Special Section
Same-Sex Marriage: Comparative Reflections

What's in a Name Case? Some Lessons for the Debate Over the Free Movement of Same-Sex Couples Within the EU

By Martijn van den Brink[*]

Abstract

This Article engages the debate over the free movement of same-sex couples and explores what can, and should, be learned from the case law on the recognition of names. These "name cases" provide valuable lessons for both the proponents and opponents of same-sex marriage recognition. These cases show, first, that Member States are under the presumption to recognize marriages performed in other Member States. This Article also considers the importance of the national and constitutional identities of the Member States and suggests that there remains a possibility that Member States may justify the non-recognition of a marriage or deprive same-sex couples of some of the rights heterosexual married couples benefit from. The Article explores how the EU is confronted with a federal clash of values and offers some suggestions on how to solve this clash.

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A. Introduction

There is a diverse set of laws among EU Member States concerning same-sex partnerships. While a number of Member States have opened the institution of marriage to same-sex couples,[1] others have adopted constitutional provisions that protect "traditional" marriage.[2] Some Member States have introduced registered partnerships, which can afford same-sex couples rights and opportunities similar to those granted to opposite-sex couples in all but name.[3] Not only do different Member States offer different kinds of partnerships, but the rights granted to same-sex couples under these partnerships also vary. For example, not all Member States that have introduced same-sex marriage provide same-sex couples with the same rights as opposite-sex married couples.[4]

As a result of a lack of uniform rules, national administrations and courts of various EU Member States have been confronted with the question of whether to recognize and give legal effect to same-sex marriages celebrated in other Member States but prohibited under domestic national law. In some instances, these states refused to do so. In 2004, a German court refused to recognize the same-sex marriage of a Dutch-Taiwanese couple who were residents of Germany and who married according to Dutch laws.[5] Other Member States have rendered similar decisions.[6] The possible harmful consequences for same-sex couples' free movement rights have given rise to concern among scholars as well as EU institutions.[7] This right, after all, is likely to become less meaningful if the Member State does not recognize the marriage legally celebrated in another Member State. Same-sex couples are less likely to move to such Member States if, as the U.S. Supreme Court recently stated in *Obergefell v. Hodges*, their marriage "is stripped from them . . . as they travel across state lines."[8]

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[1] At the moment, this category of EU Member States includes France, Spain, Portugal, the United Kingdom, the Netherlands, Belgium, Denmark, and Sweden.

[2] *See* TARNOVO CONSTITUTION, art. 46 (Bulg.); SATVERSME [CONSTITUTION], art. 110 (Lat.); LIETUVOS RESPUBLIKOS KONSTITUCIJA [CONSTITUTION], art. 38 (Lith.); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION], art. 18 (Pol.); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNYE, art. L.

[3] Nicholas Bamforth, *The Benefits of Marriage in All but Name-Same-Sex Couples and the Civil Partnership Act 2004*, 19 CHILD & FAM. L.Q. 133 (2007).

[4] France is a case on point.

[5] For a reference to this case, see Johan Meeusen, *Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?*, 9 EUR. J. MIGRATION & L. 287, 297 (2007).

[6] For references to cases in Eastern Europe, see Adam Bodnar & Anna Śledzińska-Simon, *Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTION 211 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014).

[7] For an overview, see Part B of this Article.

[8] Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015).

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This Article engages with the debate over the free movement of same-sex couples and sees what can, and should, be learned from the case law on the recognition of names. These "name cases" provide valuable lessons for both the proponents and opponents of same-sex marriage recognition. By examining the name cases, this Article demonstrates that the questions raised by the free movement of same-sex couples are more complicated than scholars have recognized. First, we need to carefully distinguish the different kinds of cross-border situations that may arise, rather than adopting a one-size-fits-all argument. Second, we should recognize that even though EU law presumes recognition of personal statuses acquired in other Member States, the protection EU law offers to same-sex couples is not as secure as it seems. Take the following hypothetical to which I will return later in this Article: A Dutch-Polish homosexual couple gets married in the Netherlands but subsequently moves to Greece where one of the partners found a job. Should Greece have an obligation to recognize this marriage? And should the answer to that question depend on whether the couple was habitually resident in the Netherlands when forming a marital union, or on the strength of Greece's public policy objections against recognizing same-sex marriages? What if the couple returns to Poland for a short while to visit the Polish national's family? Should Poland then be under the same requirements as Greece? In sum, the free movement of same-sex couples raises a multitude of challenging issues that cannot be conflated.

This Article starts with an explanation of why precisely the name cases are relevant for the debate over the free movement of same-sex couples, followed by a brief overview of the state of this debate. I argue that while policies of non-recognition are suspect under EU law, and Member States can no longer unconditionally apply their private international law tools, serious account must be taken of the national and constitutional identity of the Member States. In the last section, I argue that this dilemma must be recognized as a federal clash of values that needs to be taken seriously. Finally, I offer suggestions to deal with this dilemma.

B. The Relevance of the Names Cases

According to Ralf Michaels, an American conflict of laws expert, the law on the recognition of family names "epitomizes the cultural identities underlying the most pertinent European conflicts cases."[9] The question of the free movement of same-sex couples brings to the fore another, perhaps even more profound, clash between EU cultural identities. Interestingly, the court in the name cases specified the conditions under which free movement can take place by laying down principles for the recognition of personal statuses. These personal statuses can refer to names as well as to other personal

[9] Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1632 (2008).

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relationships, such as marriage and adoption.[10] The extent to which EU law requires Member States to change their traditional approach to recognizing foreign personal statuses for names could certainly translate to other areas, such as same-sex marriage.

Although the relevance of name cases could be questioned by suggesting that same-sex marriages are relatively more important than the spelling of names, such an argument, though understandable, is ultimately subjective and could understate the importance of language to certain member states. One significant difference between the two is that, unlike a name, a marriage generally produces a wide variety of "incidents."[11] Marriage is not merely a personal status, but one which generally provides the bearer of the status with a number of incidental rights and duties, such as the right to adopt, tax benefits, or parental responsibilities.[12] The free movement of same-sex couples raises questions, not just about the personal status of marriage, but also about these incidental rights. The name cases can provide very little insight on the latter issue. The remainder of this Article deals mainly with the question of recognition of status with some discussion about incidental rights in the last section.

C. The State of the Debate Over Free Movement Rights

How to interpret secondary legislation is disputed. At first glance, it appears obvious that Directive 2004/38 (Citizenship Directive) provides same-sex couples with better protection than the legislation it replaced. The old reference to the spouse in Article 10 of Regulation 1612/68 made it unlikely for same-sex partners to benefit from the protection offered by this provision at that time.[13] The Citizenship Directive extended the personal scope so as to include "the spouse,"[14] registered partners "if the legislation of the host member state treats registered partnerships as equivalent to marriage,"[15] and to "the partner with whom the Union citizen has a durable relationship, duly attested."[16] It is unclear whether this law strengthens the position of same-sex partners, especially because the initial proposal,

[10] Horatia Muir Watt, *European Federalism and the "New Unilateralism,"* 82 TUL. L. REV. 1983, 64 (2007).

[11] ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 93 (2006).

[12] To get an idea of the responsibilities and benefits that could possibly be conferred on married couples, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

[13] Regulation (EEC) No. 1612/68 of Oct. 15, 1968, art. 10, 1968 O.J. (L 257). The Regulation could also be read to provide the same-sex partner with protection. *See* Andrew Clapham & J.H.H. Weiler, *Lesbians and Gay Men in the European Community Legal Order*, *in* 26 HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY 7 (Kees Waaldijk & Andrew Clapham eds., 1993).

[14] Council Directive 2004/38, art. 2(2)(a), 2004 O.J. (L 158) 77, 88 (EC).

[15] Council Directive 2004/38, art. 2(2)(b), 2004 O.J. (L 158) 77, 88 (EC).

[16] Council Directive 2004/38, art. 3(2)(b), 2004 O.J. (L 158) 77, 88 (EC).

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which would have offered substantial protection, was diluted during the negotiation process.[17]

Notwithstanding the disputed scope of the secondary law, scholars have adopted a virtually uniform position. While some observers have remarked that it might be unwise for the ECJ to get too involved in such a sensitive matter,[18] such remarks are generally met with skepticism.[19] Whether or not the ECJ can rely on the Citizenship Directive, the ECJ should interpret the Treaty provisions on the free movement of EU citizens in a manner that forces Member States to recognize the personal status of marriage. The principle of mutual recognition should remove obstacles to the enjoyment of same-sex couples' right to free movement.[20] To prevent Member States from creating obstacles to same-sex couples' free movement rights by not recognizing their partnership, EU law should require all Member States to recognize a marriage legally celebrated in another Member State—including those Member States where such marriages are not lawful. Taking our hypothetical from the introduction, Greece should be obligated to recognize the Dutch-Polish couple's marriage when they establish residence in Greece. By means of a fundamental rights analysis this argument is often reinforced. Mutual recognition is the only way to ensure the protection of same-sex couples' fundamental rights.[21]

Federal theory has also been suggested to support the case for mutual recognition. Comparative studies highlight the similar recognition issues that both the EU and the

[17] Mark Bell, *Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union*, 12 EUR. REV. PRIVATE L. 613 (2004); HELEN TONER, PARTNERSHIP RIGHTS, FREE MOVEMENT, AND EU LAW 60–68 (2004).

