons.”⁹⁰ If one takes the suspect criteria seriously, this should mean that “where a difference of treatment is based on sex or sexual orientation the State’s margin of appreciation is narrow.”⁹¹ The ECtHR went even further, by stating that the “differences based solely on considerations of sexual orientation are unacceptable under the Convention.”⁹²

By requiring member states to provide weighty reasons to justify different treatment on the basis of sexual orientation, the ECtHR takes a principled stand that is more clear-cut than that resulting from current US case law (though the ECtHR is not always consistent when drawing the consequences of such a principled stand).⁹³ Courts in the United States have long “refused to recognize

87. See *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011, ¶¶ 154-55.

88. See *Salgueiro da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. 309, 319 (1999) (where for the first time the court held sexual orientation was covered by Article 14).

89. On the notion of suspect discrimination grounds, see Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 99 (2013).

90. *X v. Austria*, 57 Eur. Ct. H.R. 14 at ¶ 99 (2013). The court mentions the following cases: *E.B. v. France*, 47 Eur. Ct. H.R. 21, ¶¶ 70, 94 (2008); *Kozak v. Poland*, Eur. Ct. H.R. Appl. No. 13102/02, filed Mar. 2, 2010, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97597>; *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199 (2003); *L. v. Austria*, 2003-I Eur. Ct. H.R. 29 (2003); *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45 (1999).

91. *X v. Austria*, 57 Eur. Ct. H.R. 14, ¶ 99 (2013).

92. *Id.*

93. See *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶¶ 97-98 (2011) (citations omitted) (“On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the

sexual orientation as the basis for heightened scrutiny. As a consequence, lesbian and gay rights activists have been forced to assert and defend analogies to other ethnic groups”⁹⁴ The majority of US Circuit Courts of Appeals still apply rational basis review⁹⁵ to differential treatment based on sexual orientation.⁹⁶ Nevertheless, there is an emerging trend in some US courts to depart from this view and apply a more demanding standard of review to marriage laws that create differential treatment of same-sex couples. For example, the high courts of California, Connecticut, and Iowa have applied a seemingly heightened scrutiny, and “all concluded that the differential treatment is not sufficiently related to advancing any important government interests.”⁹⁷

Similarly, in *Windsor*, the Court of Appeals for the Second Circuit decided to examine Section 3 of the Defense of Marriage Act using intermediate scrutiny.⁹⁸ It emphasized that “several courts have read the Supreme Court’s recent cases in this area to suggest that rational basis review should be more demanding when there are ‘historic patterns of disadvantage suffered by the group adversely affected by the statute.’”⁹⁹ The Second Circuit concluded that Section 3 of DOMA requires heightened scrutiny based on factors used by the Supreme Court to decide whether a group classification qualifies as a quasi-suspect class:

- (a) whether the class has been historically “subjected to discrimination,” (b) whether the class has a defining characteristic that “frequently bears a relation to ability to perform or contribute to society,” (c) whether the class exhibits “obvious, immutable or distinguishing characteristics that define them as a discrete group”, and (d) whether the class is “a minority or politically powerless.”
- Immutability and lack of political power are not strictly necessary factors to

Contracting States”). For a critical view, see JOHNSON, *supra* note 78, at 125.

94. JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 29 (2004).

95. The appropriate standard of review, however, is debated. Some courts consider the actual purpose of the law under heightened rational basis review (this standard is distinct from intermediate scrutiny). Robert Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 288 (2011). For more on this rational basis “with bite” see Collin Callahan & Amelia Kaufman, *Equal Protection*, 5 GEO. J. GENDER & L. 17 (2004).

96. See Sarah L. Cooper, *supra* note 38, at 67.

97. Holning Lau, *Rewriting Schalk and Kopf: Shifting the Locus of Deference*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS 243, 251 (Eva Brems ed., 2012). See, e.g., *In Re Marriage Cases*, 43 Cal.4th 757, 783-85 (2008). For a comment see Richard Salas, *In Re Marriage Cases: The Fundamental Right to Marry and Equal Protection Under the California Constitution and the Effects of Proposition 8*, 36 HASTINGS CONST. L.Q. 546 (2009). See also Randall P. Ewing, Jr., *Same-Sex Marriage: A Threat to Tiered Equal Protection Doctrine*, 82 ST. JOHN’S L. REV. 1409 (2008) (for an abandon of the rigid “two-tiered” equal protection doctrine in favor of a more flexible approach). For another position, advising “minimalism” in cases involving issues that are emotionally fraught, see Lawrence Friedman, *Not the Usual Suspects: Suspect Classification Determinations and Same-Sex Marriage Prohibitions*, 50 WASHBURN L. J. 61, 77 (2010).

98. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012). Note that this federal appellate court has jurisdiction over three states that recognize same-sex marriage.

99. *Id.* at 180.

identify a suspect class.¹⁰⁰

The Second Circuit found that all four factors justify that homosexuals should be a class subject to heightened scrutiny.¹⁰¹ The US Supreme Court decision in *Windsor* was less explicit and did not indicate what standard of review it applied to DOMA.¹⁰²

The situation in the United States is thus still in flux regarding the standard of review. In comparison, as noted above, European human rights law seems more demanding. However, in our view, the ECtHR in *Schalk and Kopf* did not apply the equivalent of strict scrutiny and, though they should have, failed to seriously consider LGBT people as a suspect class. Instead, “the [ECtHR] granted Austria a wide margin of appreciation to determine whether its differential treatment of same-sex and different-sex couples could be justified”¹⁰³ under ECHR Article 8 (right to respect for family life) and Article 14 (prohibition of discrimination). However, “[this] deference in the non-discrimination context was particularly misplaced.”¹⁰⁴ When a differential treatment is based on suspect ground such as sexual orientation, the ECtHR should apply heightened scrutiny, shifting the burden of proof onto the government’s shoulders.¹⁰⁵ As the dissenting Judges in *Schalk and Kopf* put it, “in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation.”¹⁰⁶

In areas where what is at stake is the protection of minorities or vulnerable groups, recognizing an important national margin of discretion (as in Europe) or giving free rein to states by applying a standard that is rather undemanding (as in the United States) does not appear to be satisfactory because it might leave the protection of minorities in the hands of majorities, who sometimes show little concern for the rights of people belonging to minorities.¹⁰⁷

100. *Id.* at 181 (citations omitted).

101. *Id.* at 185.

102. “The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.” *United States v. Windsor*, 570 U.S. ___, at 17 (2013) (No. 12-307) (slip. op.) (Scalia, J., dissenting).

103. Lau, *supra* note 97, at 244.

104. *Id.*

105. *X v. Austria*, 57 Eur. Ct. H.R. 14, ¶ 141 (2013).

106. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 8 (J. Rozakis, Spielmann & Jebens, dissenting). For an interesting insight on the role of dissent in LGBT cases in the United States (though focusing on custody and adoption cases) see Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases*, 16 L. & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL AND TRANSGENDER LEGAL ISSUES 77 (2007).

107. See Frances Hamilton, *Why the Margin of Appreciation is Not the Answer to the Gay Marriage Debate*, 1 EUR. HUM. RTS. L. REV. 47 (2013); THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHTS OF MARGINALISED INDIVIDUALS AND MINORITIES IN NATIONAL CONTEXT (Dia Anagnostou & Evangelia Psychogiopoulou eds, 2010).

V.

A EUROPEAN CONSENSUS IS NOT DECISIVE¹⁰⁸

In *Schalk and Kopf*, the absence of a European consensus regarding same-sex marriage—no more than six out of forty-seven Convention states allowed same-sex marriage at the time¹⁰⁹—played a crucial role in the ECtHR's reasoning.¹¹⁰ According to the ECtHR, a lack of consensus combined with the deep-rooted social and cultural connotations of marriage, “which may differ largely from one society to another,”¹¹¹ result in a wide margin of appreciation to member states in this field. Consequently, the ECtHR stated that Article 12 of the ECHR should not, in present-day conditions, be read as granting same-sex couples access to marriage or, in other words, as obliging member states to provide for such access in their national laws.¹¹²

However, in *Schalk and Kopf*, the ECtHR's ruling only concerned whether the right to marriage had been violated (Article 12 of the ECHR read alone). It did not address the issue of discrimination (Article 12 taken in conjunction with Article 14 of the ECHR). We suggest that, because these cases concern the rights of minorities, the question of whether states can refuse to open marriage to same-sex couples should be examined by the ECtHR from the viewpoint of non-discrimination. This would allow “the Court to focus on the reason why the minority has been excluded from an opportunity (falling ‘within the ambit’ of another Convention right) that is provided to the majority.”¹¹³ Like other authors,¹¹⁴ or third parties intervening in the *Chapin and Charpentier* case,¹¹⁵

108. The notion of “consensus” refers to an interpretative principle used by the ECtHR, which implies a search for the existence of rights-enhancing practices among member states. When a certain measure of uniformity is reached, the ECtHR raises the standard of rights protection. The ECtHR has used this tool extensively but also incoherently, mainly as a basis for deference to the states. See Laurence Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133-165 (1993); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007); George Letsas, *The Truth in Autonomous Concepts: How To Interpret the ECHR*, 15 EUR. J. INT'L L. No. 2 279, 295-305 (2004).

109. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 27 (2011).

110. *Id.* at ¶ 105 (“The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes”).

111. *Id.* at ¶ 62.

112. *Id.* at ¶¶ 57-58.

113. *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011, ¶ 152.

114. See JOHNSON, *supra* note 78, at 77-83; Lau, *supra* note 97, at 247-249; Bamforth, *supra* note 63, at 140.

115. The third party intervention in the case of *Chapin and Charpentier* also urged the court “to consider attaching less weight to European consensus, and [focus] instead on the absence of any justification for the difference in treatment.” *Chapin and Charpentier v. France*, Eur. Ct. H.R., Appl. No. 40183/07, Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe, filed Oct. 27, 2009,

we defend the position that consensus is not relevant to the question of discrimination based on sexual orientation regarding access to marriage.

Interestingly, this argument mirrors that of the three dissenting Judges in *Schalk and Kopf*.¹¹⁶ They emphasized that in the case of differential treatment based on sexual orientation, and in the absence of very cogent reasons alleged by the government to justify it:

there should be no room to apply the margin of appreciation. Consequently, the “existence or non-existence of common ground between the laws of the Contracting States” (citation omitted) is irrelevant as such considerations are only a *subordinate* basis for the application of the concept of the margin of appreciation. Indeed, it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are better placed than [the ECtHR] is to deal effectively with the matter.¹¹⁷

It seems to us that this rejection of the consensus argument is all the more justified as the use of the consensus argument is often fraught with methodological imprecision and is often a means to conceal or justify a moral positioning of ECtHR judges.¹¹⁸

It is obvious that the consensus argument is not without merit and remains a vital force in judicial policy that the ECtHR uses when it fears that going against consensus will render its rulings ineffectual.¹¹⁹ As Professor R. Wintemute put it, “‘European consensus’ serves to anchor the [C]ourt in legal, political and social reality on the ground.”¹²⁰ Furthermore, “[i]f the [C]ourt appeared to force the views of a small minority of countries on all 47, it would risk a political backlash, which could cause some governments to threaten to leave the convention system.”¹²¹ This is probably the ECtHR’s concern when it emphasizes in *Schalk and Kopf* that “it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to

§ 26, available at http://www.fidh.org/IMG/pdf/chaplin_charpentier_v_france_fidh_written_comments_oct2009.pdf.

116. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20 (2011) (J. Rozakis, Spielmann & Jebens, dissenting).

117. *Id.* 18 at § 8.

118. JOHNSON, *supra* note 78, at 140.

119. On the concept of consensus in the context of the national margin of appreciation doctrine, see, among others: YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (2002); EVA BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (2001); Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EURO. L. J. 80 (2011); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. OF LEGAL STUD. 705 (2006).

120. Robert Wintemute, *Consensus is the right approach for the European Court of Human Rights*, GUARDIAN (Aug. 12, 2010), <http://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus>.

121. *Id.* The headlines of some British newspapers attest to this risk. See Simon Walters, *A great day for British justice: Theresa May vows to take UK out of the European Court of Human Rights*, DAILY MAIL (Mar. 2, 2013), <http://www.dailymail.co.uk/news/article-2287183/A-great-day-British-justice-Theresa-May-vows-UK-European-Court-Human-Rights.html>.

assess and respond to the needs of society.”¹²² And, indeed, parliaments and national courts already play a very important role as guarantors of ECHR rights. One cannot lose sight of the fact that the principle of subsidiarity is at the core of a very sensitive debate calling into question the authority and the legitimacy of the ECtHR. The use of the consensus approach might be reinforced in the coming years; recently a symbolic recital has been added to the Convention’s Preamble that refers to the national margin of appreciation that States enjoy.¹²³

However, the argument that national parliaments are better placed to assess and respond to the needs of society does not, in our view, seem relevant when differential treatment of minorities is at stake. The same applies to the argument, which often comes up in the debate about same-sex marriage, that by exercising tight judicial control, the ECtHR impinges on the democratic functioning of individual states. These two arguments should be revisited when minority rights are at stake. As a matter of fact, “[l]aws that differentiate people based on [sexual orientation] often reflect flawed democratic deliberations. Accordingly, judicial review of such laws ameliorates democratic deficits instead of undermining deliberative democracy.”¹²⁴ Two reasons justify not leaving the decisions concerning minority rights, including the rights of the LGBT population, exclusively in the hands of national authorities and particular legislators.¹²⁵ First, minority groups are often less well-placed to defend their rights via classical parliamentary channels where the majority prevails. Second, parliamentary debates are often fraught with stereotypes about sexual orientation, as evidenced by the recent debates in the French, British, Polish and Russian national assemblies.¹²⁶ A third-party intervention by international human rights advocates in *Perry* stated “the possibility of legislative action does not justify judicial abdication. . . . Respect for democracy has never meant that courts must permit discrimination.”¹²⁷ The brief goes on by citing countries where legislatures crafted laws to recognize same-sex marriage *after* courts determined that such recognition was constitutionally required.¹²⁸ If the primary responsibility of protecting human rights in Europe lies with states, and specifically with domestic constitutional courts, the ECtHR remains the ultimate guardian of those rights.

122. Schalk and Kopf v. Austria, 53 Eur. Ct. H.R. 20, ¶ 62 (2011).

123. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* June 24, 2013, art. 1, C.E.T.S. No. 213. *See also* the Brighton Declaration following the High Level Conference on the Future of the European Court of Human Rights, Brighton (United Kingdom), 18-20 April 2012.

124. Lau, *supra* note 97, at 248.

125. Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 848 (1999).

126. *Id.*

127. Brief of International Human Rights Advocates, *supra* note 38, at 18.

128. *Id.*

Although we believe that the reference to the consensus is not legally relevant to the issue of discrimination against LGBT individuals, we acknowledge that judicial politics could lead the ECtHR to make such a reference. If this were the case, two options would be open to the ECtHR.

The first option was developed by Holning Lau in his rewriting of the *Schalk and Kopf* ruling.¹²⁹ He suggests that the ECtHR Court should explicitly state that same-sex couples have a right to marriage equality but that the absence of European consensus should be taken into account when implementing marriage equality.¹³⁰ Thus the idea, based on the device of prospective overruling—i.e., a court changes a legal rule but only for future cases¹³¹—is not to immediately condemn the states that have not opened marriage to homosexual couples, but rather to grant them a grace period for implementation.¹³² In the absence of a follow-up or monitoring mechanism within the ECtHR system, it is proposed not to specify *ex ante* a period of expiry, at which all states should have opened marriage to homosexuals in their legal order,¹³³ but instead to take into account the evolution of the consensus among the Council of Europe's member states to determine this period in an evolving manner.¹³⁴ Therefore, as soon as a consensus emerges among the high contracting parties on establishing a registered partnership open to same-sex couples, the states that have not yet introduced it in their legislation would no longer have a margin of discretion and would be required to establish a registered partnership open to same-sex couples.

The same reasoning could apply to the opening of marriage to persons of the same sex. However, as Holning Lau acknowledges, although the proposition

129. Lau, *supra* note 97.

130. *Id.* at 255.

131. MICHAEL ZANDER, *THE LAW MAKING PROCESS* 397 (4th ed. 2004).

132. For instance, *see Stec v. United Kingdom*, where the court considered that the timing of correcting the inequality (the difference in pension ages for men and women) might be reasonable and fall within the national margin of appreciation. *Stec v. United Kingdom*, 2006-VI Eur. Ct. H.R. 131, 151-52.