[18] Anne Pieter van der Mei, *Book Reviews*, 14 MAASTRICHT J. EUR. & COMP. L. 101, 102–03 (2007).

[19] Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships within the European Union*, 82 TUL. L. REV. 1949, 1970 (2007).

[20] *See* Mark Bell, *We Are Family-Same-Sex Partners and EU Migration Law*, 9 MAASTRICHT J. EUR. & COMP. L. 335, 351–52 (2002); Jorrit Rijpma & Nelleke Koffeman, *Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS 455 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014); Gerard-René de Groot, *Private International Law Aspects Relating to Homosexual Couples*, 11 ELECTRONIC J. COMP. L. 1, 30 (2007), http://ejcl.org/113/article113-12.pdf; Türkan Ertuna Lagrand, *Mutual Recognition of Same-Sex Marriages from an EU Immigration Law Perspective*, *in* EQUALITY AND JUSTICE: SEXUAL ORIENTATION AND GENDER IDENTITY IN THE XXI CENTURY 241 (Alexander Schuster ed., 2011); Justine Quinn, *Free Movement and the European Family—Falling in Love with the Common Market*, *in* EQUALITY AND JUSTICE: SEXUAL ORIENTATION AND GENDER IDENTITY IN THE XXI CENTURY 257 (Alexander Schuster ed., 2011).

[21] Matteo Bonini Baraldi, *EU Family Policies Between Domestic "Good Old Values" and Fundamental Rights: The Case of Same-Sex Families*, 15 MAASTRICHT J. EUR. & COMP. L. 517 (2008); Rijpma & Koffeman, *supra* note 20, at 461–65.

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United States face.[22] Although the United States Constitution leaves it to the states to decide whether to recognize out-of-state same-sex marriages,[23] federal theory supports the argument that the EU can and should advance the liberty of its citizens by providing them with an exit option. Such an exit option would allow citizens to move to the Member State that best suits their interests—in this case, Member States with marital rules that are beneficial for same-sex couples.[24] EU law should be interpreted to allow the Dutch-Polish couple to move from Poland and reside in the Netherlands. Given that the Netherlands has allowed same-sex marriage, the right to non-discrimination on the grounds of nationality would subsequently require the Netherlands to extend this right to non-nationals as well. Along the same lines, the EU is also supposed to provide its citizens with an entry option, which allows citizens to move back to their member state of origin, or any other member state, with their newly-acquired status.[25] Interpreted in this manner, EU law requires Greece to recognize the marital status of the Dutch-Polish couple once they establish residence in Greece. So would Poland if the couple decided to go to Poland for a quick family visit.

Member States that do not allow same-sex couples to enter into marriages are likely to reject such arguments, particularly those with constitutional provisions specifying the mixed-gender nature of marriages. Some national administrations and courts have already decided not to recognize same-sex marriages legally celebrated abroad.[26] While those Member States may admit that non-recognition restricts the right to free movement, they will justify their stance with public policy arguments that rely on Article 4(2) TEU, which

[22] The 2015 U.S. Supreme Court decision to legalize same-sex marriages in *Obergefell v. Hodges* has, of course, radically changed the situation. The Supreme Court held that "if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined." For an EU-U.S. comparison pre-*Obergefell*, see Adam Weiss, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81 (2007).

[23] For an overview of how federal principles interact with the free movement of same-sex couples in the U.S., see KOPPELMAN, *supra* note 11; Linda J. Silberman, *Can the Island of Hawaii Bind the World—A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191(1996).

[24] Dimitry Kochenov, *On Options of Citizens and Moral Choices of States: Gays and European Federalism*, 33 FORDHAM INT'L L.J. 156, 165-167 (2009). On exit more generally, Seth F. Kreimer, *Federalism and Freedom*, *in* 574 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 66 (2001).

[25] Kochenov, *supra* note 24, at 189–95; Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 FORDHAM INT'L L.J. 1338, 1355–61 (2009).

[26] In addition to the examples referred to in the introduction, see also Patrick Wautelet, *Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe—Divided We Stand?*, *in* LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES 163–66 (Katharina Boele-Woelki & Angelika Fuchs eds., 2012); Giacomo Biagoni, *On Recognition of Foreign Same-Sex Marriages and Partnerships*, *in* SAME SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, 375–76 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014).

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requires the EU to respect the Member States' "national identities, inherent in their fundamental structures, political and constitutional."[27]

In short, there are two opposing positions in the debate over the free movement of same-sex couples. Neither accounts for the limitations of the requirements imposed by EU law. Those supporting non-recognition ignore how suspect such policies are under EU law. Unsurprisingly, those who support free movement and mutual recognition also ignore the fact that their position finds less unequivocal support in EU law than expected. The importance of the principle of mutual recognition notwithstanding, EU free movement law does not necessarily provide EU citizens with an entry option that is as strong as their exit option. The insights provided by the name cases—detailed below—are enlightening in this respect.

D. Beyond Private International Law

The name cases unambiguously demonstrate that the non-recognition of same-sex marriage is suspect under EU law. Member States can no longer unconditionally apply their traditional private international law tools; they must follow EU legal requirements. This development is reinforced by the autonomy granted by the ECJ to EU citizens. When multiple national jurisdictions could be applicable, EU citizens can decide which rules to subject themselves to. Member States are subsequently required to recognize the individuals' decision. In the first case of interest, *Garcia Avello*,[28] the Court decided to allow EU citizens to benefit from the laws of their Member State of nationality, even when residing in another Member State (Section I). Complementing *Garcia Avello, Grunkin and Paul* demonstrates that EU citizens may benefit from the laws in their Member State of residence as well, especially when those laws allow for personal statuses that do not exist in their Member State of nationality (Section II).[29] By requiring Member States to recognize the personal statuses obtained under the laws of another member state, the ECJ contributes to the federalization of private international law in the European Union through the principle of mutual recognition (Section III). Examining these cases and their consequences provides valuable lessons for the debate over the free movement of same-sex couples.

[27] Treaty on the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13, art. 4(2) [hereinafter TEU].

[28] Case C-148/02, Garcia Avello v. Belgium State, 2003 E.C.R. I-11613.

[29] Case C-353/06, Stefan Grunkin and Dorothee R. Paul v. Leohnard M. Grunkin-Paul and Standesamt S. Niebüll, 2008 E.C.R. I-7639, para. 34.

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I. The Importance of the Nationalities of the Member States

EU citizenship is often accurately considered to belong to the federal citizenship family.[30] The inverse relationship between EU citizenship and the citizenship of the Member States distinguishes EU citizenship somewhat from citizenship in many contemporary federal states.[31] While state citizenship is commonly derived from federal citizenship, one only becomes an EU citizen upon the acquisition of the nationality of a Member State. The Treaty on the Functioning of the European Union (TFEU) is very clear about this hierarchical relationship: "Every person holding the nationality of a Member State [is] a citizen of the Union."[32] Within the EU, one is primarily a national of the Member State and only after that an EU citizen. As a consequence, the nationality of an EU citizen remains unaffected by a change in the Member State of residence. Therefore, EU citizens might possess the partial membership of two Member States—the Member State of nationality and the Member State of residence by virtue of the right to non-discrimination.[33] Conversely, an EU citizen who resides in a Member State other than the one of her nationality is a full member of neither. *Garcia Avello* showed that this hierarchical relationship is not without consequences.

Esmeralda and Diego, the children of Mrs. Weber and Mr. Garcia Avello, were born in Belgium where they resided all their lives. They had dual Spanish-Belgium nationality. The Belgian authorities entered the children in the national registers under the surname Garcia Avello. Meanwhile, the children were registered as Garcia Weber in Spain. The father's request to change the surname to Garcia Weber, in accordance with Spanish law, was rejected by the Belgian authorities. The question before the ECJ was whether this decision was contrary to the provisions on Union citizenship.[34] The Court stated that a link with EU law exists for persons "who are nationals of one Member State lawfully resident in the territory of another Member State."[35] This being the case, the applicants could rely on the

[30] *See generally* Christoph Schönberger, *European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism*, 19 REVUE EUROPÉENNE DE DROIT PUBLIC 61 (2007).

[31] As Laycock observed, membership of an American state is not based on "kinship." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 317 (1992). *See also* Rainer Bauböck, *The Three Levels of Citizenship Within the European Union*, 15 GERMAN L.J. 751 (2014); Schönberger, *supra* note 30.

[32] Treaty on the Functioning European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47, art. 20 [hereinafter TFEU].

[33] The right to non-discrimination on the basis of nationality not only ensures that all Union citizens residing within the Member State receive equal treatment, but also allows Union citizens coming from other Member State to become part of, and integrate in, the host Member State. Loïc Azoulai, *"Euro-Bonds" The Ruiz Zambrano Judgment or the Real Invention of EU Citizenship*, 3 PERSPECTIVES ON FEDERALISM 31 (2011).

[34] *Garcia Avello*, Case C-148/02 at paras. 13–19.

[35] *Id.* at para. 27.

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right to non-discrimination on grounds of nationality, enshrined in Article 18 TFEU. After concluding that Belgian citizens with dual Spanish nationality find themselves in a different position from those who only have Belgian nationality,[36] the Court decided, "it is common ground that such a discrepancy in surnames is liable to cause serious inconveniences for those concerned at both professional and private levels . . . ."[37] Belgium was obligated to recognize the Spanish surname.

Scholars suggest the applicants' dual nationality was the most relevant criterion in this case.[38] Fortunately, the ECJ clarified in *McCarthy* that the possession of the dual nationality alone is insufficient.[39] The possession of a dual nationality should not, by itself, bring the bearer of this dual status within the scope of EU law. The distinguishing characteristic of *Garcia Avello* is that Spain used nationality as a criterion to determine the applicability of its law on the spelling of names. As a consequence, "Belgian nationals who have divergent surnames by reason of the different laws to which they are attached by nationality may plead difficulties specific to their situation which distinguish them from persons holding only Belgian nationality, who are identified by one surname alone".[40]

It was not dual nationality but the use of nationality, creating extraterritorial legal effects,[41] which created the dilemma in *Garcia Avello*. In the absence of clear rules, the ECJ has provided EU citizens with choice of law autonomy if two or more laws are equally applicable in any given case.[42] The Member States are subsequently obliged to recognize this choice.

Garcia Avello shows that the supremacy of the Member State's nationalities over EU citizenship matters. There also is reason to think it should matter. The decision to grant EU citizenship to everyone who was a national of a Member State, and not the other way

[36] *Id.* at paras. 31–35.

[37] *Id.* at para. 36.

[38] Matthias Lehmann, *What's in a Name? Grunkin-Paul and Beyond*, 8 YEARBOOK OF PRIVATE INT'L L. 134, 141 (2010); Cathryn Costello, *Citizenship of the Union: Above Abuse?*, *in* PROHIBITION OF ABUSE OF LAW: A NEW GENERAL PRINCIPLE OF EU LAW? 321, 331–32 (Rita de La Feria & Stefan Vogenauer eds., 2011).

[39] Case C-434/09, Sheila McCarthy v. Sec'y of State for the Home Dep't, 2011 E.C.R. I-3375, para. 56.

[40] *Garcia Avello*, Case C-148/02 at para. 37.

[41] For the extraterritorial effects of case law on personal statuses more generally, see Horatia Muir Watt, *Future Directions?*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 343, 336–70 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014).

[42] For the party autonomy in the names cases, see Toni Marzal Yetano, *The Constitutionalisation of Party Autonomy in European Family Law*, 6 J. PRIVATE INT'L L. 155 (2010); Jan-Jaap Kuipers, *Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law*, 2 EUR. J. LEGAL STUD. 66 (2009).

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around, was deliberate. The Treaty of Amsterdam reinforced this intention: "Citizenship of the Union shall complement and not replace national citizenship."[43] The ECJ's well-known mantra that EU citizenship is "destined to be the fundamental status of nationals of the Member States,"[44] indeed seems "to be in tension with text, teleology and legislative history."[45] There is no "entirely conventional supremacy of Union citizenship,"[46] and neither is it the case that "residence is the new nationality."[47] By allowing EU citizens to benefit from the family law of their Member State of nationality, the ECJ can be said to have acknowledged the current legal status quo.

If, under *Garcia Avello*, Spain was allowed to apply its family law on surnames to nationals living in another Member State, from the principles embodied in this case it follows that a state could also apply its family law concerning marriages to nationals abroad. Some Member States have adopted legislation that allows them to do precisely that. The Netherlands, for example, allows nationals residing abroad to marry according to Dutch law.[48] Swedish law follows a similar logic.[49] Same-sex couples residing in Member States that do not allow for same-sex marriages could therefore get married under Dutch or Swedish law if one of the partners is a Dutch or Swedish national. In the earlier hypothetical, if the Dutch-Polish same-sex couple decided to marry under Dutch law after taking up residence in Greece, Greece would be under the presumption to recognize this status. *Garcia Avello* also raises serious concerns about the German court's decision, discussed in more detail in the introduction, to recognize a same-sex marriage performed under Dutch law of a Dutch national residing in Germany. If nationality may serve as an eligibility criterion in family law matters, and if the EU citizen has the autonomy to decide

[43] Now TFEU art. 20.

[44] Case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193, para. 31; Case C-413/99, Baumbast and R v. Sec'y of State for the Home Dep't, 2002 E.C.R. I-7091, para. 82; Joined Cases C-482/01 and C-493/01, Orfanopoulos and Oliveri v. Land Baden Württemberg, 2004 E.C.R. I-5257, para. 65; Case C-34/09, Ruiz Zambrano v. Office national de l'emploi, 2011 E.C.R. I-1177, para. 41.

[45] J.H.H. Weiler, *Epilogue: Judging the Judges—Apology and Critique*, *in* JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 235, 248 (Maurice Adams et al. eds., 2013).

[46] Gareth Davies, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, *in* HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED MEMBER STATES IN NATIONALITY LAW? (Jo Shaw ed., 2011). See also, Dimitry Kochenov, *Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010*, 47 COMMON MARKET L. REV. 1831 (2010).

[47] *But see* Gareth Davies, *"Any Place I Hang My Hat?" Or: Residence Is the New Nationality*, 11 EUR. L.J. 43 (2005). For a critique of this view, see Floris de Witte, *The End of EU Citizenship and the Means of Non-Discrimination*, 18 MAASTRICHT J. EUR. & COMP. L. 86, 102 (2011).

[48] Wet Conflictenrecht Huwelijk van 7 september 1989 *Trb.* 1987, 137 (Neth.).

[49] Michael Bogdan, *Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden*, 78 NORDIC J. INT'L L. 253, 257 (2009).

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which law to benefit from, one must conclude that the German court should have been under the presumption to recognize the same-sex marriage.

II. Residence and Non-Discrimination on the Basis of Nationality

These conclusions should not be read as suggesting that nationals can only fall within the scope of the laws of their Member State of nationality. *Grunkin and Paul*, which complements *Garcia Avello*, demonstrates that EU citizens can also invoke provisions of his or her Member State of residence even if his or her Member State of nationality might not allow those same provisions.

Grunkin and Paul concerned Leonhard Matthias, the son of Dr. Paul and Mr. Grunkin. Leonhard Matthias was born in Denmark but possessed German nationality, as did his parents. His parents registered the surname Grunkin-Paul in Denmark. The parents requested that the German authorities register their son, who resided with the mother in Denmark but often stayed with the father in Germany, under the surname registered in Denmark. The German authorities refused, insisting that, because nationality was the sole connecting factor, only one of the surnames, Grunkin or Paul, could be accepted.[50] The parents challenged this decision on the basis of the EU citizenship and non-discrimination provisions.[51] Following earlier decisions,[52] the Court affirmed that national legislation that disadvantages the Member State's nationals simply because they have availed themselves of the right to move is a restriction of Article 21 TFEU. In other words, the Member State of nationality cannot treat its own nationals less favorably because they have resided in another Member State for a certain period of time and acquired rights there. Such is the case for someone "having to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence . . . ."[53] The justifications brought forward for using nationality as the sole connecting factor could not be accepted; this would undermine the continuity and stability of the personal status in question.[54]

Under *Grunkin and Paul*, EU citizens can acquire a personal status using the laws of the Member State of residence, even if this status is unavailable in the Member State of

[50] Opinion of Attorney General Sharpston at paras. 21–23, Case C-353/06, Stefan Grunkin and Dorothee R. Paul v. Leohnard M. Grunkin-Paul and Standesamt S. Niebüll (Apr. 24, 2008).

[51] An earlier case, entailing the same facts, was dismissed by the ECJ: Case C-96/04, Standesamt S. Niebüll, 2006 E.C.R. I-3561.

[52] Case C-406/04, De Cuyper v. Office national de l'emploi, 2006 E.C.R. I-6947, para. 39; Case C-499/06, Nerkowska v. Ubezpieczeń Społecznych Oddział w Koszalinie, 2008 E.C.R. I-3993, para. 32.

[53] *Grunkin and Paul*, Case C-353/06 at paras. 21–22.