133. It should be noted that the option of a precise deadline for the introduction of same-sex marriage in the legal order by the legislator has been the choice of both the Constitutional Court of South Africa and the Constitutional Court of Colombia. *See Fourie v. Minister of Home Affairs* 2005 (3) SA 429 (CC) at ¶ 156 (S. Afr.). *See also* Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/1, available at <http://english.corteconstitucional.gov.co/sentences/C-577-2011.pdf>. (Colom.) (“Resuelve: . . . Cuarto – Exhortar al Congreso de la República para que antes del 20 de junio de 2013 legisle, de manera sistemática y organizada, sobre los derechos de las parejas del mismo sexo con la finalidad de eliminar el déficit de protección que, según los términos de esta sentencia, afecta a las mencionadas parejas. Quinto. Si el 20 de junio de 2013 el Congreso de la República no ha expedido la legislación correspondiente, las parejas del mismo sexo podrán acudir ante notario o juez competente a formalizar y solemnizar su vínculo contractual.”). The Colombian Court exhorted Congress to legislate on the rights of same-sex couples before June 20, 2013, in a systematic and organized way, so as to eliminate the lack of protection which these couples suffer. In July 2013, a Bogota judge ordered notaries to marry same-sex couples after couples petitioned the judge because Congress failed to pass the bill. *Id.*

134. Lau, *supra* note 97, at 253-57.

has the merit of considering the institutional and political constraints on the ECtHR, it involves risks.¹³⁵ It could lead to the mobilization of conservative forces in countries where reforms are currently being debated to prevent a consensus from being reached at the supranational level. Furthermore, this makes the implementation of non-discrimination dependent on the whims of majorities at a national level, which does not, as we have emphasized, constitute a sufficient guarantee for the protection of minorities or vulnerable groups. In addition, and beyond the technical pitfalls linked to the kind of measures the ECtHR is competent to impose on member states,¹³⁶ such a path is likely, *de facto*, to undermine the power of the ECtHR to supervise the execution of its judgments.¹³⁷

The second option for the ECtHR is to address consensus, not according to an arithmetic rule, but rather by taking into account the emergence of a European and international tendency in the direction of the legal recognition of same-sex couples and the opening of marriage to those couples. The ECtHR applied the consensus doctrine in this manner in the case of *Christine Goodwin v. United Kingdom*.¹³⁸ That case concerned the lack of legal recognition of the change of gender of a post-operative transsexual. To support the evolution of its case law, the court held that it:

attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.¹³⁹

In *Schalk and Kopf*, even though the ECtHR concluded that “there is not yet a majority of States providing for legal recognition of same-sex couples,” it acknowledged the existence of “a tendency that has developed rapidly over the past decade,” and “an emerging European consensus towards legal recognition of same-sex couples.”¹⁴⁰ In addition to observing the changes which have occurred within the contracting parties of the Council of Europe since *Schalk and Kopf*, the ECtHR could thus take into consideration international evolution, such as the number of foreign countries which recognize same-sex marriage, the

135. *Id.* at 257.

136. For a clear overview of the measures the ECtHR can impose on member states and the supervision mechanism of the execution of judgments, see ELISABETH LAMBERT ABDELGAWAD, HUMAN RIGHTS FILES 19, THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS (Council of Eur. Publishing 2d ed. 2008).

137. On the importance of this issue, see Justice Pinto De Albuquerque’s concurring opinion. *Fabris v. France*, Eur. Ct. H.R. Appl. No. 16574/08, filed Feb. 7, 2013, ¶¶ 30-34, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116716>.

138. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18 (2002).

139. *Id.* at ¶ 85.

140. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 22 (2011).

case law of national courts within the Council of Europe, and the case law of foreign supreme courts.¹⁴¹

In the United States, too, some advocates plead in favor of taking into account a tendency rather than an arithmetically interpreted consensus.¹⁴² In the recent *Perry* case, an amicus curiae brief by international advocates urged the US Supreme Court to “solidify” an established and accelerating international trend toward equal marriage rights for same-sex couples.¹⁴³ These five human rights advocacy organizations,¹⁴⁴ based in the United States, the United Kingdom, Canada, South Africa, and Argentina, believe that an international *consensus* weighs in favor of heightened scrutiny and the recognition of marriage equality.¹⁴⁵ The advocates find evidence of the emerging international consensus in adopted and pending bills in many countries, and in trends in international law.¹⁴⁶ Though international law does not yet require recognition of same-sex marriages, the advocates encourage the Supreme Court to take leadership in the development of these norms.¹⁴⁷

The ECtHR should not opt for the consensus approach. When states treat individuals differently based on sexual orientation, the ECtHR should not give deference to a national margin of discretion and the (in)existence of a consensus should not play a role. Rather, the ECtHR should review this differential treatment using a strict scrutiny test.

141. This has been advocated by scholars and by NGOs. See Robert Wintemute, *Same-Sex Marriage: When Will It Reach Utah?* 20 BYU J. PUB. L. 527 (2006); see also Schalk and Kopf v. Austria, Eur. Ct. H.R. Appl. No. 30141/04, Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe, submitted on June 26, 2007, § 19, available at <http://www.fidh.org/en/europe/Austria/FIDH-third-party-intervention-13033>.

142. Regarding Eighth Amendment jurisprudence, see e.g. *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002) (“[i]t is not so much the number of jurisdictions that adopt a rule that is significant, but the consistency of the direction of change.”).

143. Brief of International Human Rights Advocates, *supra* note 38, at 6.

144. The International Center for Advocates Against Discrimination, the National Council for Civil Liberties (often present before the European Court of Human Rights), the Canadian Civil Liberties Association, the Legal Resources Center and the Center for Legal and Social Studies.

145. Brief of International Human Rights Advocates, *supra* note 38, at 6.

146. *Id.* at 4.

147. *Id.* at 6-7. On the other hand, a brief submitted by other international jurists and academics expresses the belief that there is no substantive opinion on the issue. Amicus Curiae Brief of International Jurists and Academics in Support of Petitioner Hollingsworth and Respondent Bipartisan Legal Advisory Group, submitted on February 28, 2013, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.) and *United States v. Windsor*, 570 U.S. ____ (2013) (No. 12-307) (slip. op.).

VI.

WHICH SERIOUS REASONS COULD BE INVOKED TO JUSTIFY THE DIFFERENCE IN TREATMENT?

In certain cases involving homosexuality, some have argued that the European Court of Human Rights tends to merge the analysis of serious reasons (if a suspect discrimination ground is involved) on the one hand, and the margin of appreciation on the other. Concretely, it uses the margin of appreciation to bypass the review of serious reasons, which could justify the difference of treatment. This juxtaposition gives discretion to states that could be acting on pure prejudice,¹⁴⁸ or “on the basis of erroneous or even discriminatory reasons.”¹⁴⁹ Meanwhile, no robust justification was required in *Schalk and Kopf*.¹⁵⁰ The government of Austria mainly relied on the fact that the right to marry is “by its very nature” limited to opposite-sex couples.¹⁵¹ In reaction, the applicants in the pending case of *Ferguson v. United Kingdom*¹⁵² expressly designed their complaint in the hope that the government will be required to provide a justification for the difference in treatment.

In the meantime, it is worthwhile to look at the arguments that have been brought before American courts to see how they have been received. Various arguments are to be found in case law, in petitions, in the scholarly literature,¹⁵³ and in the amicus curiae briefs submitted to the courts.¹⁵⁴ We focused on recent material as well as the two cases decided by the US Supreme Court. We

148. In some instances, however, the ECtHR will strike down policies it believes are highly prejudicial. In *Smith and Grady*, the ECtHR condemned the absolute policy against the participation of homosexuals in the UK armed forces. It noted that “[t]o the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights.” *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45, ¶ 97 (1999). See also *Markin v. Russia*, Eur. Ct. H.R. Appl. No. 30078/06, filed Oct. 7, 2010, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109868> (another case decided by the court involving gender stereotypes).

149. Hamilton, *supra* note 107, at 47.

150. As Carmelo Danisi notes, “in the absence of such justification, reliance on the absence of a wide consensus is an easy way out.” Carmelo Danisi, *How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence*, 9 INT’L J. OF CONST. L. NO. 3-4 793, 806 (2011).

151. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 43 (2011).

152. *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011.

153. See Dale M. Schowengerdt, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex Marriage*, 14 REGENT U. L. REV. 487 (2002).

154. The number of amicus curiae briefs submitted in the case of *Hollingsworth v. Perry* is remarkable: in addition to the eleven briefs submitted before certiorari was granted, forty briefs support the petitioners, and fifty-three support the respondents. “*Hollingsworth v. Perry*,” SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/> (last visited Oct. 30, 2013). Seventy-nine amicus curiae briefs have been submitted in *Windsor*. “*United States v. Windsor*,” SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/> (last visited Oct. 30, 2013).

identified two principal arguments advanced to justify the restriction of marriage to opposite-sex couples which could be relevant in the European context too:¹⁵⁵ (a) to preserve the traditional definition of marriage (we include in this the references to “tradition” in general), and (b) to encourage responsible procreation.

A. The Preservation of the Traditional Definition of Marriage

In cases that did not directly involve same-sex marriage, the European Court of Human Rights has accepted that “protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment.”¹⁵⁶ However, it immediately added that the principle of proportionality¹⁵⁷ must be respected and that “[t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it.”¹⁵⁸ Although the ECtHR recognizes that “the institution of the family is not fixed, be it historically, sociologically or even legally,”¹⁵⁹ and that it has shown some openness, it seems to leave latitude to maintain “the strongest traditions of the old European nations.”¹⁶⁰ In this vein, it is also noteworthy that the ECtHR, in the case of *Chapman v. United Kingdom*, included respect for the “traditional way of life” in the ambit of article 8,¹⁶¹ which concerns respect for private and family life.¹⁶² However, this case concerned the traditional lifestyle of Gypsies. It might be that the ECtHR should adopt different reasoning when this argument is invoked by a state, instead of by a member of a minority group who invokes the argument for protection. This is exactly what applicants and third party intervenors argue in the same-sex marriage cases: “The possible desires of the

155. We have omitted issues that are more US-specific, such as standing and the Due Process Clause.

156. *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, 213 (2003). *See also* *Estevez v. Spain*, 2001-VI Eur. Ct. H.R. 311, 324 (2001); *Kozak v. Poland*, Eur. Ct. H.R. Appl. No. 13102/02, filed Mar. 2, 2010, ¶ 98, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97597>. In the case of *Marckx*, the court even said “support and encouragement of the traditional family is in itself legitimate or even praiseworthy.” *Marckx v. Belgium*, Eur. Ct. H.R. Appl. No. 6833/74, filed June 13, 1979, ¶ 40, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534>.

157. Here, the principle of proportionality refers to a proportionality test that must be conducted to check whether an interference with a right is proportionate to the legitimate aim pursued (protection of the family in the traditional sense) by the restriction. *See* BREMS, *supra* note 119, at 365. *See generally* ARAI-TAKAHASHI, *supra* note 119.

158. *Karner*, 2003-IX Eur. Ct. H.R. 199 at 213 (2003).

159. *Mazurek v. France*, 2000-II Eur. Ct. H.R. 23, 38-39 (2000).

160. Jean-Pierre Marguénaud, *La liberté matrimoniale au sens de la Convention européenne des droits de l’homme*, in *LE DROIT DE LA FAMILLE À L’ÉPREUVE DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* 15, 27 (Frédéric Krenç & Michel Puéchavy eds., 2008).

161. *Chapman v. United Kingdom*, 2001-I Eur. Ct. H.R. 41, 79 (2001).

162. Florence Benoît-Rohmer, *La Cour de Strasbourg et la protection de l’intérêt minoritaire : une avancée décisive sur le plan des principes? (en marge de l’arrêt Chapman)*, *REV. TRIM. DR. H.*, 1003 (2001).

heterosexual *majority* to maintain a tradition that favors it, or to impose dominant religious beliefs on the lesbian and gay minority, cannot be valid justifications.”¹⁶³

The following paragraphs show how US judges have assessed arguments related to the preservation of the definition or the tradition of marriage. First, in regards to the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman, Judge Greaney, concurring in the first US case finding that same-sex couples had the right to marry,¹⁶⁴ wrote that “[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.”¹⁶⁵ In order to demonstrate the absurdity of this line of reasoning, the current debate is sometimes linked to the miscegenation laws which historically prohibited interracial marriages, by suggesting that, following this argument, the US Supreme Court would have held that the right to marry cannot extend to a person of a different race, because by definition, a marriage relates to two people of the same race.¹⁶⁶ In 2008, the Supreme Court of Connecticut stated that:

[c]ivil marriage has traditionally excluded same-sex couples—i.e., that the ‘historic and cultural understanding of marriage’ has been between a man and a woman—cannot in itself provide a [sufficient] basis for the challenged exclusion. To say that the discrimination is ‘traditional’ is to say only that the discrimination has existed for a long time. A classification, however, cannot be maintained merely ‘for its own sake’. Instead, the classification ([that is], the exclusion of gay [persons] from civil marriage) must advance a state interest that is separate from the classification itself. Because the ‘tradition’ of excluding gay [persons] from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of ‘history.’ Indeed, the justification of ‘tradition’ does not explain the

163. Oral Submissions of FIDH, ICJ, AIRE Centre & Ilga-Europe Oral submissions on behalf of the third-party intervenors, *Schalk and Kopf v. Austria*, Feb. 25, 2010, *available at* http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions/schalk_kopf_v_austria. *See also* *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011, ¶ 158.

164. *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 344-50 (2003).

165. *Id.* at 348 (J. Greaney, concurring). The ECtHR has also been confronted with this type of argument. In a case involving a pension claim from a “resident non-citizen,” the Latvian government’s argument was that it would be sufficient for the applicant to become a naturalized Latvian citizen in order to receive the full pension. The ECtHR Grand Chamber did not accept this argument and held that “the prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim’s claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance.” *Andrejeva v. Latvia*, Eur. Ct. H.R. Appl. No. 55707/00, filed Feb. 18, 2009, ¶ 91, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91388>.

166. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that such statutes were unconstitutional).

classification; it merely repeats it.¹⁶⁷

A year later, the Iowa Supreme Court called this type of approach “an empty analysis.”¹⁶⁸

A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged. When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification.¹⁶⁹

These excerpts show that many versions of the “tradition” argument have been advanced and that they have not been found persuasive. For example, in the case of *Perry v. Schwarzenegger*, it was argued that “Proposition 8 is rational because it preserves: (1) ‘the traditional institution of marriage as the union of a man and a woman’; (2) ‘the traditional social and legal purposes, functions, and structure of marriage’; and (3) ‘the traditional meaning of marriage as it has always been defined in the English language.’”¹⁷⁰ The district court did not accept this argument, finding that “[t]radition alone, however, cannot form a rational basis for a law. . . . The ‘ancient lineage’ of a classification does not make it rational. . . . Rather, the state must have an interest apart from the fact of the tradition itself.”¹⁷¹

DOMA’s stated purpose was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.”¹⁷² In the case challenging it, the Court of Appeals for the Second Circuit made a similar statement:

Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis. . . . A fortiori, tradition is hard to justify as meeting the more demanding test of having a substantial relation to an important government interest. Similar appeals to tradition were made and rejected in litigation concerning anti-sodomy laws.¹⁷³

The court then quoted a powerful line from Justice Stevens, dissenting in *Bowers v. Hardwick*: “[T]he fact that the governing majority in a [s]tate has traditionally viewed a particular practice as immoral is not a sufficient reason for

167. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008) (citations omitted).

168. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

169. *Id.*

170. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010).

171. *Id.* (citations omitted). The district court judge then made an analogy to the tradition of gender restriction. *See also* the analysis of Paul Johnson, according to whom the district court judgment shows that the court adopted a critical standpoint in respect of heteronormativity. Paul Johnson, *Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority*, 20 SOC. & LEGAL STUD. 349, 358 (2011).

172. DEFENSE OF MARRIAGE ACT, H.R. REP. NO. 104-664, at 16 (1996).

173. *Windsor v. United States*, 699 F.3d 169, 187 (2d Cir. 2012).

upholding a law prohibiting the practice; *neither history nor tradition* could save a law prohibiting miscegenation from constitutional attack.”¹⁷⁴

The claims related to tradition and history present thorny issues. First, these arguments sometimes do not gather consensus or can be used to reach opposite results. For example, William Eskridge, Professor of Jurisprudence at Yale Law School, uses the “tradition” argument to demonstrate that same-sex unions have been a valuable institution for most of human history and in most known cultures.¹⁷⁵ Similarly, the historical evidence and academic narrative of sexual identities marshaled in *Bowers v. Hardwick*,¹⁷⁶ and then seventeen years later in *Lawrence v. Texas*,¹⁷⁷ highlight how this scholarship can have problematic implications.¹⁷⁸ As Daniel Hurewitz notes, “[h]istorical arguments are, by definition, interpretations, and eventually any analytic consensus will be replaced by another.”¹⁷⁹

In addition to the fact that history can be relied upon to arrive at contradictory conclusions, there is another paradox. In cases brought for violations of the Fourteenth Amendment, individuals often support their claim by referring to the state’s long-standing history of discrimination. This is because a group must demonstrate a historic pattern of discrimination in order to benefit from certain types of judicial scrutiny. Likewise, many historical references are to be found throughout the US cases, such as references to the historical prevalence of race restrictions on marital partners.¹⁸⁰

*B. Encouraging Responsible Procreation and Child-Rearing*¹⁸¹

In Europe, the argument that denying same-sex couples the right to marry will encourage responsible procreation and child-rearing should easily be dismissed.¹⁸² As developed earlier in this Article, in *Christine Goodwin v. United Kingdom* the ECtHR stated that “the inability of any couple to conceive

174. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216) (Stevens, J., dissenting).

175. William N. Eskridge Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

176. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

177. *Lawrence v. Texas*, 539 U.S. 558 (2003).

178. Daniel Hurewitz, *Sexuality Scholarship as a Foundation for Change: Lawrence v. Texas and the Impact of the Historians’ Brief*, 7 HEALTH AND HUM. RTS. 205, 211 n.2 (2004).

179. *Id.* at 211.

180. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) (“... once common in most states (they) are now seen as archaic, shameful or even bizarre”).

181. We acknowledge that, by reviewing these arguments, we enter into the field of “the protection of family” and other delicate questions such as filiation or interest of the child we cannot explore in detail.

182. In addition, according to Jernow and Rafiq, procreation is not the heart of the controversy in Europe, where legislatures would be more concerned by filiation issues (as the recent debates at the French National Assembly also demonstrate). Alli Jernow and Arianna Rafiq, *The Kids-Marriage Conundrum and the Limited Reach of American Reasoning*, 3 CITY U. H.K. L. REV. 213, 235 n.2 (2012).

or parent a child cannot be regarded as *per se* removing their right [to marry].”¹⁸³ Article 12 provides that “[m]en and women of marriageable age shall have the right to marry and to found a family,” but the ECtHR has separated the right to marry from the right to found a family. Similarly, concerning the suitability or unsuitability of same-sex couples to raise children, the ECtHR concluded in *X. v. Austria* that “[t]he Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child’s needs.”¹⁸⁴

In the United States, the first case of a state court finding that same-sex couples had the right to marry disagreed with the Superior Court judge who had endorsed the rationale that “the state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation.”¹⁸⁵ Chief Justice Margaret Marshall wrote that the “laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family.”¹⁸⁶ She added that applicants for a marriage license are not required to attest to their ability or intention to conceive children by coitus and that “[f]ertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married.”¹⁸⁷ The Court of Appeals for the Second Circuit concedes that procreation can be an important government objective, but does not see how DOMA is substantially related to it. “Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.”¹⁸⁸

Over time, opponents of same-sex marriage have refined the procreation argument. For example, proponents of Proposition 8 in California asserted that the essential purpose of maintaining a separate legal definition for same-sex partnerships is to protect traditional, natural, and important arrangements for heterosexual marriage that are vital to society. They argued that marriage is

183. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18, ¶ 98 (2002). *See* point 1, above. According to Ludovic Hennebel “It is interesting to note that apart from the arguments relating to the evolution of science, all the arguments raised by the Court are transferable to the claims of access to the institution of marriage for the benefit of homosexuals.” Ludovic Hennebel, *Conjugalités en Droit International des Droits de l’Homme*, in ALAIN-CHARLES VAN GYSEL, *CONJUGALITÉS ET DISCRIMINATIONS* 67, 73 (2012).

184. *X v. Austria*, 57 Eur. Ct. H.R. 14, ¶ 142 (2013).

185. *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 331 (2003).

186. *Id.*

187. *Id.* The procreation argument, raised by the lawyer for the proponents of Proposition 8 during the oral arguments before the Supreme Court, led to a comical exchange with the justices, in particular Justice Kagan: “No, really, because if the couple—I can just assure you, if both the woman and the man are over the age of 55, there are not a lot of children coming out of that marriage.” *See* Transcript of Oral Argument at 24-27, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144).

188. *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012).

essential to “promote[] stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children,”¹⁸⁹ and because “it promotes ‘statistically optimal’ child-rearing households; that is, households in which children are raised by a man and a woman married to each other.”¹⁹⁰

Some courts have accepted the latter argument. For example, the state Court of Appeals of Indiana concluded that since opposite-sex reproduction may be accidental, the institution of marriage should be preserved for heterosexuals as a way of ensuring that heterosexual reproduction occurs in a stable environment. Additionally, since same-sex couples can only reproduce responsibly, marriage is unnecessary to create a responsible environment for children of same-sex couples because the manner in which they reproduce already ensures this.¹⁹¹

On the point that children must have both a father and a mother, the US District Court for the Northern District of California found that these opinions were “‘not supported by reliable evidence or methodology’ and were therefore ‘unreliable and entitled to essentially no weight.’”¹⁹² In a historic document,¹⁹³ the Obama Administration filed a brief as amicus curiae in the *Perry* case reinforcing these positions. The Administration argued that classifications based on sexual orientation should be subject to heightened scrutiny, and that Proposition 8 fails heightened scrutiny because “marriage is far more than a societal means of dealing with unintended pregnancies. . . . Even assuming, counterfactually, that the point of Proposition 8 was to account for accidental offspring by opposite-sex couples, its denial of the right to marry to same-sex couples does not substantially further that interest.”¹⁹⁴ Regarding “favoring child-rearing by married opposite-sex couples,” the Administration continued, “Proposition 8 neither promotes that interest nor prevents same-sex parenting. The overwhelming expert consensus is that children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents.”¹⁹⁵ The previous point highlighted the problematic role of historical evidence, and this point shows the significant role social sciences evidence can play.

189. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

190. *Id.*

191. *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

192. *Johnson*, *supra* note 171, at 358 (quoting *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 950 (N.D. Cal., 2010)).

193. The Administration was under no legal obligation to file anything, as it is not a party.

194. Brief for the United States as Amicus Curiae in Support of Respondents at 7-8, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.).

195. *Id.* at 8.

C. Other Arguments

As explained above, opponents of same-sex marriage have brought forth many other arguments against the recognition of a right to marry for same-sex couples, as demonstrated by the briefs submitted before the US Supreme Court. For example, some briefs argue that it is important to “proceed with caution.” This argument has two prongs. The first rests on the idea that there is not enough evidence of the implications of recognizing same-sex marriage and that proceeding with caution can avoid the “unknown consequences of a novel redefinition of a foundational social institution.”¹⁹⁶ Regarding the latter concern, the United States’ brief submitted to the Supreme Court in the *Perry* case reminds us that “similar calls to wait have been advanced—and properly rejected—in the context of racial integration, for example.”¹⁹⁷ The second prong rests more on a general call for judicial restraint in these highly debated topics.¹⁹⁸ We imagine that this argument would not be brought before the ECtHR at this stage of the analysis, but would be used to support the request for a wide margin of appreciation.¹⁹⁹

Lastly, some briefs argue that the rights of believers should be protected.²⁰⁰ Indeed, same-sex marriage legislations in the various US states often include exemptions afforded to religious groups.²⁰¹ It is a sensitive issue. However, the extent to which religious organizations might be compelled to perform same-sex marriage ceremonies is a completely different question, which raises specific issues regarding the separation of the church and state and the position of minorities within their own religious organizations. In Europe, religious

196. Brief on the merits for Respondent of the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 41, *United States v. Windsor*, 570 U.S. ___, (2013) (No. 12-307) (slip. op.). A related argument is the “slippery slope” argument, threatening that opening marriage to same-sex couples opens the door to polygamous and incest. This argument is easily dismissed because of public health and other imperative rights. Moreover, these marriages trigger specific, different reasons, which must be evaluated on their own merits and as such cannot be advanced to exclude same-sex couples from the right to marry.

197. Brief for the United States as Amicus Curiae in Support of Respondents in *Hollingsworth v. Perry*, 570 U.S. ___, 88 (2013) (No. 12-144) (slip. op.).

198. For example, the amicus curiae brief of fifteen states says “[j]udicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short vigorous democratic debates and uses of political processes. This principle recognizes that courts disrupt the democratic process and deprive society of the opportunity to reach consensus when they prematurely end valuable public debate over moral issues.” Brief of Indiana et al. as Amici Curiae in Support of the Petitioner at 27, *Hollingsworth v. Perry*, 570 U.S. ___, (2013) (No. 12-144) (slip. op.).

199. This point will be further analyzed in Section VII.

200. See Brief Amicus Curiae of Catholic Answers et al. in Support of Petitioner, *Hollingsworth v. Perry*, 570 U.S. ___, (2013) (No. 12-144) (slip. op.); see also Brief of the United States Conference of Catholic Bishops as Amici Curiae in Support of Petitioners and Supporting Reversal at 21, *Hollingsworth v. Perry*, 570 U.S. ___, (2013) (No. 12-144) (slip. op.).

201. See, e.g., Christopher W. Dickson, *Inseparability, Religious Exemptions, and New York’s Same Sex Marriage Law*, 98 CORNELL L. REV. 181 (2012) (regarding the New York Marriage Equality Act).

organizations have the choice to perform (or not to perform) same-sex weddings and blessings. For instance, since 2007, the Church of Sweden has offered same-sex couples a religious blessing of their union. More recently, the Church of Sweden decided to conduct wedding ceremonies for both opposite-sex and same-sex couples.²⁰²

Since the states have not yet provided arguments before the ECtHR to justify their denial of the right to marry to same-sex couples, we have drawn on arguments brought before US courts. In case those arguments are brought before the ECtHR (and, as the ECtHR repeated in *X. v. Austria*, the burden of proof rests on the state), the ECtHR will have to assess whether they can be qualified as “serious reasons” justifying the difference in treatment. Many US courts have found these arguments unconvincing because of fallacious or circular reasoning, or because the arguments were based on unproven assumptions. In addition, denying same-sex couples access to the right to marry does not seem to advance the claimed interests of encouraging responsible procreation and optimal households. Some even argue that legalizing same-sex marriages would further the latter interests.