[54] *Id.* at paras. 30–32.

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nationality. Any other conclusion would have been problematic, since it would have allowed for direct discrimination based on nationality.[55] *Grunkin and Paul* also makes clear that an EU citizen has the autonomy to choose the law of the Member State of residence when faced with a choice of two or more applicable laws from different Member States. Under this rule, if the Garcia Avello family had preferred a surname formed according to Belgian rules, "they could have requested the Spanish authorities that their surname be changed to comply with Belgian law."[56] This outcome recognizes the importance of the EU citizen's nationality as well as his place of residence. In the absence of legislation specifying which Member State has jurisdiction over the marriage, the Court should acknowledge that both nationality and residence can serve as criteria to determine the applicable laws regulating personal status.

Grunkin and Paul's implications are that if Member States allow residents to marry, EU citizens not possessing the nationality of a particular Member States should, on the basis of the right to non-discrimination on grounds of nationality, also be allowed to form such a partnership. Other Member States will be under the presumption to recognize this status. Member States cannot refuse to recognize the partnership of same-sex couples legally acquired in another Member State solely on the basis of their private internal law.

Residence is, of course, not always an entirely clear or undisputed criterion. Same-sex couples may decide to reside in another Member State for a brief period for the sole reason of entering into a marriage, after which they return to their Member State of origin. Member States confronted with EU citizens taking up residence in another Member State for the mere purpose of evading the less hospitable regime at home may claim this to be an abuse of EU law.[57] We should hesitate to accept such claims, and be careful not to equate circumvention with abusive practice.[58] For there to be abuse, not only must the exercise of the right to free movement be artificial—the obtainment of the gain should be the sole reason for moving[59]—but it should also be contrary to the objectives of free movement rules.[60] The Court has found that moving to avoid taxes, for example, would be

[55] Kochenov, *supra* note 24, at 199.

[56] Marzal Yetano, *supra* note 42, at 159; Meeusen, *supra* note 5, at 296.

[57] On the concept of abuse of law, see ALEXANDRE SAYDÉ, ABUSE OF EU LAW AND REGULATION OF THE INTERNAL MARKET (2014); PROHIBITION OF ABUSE OF LAW: A NEW GENERAL PRINCIPLE OF EU LAW? (Rita De La Feria & Stefan Vogenauer eds., 2011).

[58] Luca Cerioni, *The "Abuse of Rights" in EU Company Law and EU Tax Law: A Re-Reading of the ECJ Case Law and the Quest for a Unitary Notion*, 21 EUR. BUS. L. REV. 783, 789 (2010).

[59] Case C-255/02, Halifax plc et al. v. Comm'rs of Customs & Excise, 2006 E.C.R. I-1609, para. 69; Case C-110/99, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, 2000 E.C.R. I-11569, para. 51. *See also* SAYDÉ, *supra* note 57, at 83–93.

[60] Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459, para. 25.

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an abuse of law, but that incorporating or moving companies to more beneficial legal regimes is not an abuse.[61] While tax avoidance is contrary to the objectives of the free movement rules,[62] the right to form a company "in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States . . . is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty."[63]

Considering that the purpose of the free movement rights is to provide opportunities to EU citizens, allowing them to "vote with their feet" and choose the legal regime that is most beneficial for them,[64] it cannot in itself be an abuse of the right to free movement for an EU citizen to choose the legal regime with the most beneficial marital rules.

It is possible that the connection with a Member State is very tenuous. The above situations do not answer the question of whether Member States are also under a presumption to recognize a same-sex marriage if neither participant in the marriage was a resident or national of a Member State. Given that most Member States have included nationality or residence requirements in domestic marriage laws, this situation is not likely to happen. Should such a situation occur, non-recognition is easiest to justify, if we accept, as I do in this Article, that Member States have a right to govern their own residents and/or nationals.[65] EU law provides tools to Member States to deal with connections that truly prove to be too tenuous. While nationality might very well provide a sufficiently strong connection with a Member State by definition,[66] one can distinguish between a true residence and a mere visit using a habitual residence test along the lines of some of the EU's private international law legislation[67] or by examining whether the residence is

[61] Pierre Schammo, *Arbitrage and Abuse of Rights in the EC Legal System*, 14 EUR. L.J. 351 (2008); *See* SAYDÉ, *supra* note 57, at 93–98.

[62] Case C-196/04, Cadbury Schweppes v. Comm'rs of Inland Revenue, 2006 E.C.R. I-7995, para. 54–64.

[63] *Centros*, Case C-212/97 at para. 27; Case C-167/01, Van Koophandel v. Inspire Art, 2003 E.C.R. I-10155, paras. 137–38.

[64] On voting with one's feet, see Kreimer, *supra* note 24; Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992). For a more skeptical view, see Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL'Y 29 (2009). For a translation of these ideas in the context of the EU, see Floris de Witte, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, 18 EUR. L.J. 694, 699 (2012); Kochenov, *supra* note 24.

[65] *See also* KOPPELMAN, *supra* note 11, at 102.

[66] See, by analogy, Case C-168/08, Hadadi v. Mesko, 2009 E.C.R. I-6871, para 43.

[67] Council Regulation 2201/2003 of Nov. 27 2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, 2003 O.J. (L 338) 1-29 (EC).

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"genuine," as the ECJ did in more recent family reunification case law.[68] These tests should provide for sufficient safeguards against abuses of EU law.

In general, however, Member States should be under the presumption to recognize marriages celebrated in other Member States, even if it concerns nationals who have been resident in the Member State of marriage for a brief period of time.

III. The Federalization of Private International Law in the Europe Union Through the Principle of Mutual Recognition

It follows that unless Member States can bring forward legitimate justifications,[69] they are required to recognize acquired personal status according to the laws of other Member States. This development amounts to a federalization of private international law within the EU through the application of the principle of mutual recognition.

This development will probably not surprise EU lawyers because it is a rather orthodox application of this principle.[70] Private international lawyers, however, have been amazed by these developments. For a long time, the effect of EU law on private international law has been underestimated. This is undoubtedly because of the ECJ's indications that national private internal law provisions fell outside the scope of the Treaty.[71] *Grunkin and Paul* leaves no doubt that this is no longer the case. Contrary to what Germany argued in *Grunkin and Paul*,[72] Germany was not allowed to subject EU citizens coming from other Member States to their private international laws.

Scholars suggest that, due to the lack of a clear country of origin, *Garcia Avello* and *Grunkin and Paul* cannot be explained with reference to mutual recognition.[73] The principle of mutual recognition, however, has long been seen as comprising more than just a country of origin rule; it can also be invoked against the home Member State.[74] Moreover,

[68] Case C-456/12, O & B v. Minister voor Immigratie, (Dec. 12, 2014), http://curia.europa.eu/.

[69] On justifying non-recognition, see generally CHRISTINE JANSSENS, THE PRINCIPLE OF MUTUAL RECOGNITION IN EU LAW __ (2013).

[70] OLIVIER VONK, DUAL NATIONALITY IN THE EUROPEAN UNION: A STUDY ON CHANGING NORMS IN PUBLIC AND PRIVATE INTERNATIONAL LAW AND IN THE MUNICIPAL LAWS OF FOUR EU MEMBER STATES 148 (2012); JANSSENS, *supra* note 69.

[71] In 1999, the ECJ still maintained that "the national provisions of private international law determining the substantive national law applicable to the effects of a divorce [do not] . . . fall within the scope of the Treaty." Case C-430/97, Johannes v. Johannes, 1999 E.C.R. I-3475, para. 27.

[72] *Grunkin and Paul*, Case C-353/06 at paras. 32–34.

[73] Kuipers, *supra* note 42, at 83–84.

[74] For analysis, see JANSSENS, *supra* note 69, at 38–40.

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functional equivalence is no prerequisite for the application of the principle of mutual recognition:[75] Also "in the absence . . . even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty . . . may arise . . . ."[76] To what extent mutual recognition is appropriate in the absence of some sense of common principles is indeed a valid question,[77] but the fact that the laws on the spelling on surnames are not equivalent in the different Member States should not deter one from describing the situations in *Garcia Avello* and *Grunkin and Paul* as ones of mutual recognition.

Initial signals from the ECJ aside, private international lawyers cannot be entirely surprised about the reach of EU law. The decision to apply the principle of mutual recognition, and to move beyond national private international law rules, is entirely logical. The need to protect the exercise of the right to move and reside has already given rise to the adoption of EU legislation in the field of private international law. It cannot come as a surprise that the ECJ gives preference to the right to free movement when it is challenged by the application of a Member State's private international legal rules.[78] What we are witnessing is a "federalization" of private international law. Federal unions that aim to guarantee and facilitate the free movement of persons among the constituent states will need to ensure that the effects of movement on the personal statuses of citizens are, as far as possible, neutralized. In federal unions that have not unified substantive law, demands for legal certainty and justice are likely to result in the development of an "interstate private law."[79] Respect for those principles is even more important in an area of freedom, security, and justice.[80] To avoid restrictions to free movement, principles or rules must be adopted at

[75] *Id.* at 30–38.

[76] Case C-288/89, Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media, 1991 E.C.R. I-4007, para. 12; Case C-353/89, Comm'n v. The Netherlands, 1991 E.C.R. I-4069, para. 16.

[77] Meeusen, *supra* note 5, at 303.

[78] Johan Meeusen, *The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance Between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC*, 18 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 186 (2010); Gerard-Rene de Groot, *Towards European Conflict Rules in Matters of Personal Status*, 11 MAASTRICHT J. EUR. & COMP. L. 115 (2004).

[79] *See* Vanessa Abballe, *Comparative Perspectives of the Articulation of Horizontal Interjurisdictional Relations in the United States and the European Union: The Federalization of Civil Justice*, 15 NEW ENG. J. INT'L & COMP. L. 1, 1 (2009); *see generally* Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT'L L. 369 (2010); Milena Sterio, *The Globalization Era and the Conflict of Laws: What Europe Could Learn from the United States and Vice Versa*, 13 CARDOZO J. INT'L & COMP. L. 161 (2005); Michaels, *supra* note 9; Alex Mills, *Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law*, *in* PRIVATE INT'L LAW AND GLOBAL GOVERNANCE (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014); Jacco Bomhoff, *The Constitution of the Conflict of Laws*, *in* PRIVATE INT'L LAW AND GLOBAL GOVERNANCE (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014).

[80] For the importance of EU conflict of law rules in an area of freedom, security, and justice, see Meeusen, *supra* note 5.

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the federal level. Those rules may take different forms, ranging from mere principles to harmonized rules,[81] allowing for general freedom for the constituent states. The move away from conventional international private law appears inevitable, especially in a union that purports to ensure the free movement of citizens throughout the federal territorial space.[82]

The principle of mutual recognition requires Member States to recognize rights acquired in another Member State and to refrain from imposing additional obstacles. Regarding surnames, Member States are thus under an obligation—absent justifiable overriding requirements—to recognize the name lawfully acquired in another Member State. There is no reason why this logic should be different for other personal statuses. The development of a federal private law within the EU, through the principle of mutual recognition, consequently presumes that Member States recognize same-sex marriages legally celebrated in another Member State. Member States that have not expanded marriage to same-sex couples cannot invoke their private international law to justify non-recognition.

It is clear from the cases that the principle of mutual recognition can also be invoked against the Member State of origin, or, more accurately, that the Member State of origin is not necessarily the Member State of nationality. Germany, the Member State of nationality of the entire Grunkin and Paul family, had to recognize the surname required according to Danish law. Regarding the free movement of same-sex couples, this implies that Member States that do not allow same-sex couples to marry cannot, by definition, declare void the marital status obtained by their nationals in another Member State. Of course, this cannot come as a surprise. After all, it is not a new development that free movement provisions can be invoked against the Member State of nationality.[83]

E. National and Constitutional Identities Matter

Those following the development of the case law on the recognition of names might not be astounded by this analysis and the lessons derived from those cases. Those in support of the mutual recognition of same-sex marriages have also used the cases to support their claims. That said, another contrasting lesson must be distilled from the name cases, one which stands in stark contrast with what has been discussed so far. Just as a policy of automatic non-recognition of same-sex marriages legally performed in another Member State clearly ignores some of the requirements of EU law, those who have argued in favor

[81] The EU has, interestingly, opted for a much more centralized approach than the U.S. *See* Abballe, *supra* note 79, at 24.

[82] Also in the United States, interstate jurisdictional conflicts were initially governed by more traditional international private law. *See* Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part 1*, 65 BROOK. L. REV. 935, 969–70 (1999).

[83] *See*, *e.g.*, Case C-224/98, Marie-Nathalie D'Hoop v. Office national de l'emploi, 2002 E.C.R. I-6191.

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of unconditional mutual recognition have ignored essential aspects of the name cases. Most importantly, they have forgotten that national and constitutional identities of the Member States matter, as evidenced in *Sayn-Wittgenstein* and *Runevič-Vardyn* (Section I). The case law analysis is followed by a discussion of its implications for the free movement of same-sex couples (Section II).

I. National Identity in the ECJ's Case Law

In 1991, Lothar Fürst von Sayn-Wittgenstein adopted an Austrian citizen named Ilonka Kerekes, born in 1944. Ilonka lived in Germany at the time of the adoption and continued to live there pending the decision. After the adoption, Ilonka acquired the surname of her adoptive father in the form of "Fürstin von Sayn-Wittgenstein." The authorities registered that name in the Austrian register and issued several documents in the name of Ilonka Fürstin von Sayn-Wittgenstein. Then, in 2003, the Austrian Constitutional Court interpreted the Austrian law on the abolition of the nobility as precluding an Austrian citizen from acquiring a surname bearing titles of nobility. Following this decision, the Austrian authorities determined that the birth certificate was incorrectly issued, and sent the applicant a letter stating that her surname would be changed to Sayn-Wittgenstein. The applicant challenged this decision on the basis of the free movement provisions in EU law.[84]

In line with precedent, the ECJ again held that requiring an EU citizen "to use a surname, in the Member State of which he is a national, which is different from that already conferred and registered in the Member State of birth and residence" would be an obstacle to the right to move and reside.[85] The Court found that the sudden non-recognition would result in serious inconveniences for the applicant, partially because the Austrian authorities had for many years recognized the name and documents had been issued bearing that name, and decided that the decision of the Austrian authorities amounted to a restriction of the right to free movement.[86] The Court swiftly accepted the Austrian government's justifications, which claimed that the law on the abolition of the nobility enjoys constitutional status and implements the principle of equal treatment.[87] First, the protection of the principle of equality was compatible with EU law. Second, the EU had a duty under Article 4(2) TEU to respect the national identities of the Member States. Therefore, the Court found the obstruction to the right to free movement legitimate.[88]

[84] Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, 2010 E.C.R. I-13693, paras. 19–29.

[85] *Id.* at para. 54.

[86] *Id.* at paras. 62–71.

[87] *Id.* at para. 32.

[88] *Id.* at paras. 88–95.

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The argument in *Runevič-Vardyn* was similar. Runevič-Vardyn was a Lithuanian national belonging to the Polish minority in Lithuania. Her parents gave her the first name "Małgorzata" and the surname "Runiewicz." The birth certificate issued in 1977 spelled the applicant's name using Cyrillic characters. A newly-issued birth certificate in 2003 used the Roman alphabet. Both, according to the referring court, spelled the names according to the Lithuanian form as "Malgožata Runevič." The Polish authorities issued the applicant a birth certificate in 2006, which spelled the name according to Polish rules as "Małgorzata Runiewicz." After having lived in Poland for some time, the applicant married Łukasz Paweł Wardyn, the second applicant. On the marriage certificate issued by the Lithuanian authorities, the name of the second applicant was transcribed as "Lukasz Pawel Wardyn," while the first applicant's name was transcribed as "Malgožata Runevič-Vardyn." The first applicant requested that the Lithuanian authorities change her name to "Małgorzata Runiewicz" on the birth certificate and "Małgorzata Runiewicz-Wardyn" on the marriage certificate. The second applicant requested his forenames to be entered on the marriage certificate in a form that complied with Polish spelling rules. The Lithuanian authorities refused, arguing that to do so would be against the national rules.[89]

With respect to the second complaint—that the husband's surname be added to the maiden name in a form that "does not correspond to the husband's surname as registered in the Member State of origin"[90]—it was decided that such treatment is precluded if "there is a real risk . . . that family members will be obliged to dispel doubts as to their identity and the authenticity of the documents which they submit."[91] The Court agreed with Lithuania's justifications that the need to protect the cultural, constitutional, and national identity of Lithuania warranted the national measures. The ECJ concluded that the EU is under a duty to "respect its rich cultural and linguistic diversity."[92] Article 4(2) TEU, in addition, requires the respect for "the national identity of its Member States, which includes protection of a State's official national language."[93] The case was sent back to the national court with instructions to strike a balance between the right to a personal identity and the right to a private life.[94] The other complaints were dismissed for failure to violate the right to non-discrimination and free movement.

[89] Case C-391/09, Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius, 2011 E.C.R. I-3787, paras. 15–27. For the three different complaints, see *id.* at para. 50.

[90] *Id.* at para. 74.

[91] *Id.* at para. 77.

[92] *Id.* at para. 86.

[93] *Id.*

[94] *Id.* at paras. 89–91.