VII.

THE OPTIONS AVAILABLE TO THE EUROPEAN COURT OF HUMAN RIGHTS

In this final section, we examine the different options available to the ECtHR, and indicate which options should be favored and which could alternatively be considered.

In order to address the lack of access to marriage for same-sex couples, the ECtHR could decide the question under Article 12 (the right to marry) in conjunction with Article 14 of the ECHR (the prohibition of discrimination) (option a). However, it is also possible that the ECtHR will apply the same reasoning as in *Schalk and Kopf*, thus adopting a position of self-restraint on access to marriage until a consensus is reached within the member states of the Council of Europe. Under the latter approach, the ECtHR would apply a combination of Article 8 (the right to family life) and Article 14 of the ECHR to assess the discriminatory aspect (or lack thereof) of either a legal alternative to marriage or the lack of legal recognition of stable relationships between persons of the same sex (option b).

202. Svenska Kyrkan [Swedish Church], *Wedding and Marriage*, Church Synod Liturgy Comm. Report 2009:2. (Swed.), available in English at <http://www.svenskakyrkan.se/default.aspx?id=673793>. On the other hand, the United Kingdom Marriage Bill currently awaiting approval from the House of Lords makes it illegal for the Church to conduct gay marriage but foresees a system of “opt-in” if its own canon law changes (the Quakers and the Unitarians for example have decided to opt-in).

A. The Right to Marry for Same-Sex Couples (ECHR Article 12 and Article 14)

The ECtHR should address the question of whether excluding same-sex couples from marriage is discriminatory. Given the ECtHR's case law, it seems highly unlikely that the objectives pursued by a national law would be found illegitimate. Indeed, "the protection of the traditional family" will most likely be accepted as a legitimate goal.²⁰³ But then, the ECtHR should resolve the following question: can the exclusion of same-sex persons from marriage be considered necessary and proportionate to the achievement of this goal? This question engenders a proportionality test in the broad sense.²⁰⁴ In this paper, we advocate that it cannot, and that the right to marry should be open to persons of the same sex. Otherwise, discrimination based on sexual orientation will persist. If, however, for reasons of judicial policy, the ECtHR does not follow this principle, we consider two alternative options below that could be used to adjudicate same-sex marriage rights claims.

Indeed, we know that the ECtHR must take into account contextual factors that directly impact the effectiveness of its judgments. Professor Wintemute highlighted that "if the Court appeared to force the views of a small minority of countries on all 47 [contracting states] it would risk a political backlash, which could cause governments to threaten to leave the convention system."²⁰⁵ In this context, other options could be favored, which less directly attack the political and legal systems of states that refuse gay marriage. The same discussion animated advocates of same-sex marriages in the United States. The discussion involved not only whether courts should decide this issue, but also to what extent courts should be involved and to what extent they should or could impose far-reaching rulings. Noting that the cultural ground has shifted deeply and rapidly in recent years, some authors argue that:

the Supreme Court would simply lack credibility were it to claim that the equal protection of the laws and the Constitution's protection of fundamental liberty interest could be satisfied by relegating same-sex couples either to a second-class form of civilly sanctified relationship or to a social space in which their love, commitment, and dignity are denied any legal recognition at all.²⁰⁶

Additionally, fears of socio-political backlash as a basis for judicial inaction become very difficult to defend.²⁰⁷ Other commentators advocate an incremental approach. Along these lines, William Eskridge argues that such incrementalism is desirable because legal reform helps to cultivate inclusive

203. More than that, the court expressly states that "[t]he Court has accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment," and refers to various previous judgments. *X v. Austria*, 57 Eur. Ct. H.R. 14, ¶ 138 (2013).

204. See ARAI-TAKAHASHI, *supra* note 119.

205. See Wintemute, *supra* note 120.

206. Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 478-479 (2012).

207. *Id.*

social attitudes that prevent popular backlash against same-sex marriage.²⁰⁸ During the oral arguments before the US Supreme Court this year, Justice Samuel Alito said “[t]he Court should not move too fast. . . . You want us to step in and render a decision based on an assessment of the effects of this institution, which is newer than cellphone and the Internet.”²⁰⁹ Lawrence Friedman wrote, “there may be advantages in moving slowly. Slowness allows time for public acceptance, if not approval.”²¹⁰ Related concerns have arisen about the potential harm to the courts’ legitimacy. Friedman adds that “[a] court’s prestige is critical, particularly when its budget and daily functioning may depend upon the good will of those legislators who disagree with its decision-making.”²¹¹ This dilemma surely resonates among ECtHR judges.

B. The Right to Marry as a Matter of Principle

The issue of proportionality requires asking the following question: “How does excluding same-sex couples from access to legal marriage ‘protect’ different-sex couples, or in any way improve their lives?”²¹² Is this exclusion necessary to the protection of opposite-sex couples? Aren’t there less restrictive alternatives to achieve this end? As was bluntly stated by a third party intervenor in *Schalk and Kopf*: “[t]here is no shortage of marriage licenses and no need to ration them.”²¹³ The question was also explicitly raised during the oral arguments held before the Supreme Court this year. Justice Kagan asked the petitioners’ attorney: “What harm [do] you see happening and when and how and . . . what harm to the institution of marriage or to opposite-sex couples, how does this cause and effect work?”²¹⁴ We push the ECtHR to ask the same question, which should lead to the conclusion that no valid reason can be invoked to deny same-sex couples the right to marry. Further, it will also

208. WILLIAM ESKRIDGE, *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS*, 158 (2002) cited in Lau, *supra* note 97, at 255. *But see* Aloni, *supra* note 24.

209. Transcript of Oral Argument at 56, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.).

210. Friedman, *supra* note 97, at 74.

211. *Id.* at 75.

212. Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe, *supra* note 115, at ¶ 17.

213. *Id.* The Court of Appeal for Ontario similarly said: “The question to be asked is whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples.” *Halpern v. Canada (Att’y Gen.)* (2003), 60 O.R. 3d 321, ¶¶ 91, 94, 108 (Can. Ont. C.A.). It added: “Denying same-sex couples the right to marry perpetuates the . . . view . . . that same-sex couples are not capable of forming loving and lasting relationship, and thus same-sex relationship are not worthy of the same respect and recognition as opposite-sex relationships.” *Id.* at ¶ 94. It ultimately ruled that the common-law definition of marriage as “the voluntary union for life of one man and one woman to the exclusion of all others” violates the principle of equality and non-discrimination enshrined in the Canadian Charter of Rights and Freedoms. *Id.* at §108.

214. Transcript of Oral Argument at 17, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.).

demonstrate that it is difficult to devise a strict proportionality test that would validate the views of the majority if they are at the expense of a vulnerable minority group's rights.

At the end of the day, this issue touches upon the dignity of same-sex couples and the core of the equality principle. The majority in *United States v. Windsor* did not mince its words when writing that marriage:

is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.²¹⁵

C. The Right to Marry Implemented Incrementally

Incremental implementation of a right to marriage is the option proposed by Holning Lau in his exercise of "rewriting" *Schalk and Kopf*. As explained above in more detail, Lau suggests that the ECtHR adopt an incremental approach by shifting the locus of judicial restraint from determinations about *whether* a right should be protected to determinations about *how* and *when* to implement protections of that right.²¹⁶ His proposal may be summarized as follows: the ECtHR should explicitly state that same-sex couples have a right to marriage equality but, at the same time, should take into account the absence of European consensus at the stage of implementing this principle. Thus, the idea is not to immediately condemn the states that have not opened marriage to homosexual couples, but rather to grant them a grace period to implement it.²¹⁷

D. The Right to Marry Derived from the Need for Consistency and the Prohibition of Segregation

This third option would initially require only some states to grant the right to marry to persons of the same sex. A state that has made the choice to create a legal framework for stable same-sex relationships (i.e. a different but equivalent recognition of marriage) should open marriage to homosexuals in the name of the prohibition of segregation and the need for consistency. Under this approach,

215. *United States v. Windsor*, 570 U.S. ___, at 20 (2013) (No. 12-307) (slip. op.). We cannot enter here into the debates on the notion of dignity in this context and its use by the two jurisdictions. For a more detailed look at this issue see Danieli Evans, *Imagining a Same-Sex Marriage Decision Based on Dignity: Considering Human Experience in Constitutional Law*, N.Y.U. REV. L. & SOC. CHANGE, 251 (2013). See also Paolo Carozza, *Human Dignity in Constitutional Adjudication*, in RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW, 459 (Tom Ginsburg & Rosalind Dixon eds., 2011). For an interesting debate on the use of the notion of dignity in the *Windsor* case, see Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29 (2013), and for a reply see Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39 (2013).

216. Lau, *supra* note 97, at 244.

217. *Id.* at point 4.

states are not required to open marriage to same-sex couples overnight. However, when a state does give quasi-identical rights to same-sex couples and married couples, it must take this reasoning to its logical conclusion and give them access to marriage as such. This therefore avoids the persistence of a “separate but equal” system.

The ECtHR could consider this option in the pending case of *Ferguson v. United-Kingdom*. This argument is explained in detail in the *Ferguson* application before the court. First, the fact that same-sex civil partners and different-sex spouses in the United Kingdom enjoy virtually identical rights and obligations is stated as a premise.²¹⁸ On the basis of this premise, the applicants argue that “[t]here are no ‘particularly serious reasons’ that could justify excluding same-sex couples from the traditional, public, legal institution of marriage, and different-sex couples from the new, public, legal institution of civil partnership.”²¹⁹ According to them, “[t]he only reason for maintaining the two forms of exclusion is to use the law to stigmatize: to mark same-sex couples as inferior, and different-sex couples as superior.”²²⁰ They further insist that “[u]sing the law to maintain a social hierarchy based on sexual orientation is not a legitimate aim of government, for the purposes of Article 14, Article 12 or Article 8.”²²¹ The application concludes that “the [ECtHR] should, as a matter of consistency and to preclude pettiness, require the United Kingdom, and any other Council of Europe member states in the same position . . . to take the final step and grant access to the traditional, public, legal institution and word ‘marriage.’”²²²

In the United States, this option was the so-called “eight-state solution” suggested to the Supreme Court in *Hollingsworth v. Perry*. Martin Lederman explained that:

the Court could conclude that once a state *has* offered same-sex couples all or virtually all of the incidents of marriage that it offers to similarly situated opposite-sex couples, there is no legitimate justification for denying those couples the status of ‘marriage’ itself, and that therefore it is fair to conclude that such a denial is designed only to stigmatize, or to deny respect, on the basis of sexual orientation, which the Constitution forbids.²²³

Such a statement “would directly affect only those states (California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island) that already treat same-sex couples the same as opposite-sex couples in virtually all ways but

218. *Ferguson v. United Kingdom*, Eur. Ct. H.R. Appl. No. 8254/11, filed Feb. 2, 2011, ¶ 144.

219. *Id.*

220. *Id.* at ¶ 145.

221. *Id.*

222. *Id.* at ¶ 147.

223. Marty Lederman, *The Court’s five options in the California marriage case*, SCOTUSBLOG (Mar. 1, 2013, 11:11 AM), <http://www.scotusblog.com/2013/03/the-courts-five-options-in-the-california-marriage-case/>.

one.”²²⁴ Earlier during the litigation, in *Perry v. Schwarzenegger*, such a line of argumentation had been adopted under the due process obligation:

the evidence shows that the withholding of the designation ‘marriage’ significantly disadvantages plaintiffs. The record reflects that marriage is a culturally superior status compared to a domestic partnership. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same-sex couples.²²⁵

This passage shows that the solution of condemning states that have already introduced a parallel legal framework for same-sex couples is plausible in the eyes of some advocates and judges. However, while the Supreme Court ultimately did not rule on the merits of this case, it was apparent in oral argument that the Justices were not convinced by the suggested solution of condemning states that already grant most rights to same-sex couples. As Justice Breyer declared, “a [s]tate that does nothing hurts them much more, and yet your brief seems to say it’s more likely to be justified under the Constitution.”²²⁶ Justice Sotomayor underlined the ironic point that states that grant more rights would then have fewer rights.²²⁷

E. Granting Legal Recognition to Same-Sex Couples (ECHR Article 8 and Article 14)

As argued above, at least since the *Schalk and Kopf* case, same-sex relationships have been protected as part of family life in the ECHR system. As emphasized by Judges Rozakis, Spielmann, and Jebens in their dissenting opinion in *Schalk and Kopf*, the ECtHR should have drawn inferences from the latter finding and deduced a “positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.”²²⁸ Of course, this statement leaves numerous questions unanswered and in particular does not clarify which type of legal recognition

224. *Id.* In addition, four of the eight states that provide same-sex couples with virtually all incidents of marriage (Delaware, Illinois, and Oregon, in addition to California), and which would thus be concerned by such a solution, filed amicus curiae briefs urging the Court to affirm the judgment declaring that Proposition 8 was invalid. See Brief of Massachusetts et al. as Amici Curiae in Support of Respondents, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.); see also Brief for the State of California as Amici Curiae in Support of Respondents, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.). “The eight-state holding would permit the Court to avoid for now any decision on whether some other states might have a sufficient justification for denying same-sex couples substantial benefits and privileges that they offer to opposite-sex couples. . . .” *Id.* This solution would obviously raise many questions regarding the constitutions and laws of the other thirty-three states but the Court would not have to resolve constitutional. *Id.*

225. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010).

226. Transcript of Oral Argument at 53, *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (No. 12-144) (slip. op.).

227. *Id.* at 54-55.

228. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 4 (2011) (J. Rozakis, Spielmann & Jebens, dissenting).

would be held as a “satisfactory framework,” and therefore judged compatible with the requirements of the Convention under Articles 8 and 14.

Following this reasoning, it seems obvious that states that are parties to the Convention should at least provide some kind of legal recognition.²²⁹ A 2010 Committee of Ministers of the Council of Europe recommendation on measures to combat discrimination on the grounds of sexual orientation or gender identity supports this argument.²³⁰ Where national legislation neither recognizes nor confers rights or obligations on registered same-sex partnerships and unmarried couples, the Committee invites member states “to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.”²³¹

It is rather difficult to draw the line between a legal recognition that would be acceptable and a legal recognition that would be held incompatible with the requirements of the Convention. In *Schalk and Kopf*, the ECtHR acknowledged “an emerging European consensus towards legal recognition of same-sex couples.”²³² Nevertheless, in the absence of a majority of states providing for legal recognition of same-sex couples, it granted a margin of appreciation to the states “in the timing of the introduction of legislative changes.”²³³ Moreover, the ECtHR held “that [s]tates enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition” of same-sex couples.²³⁴

In the United States, twenty states and the District of Columbia recognize some form of civil union between same-sex couples. In most of them, this form of recognition originated from legislative action. In 1999, the Vermont Supreme Court ruled²³⁵ that same-sex couples had the right to a treatment equivalent to that afforded to different-sex couples but left the legislature the choice to allow marriage or to implement an alternative legal mechanism.²³⁶ In 2000, the

229. To recall, in *Schalk and Kopf* the court expressly stated that it “is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8.” 53 Eur. Ct. H.R. at ¶ 103.

230. See Council of Europe, Committee of Ministers, *Recommendation on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Activity*, Mar. 31, 2010, available at <https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> [hereinafter *Recommendation on Measures to Combat Discrimination*].

231. *Id.* at § 25.

232. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20 at ¶ 105 (2011).

233. *Id.*

234. *Id.* at ¶ 108.

235. *Baker v. Vermont*, 744 A. 2d 864, 889 (Vt. 1999).

236. “We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions.” *Id.* at 39.

legislature voted in favor of civil unions. In 2009, Vermont legalized same-sex marriage.²³⁷ In 2006, the Supreme Court of New Jersey held that:

denying to committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose . . . committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.²³⁸

The court let the legislature choose the name to give to “the statutory scheme that provides full rights and benefits to same-sex couples.”²³⁹ Again, these instances show that legal recognition may take various paths.

In the system of the Council of Europe, would it be acceptable to have only a legal recognition equivalent to the one open to unmarried heterosexual couples? If the ECtHR opts for an incremental approach, it may accept such a recognition, at least until a consensus on a more formalized form of recognition (marriage or partnership) emerges within the Council of Europe. Moreover, the Committee of Ministers of the Council of Europe recommended that “[w]here national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights.”²⁴⁰

In conforming with this incremental approach, the Committee of Ministers of the Council of Europe recommends to member states that recognize registered same-sex partnerships that they “seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.”²⁴¹

Yet this statement is unclear; what is meant by “heterosexual couples in a similar situation?” Is the Committee using heterosexual couples who have entered into a registered partnership as the reference point for the rights that should be afforded to registered same-sex partners? It is from this standpoint that the Grand Chamber of the ECtHR will be called upon to rule on this question in *Vallianatos v. Greece* and *C.S. v. Greece*, currently pending, which address the question of the discriminatory character (Article 8 in conjunction

237. Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, WASH. POST (Apr. 7, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html>.

238. *Lewis v. Harris*, 908 A.2d 196, 220 (N.J. 2006).

239. *Id.* at 224.