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II. Implications for the Free Movement of Same-Sex Couples

These two cases lend further support to the conclusion adopted in the analysis of *Grunkin and Paul*, specifically that the refusal to recognize a personal status granted legally in another Member State is considered to be an obstacle to the right to free movement. In order to avoid the violation of EU law, the refusal must be objectively justifiable. In addition, *Sayn-Wittgenstein* and *Runevič-Vardyn* demonstrate the ECJ's willingness to consider and accept the Member States' justifications.

By referring and giving substance to Article 4(2) TEU for the first time, the Court emphasized that the national identities of the Member States do matter. It is not unique or novel that the Court took into account such concerns.[95] In *Groener*, decided in the 1980s, a Dutch national was not allowed to obtain a permanent full-time lecturer position in Ireland due to her inadequate knowledge of the Irish language. The ECJ held that the Treaty allows policies protecting national languages. Even though knowledge of the Irish language was not explicitly required for the lectureship, the fact that the Irish constitution recognizes the Irish language as the first official language justified the requirement.[96] In *Omega*, moreover, the ECJ allowed Germany to invoke the constitutional value of human dignity as a justification for a ban on laser games simulating homicide.[97]

It seems hard to dispute that "if it is more than a noble gesture,"[98] the identity clause in Article 4(2) ought to be capable of justifying deviations from EU law. The clause does not merely reflect that a common identity is absent within the EU, and that Member States' constitutions may rest upon different normative foundations, but it also requires that those differences "be respected rather than overcome."[99] In the face of such diverging values, it is important to give due regard to the differences. Not allowing flexibility in the case of diversity may very well undermine the basis of the Union's legitimacy.[100]

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[95] For an overview of references to national identity in the case law of the ECJ, as well as AG Opinions, see Laurence Burgorgue-Larsen, *A Huron at the Kirchberg Plateau or a Few Naïve Thoughts on Constitutional Identity in the Case-Law of the Judges of the European Union*, *in* NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 275 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

[96] Case C-379/87, Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee, 1989 E.C.R. I-3967, paras. 15–20.

[97] Case C-36/02, Omega Spielhallen–und Automatenaufstellungs–GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9609.

[98] ALEXANDER SOMEK, INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION 94 (2008).

[99] Leonard F.M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 41 (2010).

[100] *See generally* Fritz Scharpf, *Legitimate Diversity: The New Challenge of European Integration*, *in* 6 THE STATE OF THE EUROPEAN UNION: LAW, POLITICS, AND SOCIETY 79 (Tanja A. Börzel & Rachel A. Cichowski eds., 2003).

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Of course, the identity clause should not allow Member States to determine unilaterally when to derogate from EU law.[101] After all, the "respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules."[102] "Instead, it imposes the obligation on the Union to provide, in certain cases, for the exception to the uniform application of EU law."[103] In the end, it is up to the ECJ to decide whether it accepts the identity claims made by the Member States, as it did in pre-Lisbon times.[104] Nevertheless, it would be wise for the Court to proceed with care when scrutinizing national identity claims. The ECJ is not in a position to decide which aspects belong to the national and constitutional identities of the Member States.[105]

Evidently, the growing relevance of the identity clause poses serious challenges for those who consider the principle of mutual recognition to be a means of safeguarding the free movement of same-sex couples. Of course, the principle of mutual recognition has never been unconditional.[106] The argument that the ECJ is the right actor to settle issues concerning the recognition of same-sex couples' legal statuses, because its economic analysis "does not involve deference to the national concerns of the Member States"[107] thus simply ignores precedent. That said, taking the national and constitutional identities of the Member States into consideration creates additional difficulties, precisely because the diverging normative positions on same-sex marriage go to the core of how Member States define themselves. This divergence is reflected in the fact that a number of Member States have adopted constitutional provisions clarifying that marriage can be between one man and one woman only. It seems hard to deny that those Member States can "invoke

[101] Case C-393/10, Dermod Patrick O'Brien v. Ministry of Justice, 2012 E.C.R. I-0000, para. 49.

[102] Case C-213/07, Michaniki AE v. Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias, 2008 E.C.R. I-9999, para. 33.

[103] Monica Claes, *National Identity: Trump Card or Up for Negotiation?*, *in* 4 NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013). *See also* Armin Von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

[104] Case C-473/93, Comm'n v. Luxembourg, 1996 E.C.R. I-3207, paras. 32–36.

[105] ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW 12–13 (2015); Elke Cloots, *Respecting Linguistic Identity Within the EU's Internal Market: Las. Case C-202/11, Anton Las v. Psa Antwerp NV, Judgment of the Court of Justice (Grand Chamber) of 16 April 2013*, 51 COMMON MKT. L. REV. 623, 641 (2014).

[106] JANSSENS, *supra* note 69, at 13.

[107] Andrew Stumer, *Homosexual Rights and the Free Movement of Persons in the European Union*, 7 INT'L TRAD & BUS. L. ANN. 205, 221 (2002).

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[their] constitutional understanding of the institution of marriage" when defending the obstruction to the right to free movement.[108]

The response to the observation that Member States may justify their policies has been rather predictable, with most critics dismissing the idea that Member States can possibly justify the non-recognition of a same-sex marriage by a reference to fundamental rights.[109] Though it is not disputed here that the fundamental rights dimension is relevant, and as such, requires careful attention, the fundamental rights argument presents several dilemmas. First, after *Sayn-Wittgenstein* and *Runevič-Vardyn*, such an argument can no longer be made without a fierce critique of those cases. The fundamental rights dispute at the center of the free movement of same-sex couples is evident, but these name cases are not free from similar rights concerns.[110] For example, in *Runevič-Vardyn*, the Lithuanian legislation at stake was criticized for not respecting minority rights.[111] Nonetheless, the Court accepted Lithuania's justifications. It merely ordered the national court to take into account the right to a private life and a family life when considering whether the Lithuanian authorities had struck the right balance.[112] The idea that Member States may rely on Article 4(2) TEU as long as it respects the fundamental values upon which the EU is founded, laid down in Article 2 TEU, is, as a consequence, doubtful.[113] To argue that fundamental rights must trump national identity is contrary to *Sayn-Wittgenstein* and *Runevič-Vardyn*.

Of course, one may criticize these cases and argue that the application of the national identity clause should never result in a restriction of fundamental rights. Given the use of fundamental rights in the debate on the free movement of same-sex couples, it is somewhat surprising that the fundamental rights dimension of *Runevič-Vardyn* has received scant attention.[114] Considering the minority rights at stake in that case, the rather

[108] CLOOTS, *supra* note 105, at 285–86.

[109] Bonini Baraldi, *supra* note 21; Ertuna Lagrand, *supra* note 20.

[110] Case C-168/91, Christos Konstantinidis v. Stadt Altensteig–Standesamt and Landratsamt Calw–Ordnungsamt, 1993 E.C.R. I-1191, para. 40; *Runevič-Vardyn*, Case C-391/09 at para. 89; Matthew J. Elsmore & Peter Starup, *Union Citizenship–Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy*, 26 Y.B. EUR. L. 57, 91–92 (2007).

[111] GAETANO PENTASSUGLIA, MINORITY GROUPS AND JUDICIAL DISCOURSE IN INTERNATIONAL LAW: A COMPARATIVE PERSPECTIVE 67–68 (2009). Generally, the new Member States are unlikely to do more than the minimum to protect their minorities. *See* Will Kymlicka, *National Minorities in Postcommunist Europe: The Role of International Norms and European Integration*, *in* ETHNIC POLITICS AFTER COMMUNISM 191 (Zoltan Barany & Robert G. Moser eds., 2005).

[112] *Runevič-Vardyn*, Case C-391/09 at para. 91.

[113] For such a claim, see Von Bogdandy & Schill, *supra* note 103, at 1430.

[114] The main analysis so far hardly considers the fundamental rights dimension. *See* Hanneke van Eijken, *Case Note on C-391/09 Runevič-Vardyn*, 49 COMMON MKT. L. REV. 809 (2012).

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deferential proportionality analysis was unexpected.[115] That being said, the idea that fundamental rights, by definition, trump national identity is one that must be dismissed for three reasons—with the first two demonstrating that such an idea is far from feasible: First of all, as *Sayn-Wittgenstein* demonstrates, the Court might be confronted with a clash between different fundamental rights; in *Sayn-Wittgenstein*, there was a conflict between the principle of equal treatment and the right to private life.[116] This alone demonstrates why the Court cannot always side with the fundamental rights at stake.[117] Second, it is difficult to define what qualifies as a fundamental right and how broadly those rights must be construed. Broadly defined rights that will always trump basically render the identity clause meaningless. Those critical of the national identity clause—who see it as a threat to the unity of the European legal order—might be happy with such an outcome. A different position is taken here because there must be legitimate scope for diversity, disagreement, and contestation in a pluralist legal order.[118]

From this follows the third and most fundamental problem concerning the belief that the national identity clause cannot be invoked if such invocation would result in a restriction of a fundamental right. Due to their universal premises, fundamental rights are likely to function as centripetal forces within a polity. Their legal codification is likely to only increase the centralizing propensity of fundamental rights. The inevitable tensions such dynamics may create in pluralist societies are,[119] as shown in this section, also present within the EU. An approach that focuses on rights only, or an approach which ignores the existence of legitimate disagreement about rights' interpretation,[120] is likely to ignore or

[115] Whereas the ECJ held in *Garcia Avello* that the national measures were disproportionate because Belgium had already allowed "derogations from application of the Belgian system of handing down surnames in situations similar to that of the children of the applicant in the main proceedings," see *Garcia Avello*, Case C-142/08 at para. 44, the Lithuanian refusal to rewrite Vardyn as Wardyn was only possibly disproportionate, which was ultimately for the national court to decide, even though Lithuanian authorities normally allowed for the use of the letter W; *see id.* at paras. 92–93. For the inconsistent application of the proportionality test in relation to the national identity clause, see also CLOOTS, National Identity, *supra* note 105, at 308-310.