240. Council of Europe, Committee of Ministers, *Recommendation on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Activity*, Mar. 31, 2010, § 23, available at <https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

241. *Id.* at § 24.

with Article 14 of the ECHR) of the Greek “pact of common life,” open only to heterosexual couples.²⁴²

Registered partnerships are sometimes created solely for the benefit of same-sex couples, as in the United Kingdom.²⁴³ In such a case, is the “homosexual couple in a comparable situation” with the married heterosexual couple? In *Schalk and Kopf*, the ECtHR did not take the reasoning to its logical conclusion in this regard. It held that the applicants had “the possibility to obtain a legal status equal or similar to marriage in many respects,”²⁴⁴ noting slight differences with respect to material consequences but also some substantial differences in respect of parental rights.²⁴⁵ Since the ECtHR was not required to examine all the differences between the registered partnership and marriage, it decided that there was no evidence that “the respondent [s]tate exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership.”²⁴⁶

If we follow the recommendation of the Committee of Ministers cited above, it seems difficult to identify which rights or obligations stemming from marriage—if any—could be denied to homosexual couples engaged in a registered partnership. In addition, the argument of indirect discrimination would certainly be raised, to the extent that homosexual couples—unlike heterosexual couples—do not have access to marriage.²⁴⁷ Could we reasonably argue that it is necessary and proportionate to achieve the protection of the traditional family or the interest of the child to exclude same-sex couples from the right to adopt or to access medically assisted procreation techniques? In light of the jurisprudence of the ECtHR, especially in the cases *EB v. France* and *X v. Austria*, we do not see which compelling reasons would justify such discrimination based on sexual orientation in matters of filiation, because “in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples.”²⁴⁸

Therefore, if a state in which marriage is not open to same-sex couples creates a registered partnership for their benefit, it would, in principle, be required to attach to it all the rights and obligations associated with marriage. However, in this case, we fall back on arguments about the risk of segregation

242. *Vallianatos v. Greece*, Eur. Ct. H.R. Appl. No. 29381/09, filed May 6, 2009, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113205>.

243. Civil Partnership Act, 2004 (c33), 3 (1) (a). Previously, it was also the case in Denmark. See Registered Partnership Act, June 7, 1989 (Lov om Registreret Partnerskab, *Stb.* 1989, 372), repealed on June 15, 2012.

244. *Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 109 (2011) (citations omitted).

245. *Id.*

246. *Id.*

247. See also Written Comments of FIDH, ICJ, AIRE Centre & ILGA-Europe, *supra* note 115.

248. *X v. Austria*, 57 Eur. Ct. H.R. 14, ¶ 112 (2013).

(separate but equal) developed above, which would ultimately impose upon those states the duty to open marriage to same-sex couples.²⁴⁹

It thus appears very difficult to design a type of alternative legal recognition to marriage that satisfies the requirements of the protection of family life and the prohibition of discrimination. The gradual approach the ECtHR could opt for, in order to take into account the lack of consensus on the matter, also has drawbacks and may even lead to paradoxical effects. Indeed, it appears that a state opting for a form of registered partnership thereby loses almost all its discretion and must—because of the requirement of consistency, prohibition of indirect discrimination, and segregation—open marriage to same-sex couples. These consequences could be a “bonus” to immobility and encourage mobilization against the adoption of LGBT rights. As highlighted by Nicolas Hervieu, “[t]he discriminatory prism can . . . produce paradoxical effects [in that] it [may] punish the states which have recognized more rights without affecting those who are less generous.”²⁵⁰

Ultimately, the tenuous nature of an alternative form of legal recognition is an additional argument in support of the principled solution that we encourage the court to adopt.

CONCLUSION

The case law of the ECtHR has provided steadily increasing recognition of fundamental rights of LGBT persons.²⁵¹ Today, the court is confronted with the contentious issue of same-sex marriage. This Article comes to the conclusion that the ECtHR should find state laws that prohibit same-sex marriages or that provide only some form of registered partnerships in violation of the European Convention on Human Rights. This conclusion is grounded on legal arguments—which, we acknowledge, are in many respects delicate and difficult to make given the political situation. This conclusion, however, could be reached by application of the ECtHR’s own methods of interpretation and precedents.

The ECtHR has already found that the right to marry is gender neutral and that same-sex relationships are protected under family life. The ECtHR has established that same-sex couples are in a relatively similar situation compared to opposite-sex couples regarding their need for legal recognition and protection of their relationships. The refusal to grant access to marriage to same-sex couples is thus a difference in treatment based on sexual orientation. Differences based on sexual orientation require particularly serious justification. And this is the sticking point. By claiming that states should provide convincing and

249. *Id.* at point 7 (a right to marriage is derived from the need for consistency and the prohibition of segregation).

250. Hervieu, *supra* note 22.

251. Helfer & Voeten, *supra* note 14, at 2.

weighty reasons, the ECtHR takes a more principled stand than the US Supreme Court, which still struggles to define what standard of scrutiny it applies in sexual orientation cases. However, the reality is that the ECtHR does not take sexual orientation as suspect criteria seriously and instead, on the basis that no European consensus exists on this issue, grants states a wide margin of appreciation. We join other authors in deploring reliance on these concepts in same-sex marriage cases. We believe they are misplaced, as minority rights are at stake and the concrete application of these concepts lacks clarity. In addition, in practice, this means that the ECtHR does not investigate the reasons behind states' same-sex marriage decisions and that states could thus be acting on the basis of erroneous or even discriminatory reasons.²⁵²

Looking at the American situation, it is clear that "[t]he litigation process has served the useful purpose of airing the rationalizations for discriminating against homosexuals."²⁵³ Many US judges have found the main arguments brought against same-sex marriage—to maintain the traditional definition of marriage and to encourage responsible procreation and child-rearing—unconvincing. US courts have been labeled as "bastions of rationality in dealing with same-sex marriage, as compared to other governmental actors,"²⁵⁴ and we would like to see the ECtHR take a similar approach. The ECtHR could at the very least require the states to provide a justification for not granting the same rights to same-sex couples. Publicly setting out the reasons in briefs and in judgments, as a beginning, can create moments of opportunity for a wide range of actors within specific legal and political contexts.²⁵⁵ After evaluating these justifications, the ECtHR could, at the stage of the proportionality analysis, come to the conclusion that "[i]n the absence of evidence on the part of the [s]tates showing how differential treatment leads to the protection of very weighty interests not amenable to being otherwise served, the interests of the Government need take second place to those of the applicant alleging discrimination."²⁵⁶

In terms of judicial policy, we realize how sensitive it could be for the ECtHR to find a right to marry for same-sex couples based on the Convention. We therefore reviewed the alternative options available to the ECtHR. The ECtHR could explicitly state that same-sex couples have an equal right to marry but, in the absence of a European consensus, grant the states a grace period to implement it. Another option would be to require states that already possess a

252. Hamilton, *supra* note 107, at 49.

253. Jeffrey Toobin, *Wedding Bells*, NEW YORKER, Apr. 1, 2013, available at http://www.newyorker.com/talk/comment/2013/04/01/130401taco_talk_toobin.

254. Evan Gerstmann, *Litigating Same-Sex Marriage: Might the Courts Actually Be Bastions of Rationality?*, 38 PS: POL. SCI. AND POL. 217 (2005).

255. See ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 200 (2006).

256. Eirik Bjorge, *A History of Sexuality in Europe: LGBT Rights and Dynamic Interpretation of the ECHR* (Feb. 18, 2010), at 66, available at SSRN at <http://papers.ssrn.com/abstract=1554901>.

legal framework for stable same-sex relationships to grant same-sex couples access to marriage. The argument, which is based on the need for consistency and the prohibition of segregation, has been made both before the US Supreme Court and the ECtHR. Finally, on the basis of the obligation to protect family life, the ECtHR could require member states to at least provide for some degree of legal recognition to same-sex couples. However, these alternative options all have serious flaws in their principle, their practicability, or their consequences, and ultimately the principled solution—that same-sex couples have the right to marry—is the only defensible solution from a legal point of view.

Such a decision would no doubt be controversial, especially in countries where backlash against LGBT individuals is present and even growing. It also raises the debate of whether courts should lead or merely reflect public opinion. The ECtHR's rulings have already been “instrumental in socializing a pan-European consensus on intimate and sexual privacy”²⁵⁷ for LGBT individuals and should continue to have an agenda-setting effect that catalyzes domestic mobilization in favor of policy changes.²⁵⁸ In addition, particularly in the same-sex marriage debate, words carry particular weight and court rulings convey powerful discursive resources. This Article has provided some excerpts of the debate currently taking place in the United States in the hope that some elements will be echoed in Europe.

257. Paul Johnson, ‘An Essentially Private Manifestation of Human Personality’: *Constructions of Homosexuality in the European Court of Human Rights*, 10 HUM. RTS. L. REV. 67 (2010).

258. See Helfer & Voeten, *supra* note 14, at 7.