[116] Even though the case did not contain an explicit reference to the right to private life, all name cases raise this issue. *See* Case C-168/91, Christos Konstantinidis v. Stadt Altensteig–Standesamt and Landratsamt Calw–Ordnungsamt, 1993 E.C.R. I-1191, para 40.

[117] For a powerful analysis, see J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, *in* THE EUROPEAN UNION AND HUMAN RIGHTS 51 (Nanette A. Neuwahl & Alan Rosas eds., 1995).

[118] By "pluralism" I refer to value pluralism, not to legal pluralism. On the difference between the two, see Michel Rosenfeld, *Constitutional Versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 CARDOZO L. REV. 2339, 2340 (2010).

[119] Richard Bellamy, *Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS 31 (Tom Campbell et al., eds., 2001).

[120] JEREMY WALDRON, LAW AND DISAGREEMENT 12 (1999).

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downplay those tensions as well as the adopted mechanisms that countervail such centralizing tendencies.[121] One of those countervailing mechanisms within the EU is the national identity clause. The primary issue with an approach focusing only on rights is that it overlooks the fact that the EU has promised to promote and respect a range of values and objectives, of which the respect for fundamental rights is a very important one. But respect for the national and constitutional identities of the Member States belongs to those as well. Instead of considering fundamental rights as quasi-automatically trumping the identity clause, a more balanced approach—which recognizes the tensions and allows for mediation between the conflicting values—is warranted.

F. A Federal Clash of Values and Some Possible Solutions

Rather than adopting a hierarchical vision—where everything is subordinated to fundamental rights—Article 4 TEU must instead be viewed as the Union's federal provision which recognizes the reciprocal relationship between the EU and the Member States, and requires mutual respect.[122] To that aim, Article 4 TEU includes, in addition to the requirement of respect for the national identity of the Member States, the principle of limited conferral of competences (Art. 4(1) TEU), the equality of the Member States (Art. 4(2) TEU), and the respect for the Member States' essential state functions (Art. 4(2) TEU). Article 4(3) TEU, in addition, provides the "'glue' to keep the federal construction together,"[123] namely the principle of sincere cooperation. Accordingly, Member States must adopt any necessary measures "to ensure fulfillment of the obligations arising out of the Treaties" as well as "refrain from any measure which could jeopardise the attainment of the Union's objectives."[124]

The latter principle, which is analogous to the "fidelity principle" that governs relations within federal states,[125] further supports the conclusions in the first two sections: (1) Member States are no longer completely foreign to each other, and (2) the Treaties provide for an overarching set of norms that justify the non-application of the private international law rules[126] which Member States may still invoke against non-Member States. The dark side of the fidelity principle is that it may suppress diversity rather than

[121] Bellamy, *supra* note 119.

[122] Von Bogdandy & Schill, *supra* note 103, at 1425.

[123] ELKE CLOOTS, GEERT DE BAERE, & STEFAN SOTTIAUX, FEDERALISM IN THE EUROPEAN UNION VIII (2012).

[124] Treaty on the European Union, art. 4(3) [hereinafter TEU].

[125] DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 213 (2014). For a further discussion of the fidelity principle, see Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 737 (2004).

[126] For this conclusion, see also Michaels, *supra* note 9, at 235.

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generate "vibrant democratic interaction by a greater number of constituencies and elected politicians regarding the needs of the political system as a whole."[127] From a self-determination perspective, strong support exists for respecting the moral and value choices of Member States, even if those choices run counter to what we find normatively acceptable.[128] The other provisions in Article 4 TEU leave room for such a debate, particularly when the matters at stake are delicate. It is too often ignored that the definition and delineation of fundamental rights may belong to those matters. Differences in fundamental rights protection within Member States, after all, "reflect fundamental societal choices and form an important part in the different identities of polities and societies."[129]

It should be evident that the above argument does not suggest that the national identity clause, by definition, allows Member States to not recognize a same-sex marriage legally celebrated in another Member State. The Union's legitimacy, after all, derives from the fact that it is possible to treat the other as one of us, despite the differences: "[D]espite the boundaries which are maintained, and constitute the I and the Alien, one is commanded to reach over the boundary and accept him."[130] This should not prevent us from discussing the limits of mutual recognition. As Nicolaïdis suggests, we must ask to what extent "recognition between states' laws and regulations create resistance to recognition between peoples."[131]

The ostensible incommensurability of those conflicting legal norms presents the EU with a great dilemma. Rather than unilaterally imposing "European" standards upon the Member States, or placing the issue outside the free movement legal framework altogether, we must strive for an approach that balances these conflicting interests. We need a framework of analysis that provides insights as to when the protection of a Member State's national identity creates a legitimate obstacle to the right to free movement.[132]

Despite its gravity, the dilemma is not irresolvable. People can, and will, disagree over morals, but that should not allow them to disrespect the overall intrinsic worth of human beings. Entirely bigoted interests should not be accepted. In addition, the range of

[127] Halberstam, *supra* note 125.

[128] Floris de Witte, *Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law*, 50 COMMON MKT. L. REV. 1545, 1546–51 (2013).

[129] Weiler, *supra* note 117, at 51.

[130] J.H.H. Weiler, *In Defence of the Status-Quo: Europe's Constitutional Sonderweg*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7, 20 (J.H.H. Weiler & Marlene Wind eds., 2003).

[131] Kalypso Nicolaïdis, *European Democracy and Its Crisis*, 51 J. COMMON MKT. STUD. 351, 360 (2013).

[132] For an interesting approach, see CLOOTS, National Identity *supra* note 105.

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interests Member States can invoke has been limited by the case law of the European Court of Human Rights (ECtHR). Regulating the sexual conduct of same-sex couples, or expressing moral disapproval of same-sex relations through legislation is no longer allowed within the Council of Europe Member States and, hence, within the EU.[133] Criminalizing homosexual conduct has been found to be in breach of the Convention, and,[134] in more recent years, the ECtHR has also taken a strong stance against expressing moral disapproval or discouraging homosexual conduct by singling out same-sex couples and subjecting them to discriminatory treatment.[135] This notion is most clearly expressed in *Vallianatos and Others v. Greece*, where the ECtHR decided that Greece had breached the Convention by excluding same-sex couples from civil unions.[136]

The ECtHR case law may not get us very far if a Member State "invoke[s] its constitutional understanding of the institution of marriage, but not the conviction that homosexuality is incompatible with its national identity."[137] Member States might believe that marriage is essentially heterosexual, either due to its link to procreation or for other reasons, and still design policies which respect and protect the human dignity of same-sex persons.[138] This is precisely what the case law of the ECtHR seems to allow. While the contracting states may protect the "family in the traditional sense,"[139] rights granted to non-married persons should be granted to heterosexuals and homosexuals alike. For this reason, it will not always be possible to escape a balancing of the different interests at stake.

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[133] John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, 12 EUR. L.J. 15, 35–36 (2006). With respect to the interests that can be invoked, the EU closely resembles the U.S. *See* Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005).

[134] Dudgeon v. The United Kingdom, App. No. 7525/76 (Oct. 22, 1987), http://hudoc.echr.coe.int/; Norris v. Ireland, App. No. 10581/83, (Oct. 26, 1988), http://hudoc.echr.coe.int/.

[135] *See, e.g.*, E.B. v. France, App. No. 43546/02 (Jan. 22, 2008), http://hudoc.echr.coe.int/; J.M. v. the United Kingdom, App. No. 37060/06, (Sept. 28, 2010), http://hudoc.echr.coe.int/.

[136] Vallianatos and Others v. Greece, App. Nos. 29381/09 and 32684/09, (Nov. 7, 2013), http://hudoc.echr.coe.int/.

[137] CLOOTS, *supra* note 105, at 285.

[138] KOPPELMAN, *supra* note 11, at 51. One may argue that dignity requires the opening up of the institute of marriage to same sex couples. Arguments relating to dignity played a central role in the U.S. Supreme Court's decision to legalize same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[139] Karner v. Austria, App. No. 40016/98, para. 40 (Jul. 24, 2003), http://hudoc.echr.coe.int/; Vallianatos, *supra* note 136, at para. 83. *See also* Schalk & Kopf v. Austria, App. No. 30141/04, (Jun. 24, 2010), http://hudoc.echr.coe.int/.

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How this balance should be struck depends on the kind of cross-border movement taking place. A distinction must be made between different situations.[140] While non-recognition is easiest to justify in cases of abusive practices (see Section D(II) of this article), it is hard to see how a Member State can have a legitimate interest to not recognize the marriage of a visiting couple. Should the fictitious Dutch-Polish same-sex couple, referred to in the introduction, return to Poland for a quick visit, Poland should be prohibited from not recognizing their marriage. The most contentious and complicated situation arises when same-sex couples take up residence in a Member State with strong public policies against same-sex marriages.

Proportionality appears to be the preferred legal tool used to balance two competing legal claims in such situations. Problematically, however, the proportionality test is anything but neutral in situations of conflict. Proportionality creates a "race to the top" regarding the protection of rights.[141] According to Reich, in addition, a strict proportionality scrutiny in free movement case law demonstrates the ECJ's tendency to, at times, adopt a "quasi-legislative approach."[142] If the free movement dimension of the same-sex cases results in a similarly strict scrutiny, a proportionality examination would risk "making a mockery of national autonomy,"[143] allowing centrally-imposed "European" norms to enter through the backdoor.

A more deferential proportionality analysis might be required to ensure that the Court's judicial review respects pluralism.[144] Such a review has been proposed by de Witte, who argues in favor of a more procedural approach to the principle of proportionality; rather than examining the substantive content of the national measure, the procedural version focuses on the "coherence, consistency, and transparency" of the national policy.[145] Some of the name cases show how a similar proportionality review would play out. In *Sayn-Wittgenstein*, for example, the rooting of the policy at stake in the Austrian constitutional identity would have had a decisive impact on the Court's decision to grant Austria a margin of appreciation.[146] While Member States are given flexibility when their national and constitutional identities are at stake, the Court will take into account the consistency and

[140] KOPPELMAN, *supra* note 11, at 97.

[141] MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 134–36 (2013).

[142] Norbert Reich, *How Proportionate Is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 105 (Hans-W Micklitz & Bruno de Witte eds., 2012).

[143] De Witte, *supra* note 128, at 1569.

[144] Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EUR. L.J. 80 (2011).

[145] De Witte, *supra* note 128, at 1571.

[146] *Sayn-Wittgenstein*, Case C-208/09 at para. 87.

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coherence of a national measure when deciding whether or not to strike it down. In *Garcia Avello*, the Court struck down the Belgian decision precisely because Belgium did not apply its policy consistently.[147] In addition, Member States are expected to produce clear evidence of the importance of their moral considerations. General and vague indications of the moral importance will not suffice.[148]

A procedural proportionality test can provide guidance when determining whether to allow Member States to refuse recognition of same-sex marriages legally celebrated in another Member State. First of all, Member States should provide clear evidence of the fact that their argument for non-recognition is firmly grounded in consideration of national and constitutional identities. Member States should, moreover, be expected to apply their policy in a consistent and coherent manner to prevent it from being struck down. If a Member State's policy of non-recognition is applied inconsistently, it is questionable whether the issue is of true fundamental importance to a Member State's self-identification. On the contrary, it might be argued that all this will do is push the Member States to adopt harsher policies, for example, adopt constitutional provisions that press the importance of traditional marriage, or urge government officials to refuse to recognize same-sex marriages. It is far from certain that in today's climate, which seems somewhat more tolerant than a decade ago, the threshold for constitutional amendment can still be reached in those Member States that have not yet adopted any constitutional definition of marriage.

Though it provides some guidance, a procedural proportionality test might not get us very far. It is easily conceivable that a Member State's policy fulfills the requirements of a procedural proportionality test, but nonetheless produces grave and intolerable consequences, contrary to the rights enshrined in the European Convention on Human Rights (ECHR). Even if Member States can justify non-recognition, they should not be allowed to refuse to provide access to the same-sex partner of an EU citizen exercising the right to free movement. Returning to our example, this would mean the following: Even if Greece can demonstrate that it has a sufficiently strong public policy against recognizing same-sex marriages, it should still allow the Dutch-Polish same-sex couple to enter and reside there. It should not be allowed to prevent access to an economically-inactive partner on the ground that Greece does not recognize the partnership. To do so would be an unjustifiably severe burden on the right to free movement, with the aim of punishing homosexuality, rather than protecting the constitutional understanding of marriage.

Recognizing the tension between the protection of national identity and the respect for fundamental rights, Cloots suggested a pragmatic solution. Member States are under an

[147] *Garcia Avello*, Case C-142/08 at para. 44. The ECJ is not always consistent about its search for consistency. *See* Cloots, *supra* note 105.

[148] Case C-165/08, Comm'n v. Poland, 2009 E.C.R. I-6843, para. 54.

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obligation to "equate couples who got married in another Member State to 'local' married couples, thus granting those couples the same rights but without registering them as 'married' in national official documents."[149] Unfortunately, this solution neither respects a Member State's national identity, nor guarantees same-sex couples' fundamental rights. Cloots' suggestion ignores that the constitutional understanding of marriage is likely to include more than marital status alone. A Member State might believe that certain rights, such as the right to adopt children, for example, belong to this understanding, and should therefore be reserved for heterosexual married couples alone. In addition, allowing Member States to not recognize a marriage may produce disproportionate consequences. This is particularly so in the case of parent-child relationships, the stability of which can be undermined by non-recognition. EU law should never allow children to end up in such a vulnerable situation.[150]

If there is a pragmatic solution to this problem, it would be one that achieves almost the opposite of what Cloots suggests. Koppelman, in an analysis of a formerly similar dilemma within the U.S.,[151] has provided such an alternative. To ensure the stability of same-sex relationships and to avoid the evasion of marital obligations, the right of Member States not to recognize a same-sex marriage should be constrained. To ensure respect for the diversity of moral and ethical norms Member States should be permitted to reserve the rights they believe belong to the institute of heterosexual marriage for married heterosexual couples only. The latter implies that once Member States grant rights to unmarried heterosexual couples, their scope should be extended so as to include same-sex couples as well.[152] This solution respects the limits set by the ECtHR, while also respecting the diverse set of national identities within the EU. By protecting same-sex couples and their relatives against the extreme hardship non-recognition may give rise to, and against their placement in a position inferior to non-married heterosexual couples, this suggestion would be less likely to violate the rights enshrined in the ECtHR. Simultaneously, by allowing Member States to decide which rights to grant to married heterosexual couples only, the EU would acknowledge the value of plurality and diversity within itself.

G. Conclusion

The world we are now living in is not indifferent to someone's sexual orientation. If we want to take diversity seriously, the EU may be required to accept practices incompatible with many of the liberal values which it promises to uphold. In pluralist societies, after all,

[149] CLOOTS, *supra* note 105, at 286 (italics omitted).

[150] In relation to the debate in the U.S., this argument was made by KOPPELMAN, *supra* note 11, at 109.

[151] KOPPELMAN, *supra* note 11; *See also* Linda J. Silberman, *Can the Island of Hawaii Bind the World—A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191 (1996).

[152] KOPPELMAN, *supra* note 11, at 106–10.

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there is a distinction between the ideas and practices incompatible with liberal principles, and the imposition of liberal ideas on illiberal groups.[153]

Nevertheless, the capacity of the Member States to refuse recognition of same-sex marriages celebrated in other Member States is very much constrained by EU law. As demonstrated in this article, Member States are under a presumption to recognize such same-sex marriages. This presumption can only be refuted in cases where the Member States have a strong public policy against same-sex marriages, to the point that recognition would go against their national and constitutional identity. Even then, Member States are required to respect the rights enshrined in the ECtHR. Member States should be allowed to invoke their constitutional understanding of marriage, but such understandings cannot justify unrelated and bigoted policies. The belief, held by some Member States, that marriage is inherently heterosexual cannot result in policies that interfere with, or dissolve, parent-child relationships. Nor is it proportionate, if non-recognition is justifiable at all, to fully deny same-sex couples the right to free movement.

All of this notwithstanding, the idea that EU law provides the magical formula whereby all injustices faced by moving same-sex couples will disappear is questionable. EU law should leave room for, and respect the plurality of, values within the EU. As a consequence, it cannot be excluded that Member States can justify the non-recognition of a marriage or not provide same-sex couples with all the rights heterosexual married couples benefit from. While EU law poses serious constraints on Member States in this respect, the justification of limitations on the free movement rights of same-sex couples cannot be excluded completely.

[153] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 164 (1995).

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