Special Section
Same-Sex Marriage: Comparative Reflections

Same-Sex Marriage and the Role of Transnational Law: Changes in the European Landscape

By Massimo Fichera[*]

Abstract

This Article has a twofold aim. First, it focuses on a particular case study, which has attracted the interest of several scholars from an interdisciplinary perspective: the legalization of same-sex marriage. The Article aims to show how changes in one specific socio-cultural landscape may spill into other contexts as a result of a ripple effect. The idea is to demonstrate how the emergence of a social fact—the increasing demands made by homosexual couples for their union to be recognized in one way or another—may make the process of institutionalization natural. A legal system may sometimes be bound to recognize social facts, and transnational law may enhance this phenomenon. The second aim of the Article is to claim is that, when analyzing change, legal deterministic theories should be dismissed, as they are based upon easy assumptions that do not correspond to empirical observations. Instead, as shown by constructivist approaches, the combined effect of structure and agency in some specific circumstances contributes to social and legal change. However, constructivists perhaps underestimate the relevance of unpredictable events and the (positive or negative) influence that transnational frameworks may have in forming discourses of power. In particular, the EU and the ECtHR systems may facilitate the diffusion of ideas and norms deriving directly from the liberal paradigm that inspire them. However, the liberal paradigm is contradictory, as it does not necessarily provide an incentive for change.

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A. Introduction

This Article analyzes the legalization of same-sex marriage as an emblematic example of transnational law. Here, transnational law is interpreted broadly as all law that regulates events that have relevance beyond the domestic borders of modern states.[1] In Europe, legal changes occurring in one socio-cultural context often transmit to other socio-cultural contexts. This change takes place in different ways and speeds, and transnational law enhances this phenomenon. In addition, this Article argues that the best way to examine legal change is through a critical constructivist approach. Such an approach allows us to observe the weaknesses and contradictions of the liberal paradigm.[2]

In other words, this Article tells a story about change and empowerment, individual deeds and collective endeavors, and silences and strategies. It is also about the role transnational law may have in bringing about or reflecting social change. Institutionalization—an incremental process through which an institution acquires meaning and value over a prolonged period—makes change more difficult and expensive but does not prevent it. Nevertheless, institutionalized practices and processes show patterns of development that cannot easily be predicted. A variety of concurring factors—dependent on various socio-political and historical contexts—may change the speed of, promote, or even impede change. In this regard, institutions which, broadly speaking, set conventions, norms, organizational patterns and procedures, and legal arrangements that operate during a specific period,[3] raise complex issues about the extent to which changes occur.

Constitutional changes, in particular, may have an important role in shaping institutions and reflecting major paradigm shifts. Attempts to interpret and explain constitutional changes are sometimes classified as being either "static" or "dynamic."[4] Although both approaches conceive of formal constitutional change, they consider different variables

[1] For a discussion of some aspects of transnational law, see Massimo Fichera, *Law, Community & Ultima Ratio in Transnational Law*, *in* POLITY AND CRISIS—REFLECTIONS ON THE EUROPEAN ODYSSEY 189 (Massimo Fichera, Sakari Hänninen & Kaarlo Tuori eds., 2014).

[2] By "liberal paradigm" I mean the paradigm that asserts, *inter alia*, the priority of individual claims and rights, limited government, rule of law, impartial role of the judiciary, etc. Its historical and cultural evolution, however, is very diversified. *See e.g.,* JOHN GRAY, TWO FACES OF LIBERALISM (2000).

[3] *See e.g.,* Asbiørn Sonne Nørgaard, *Rediscovering Reasonable Rationality in Institutional Analysis,* 29 EUR. J. OF POL. RES. 31 (1996); James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943 (1998).

[4] Astrid Lorenz, *Explaining Constitutional Change: Comparing the Logic, Advantages and Shortcomings of Static and Dynamic Approaches*, *in* NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012).

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when it comes to the adoption or amendment of a constitution.[5] Static approaches tend to focus on relatively abstract causes, such as culture, constitutional rigidity, or the federal or quasi-federal framework of a polity. For example, a static perspective would support the claim that non-federal, less complex systems provide fewer incentives to change. In contrast, dynamic approaches look at additional variables, such as the modification of a norm regardless of textual constitutional changes.[6]

This Article has two goals: The first goal is to focus on a particular case study that has attracted the interest of several scholars from an interdisciplinary perspective—the legalization of same-sex marriage. This Article shows how changes in one specific socio-cultural landscape may spill into other contexts via a ripple effect. This is how the emergence of a fact—for example, homosexual couples increasingly demanding for meaningful recognition of their unions—may become so widely accepted as to make the process of institutionalization natural. A legal system may face the normative force of facts, especially if influenced by transnational laws, and be bound to recognize such realities.

The same-sex marriage saga is a significant example of the power of transnational law, which is often characterized by cross-fertilization and porous legal borders. In this respect, Europe is an interesting geo-political arena largely because of its internal diversity. Furthermore, Europe's two main transnational courts—the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)—have unfolded two parallel stories. Discourses taking place at judicial and legislative levels, as well as actions taken by social and political actors, may contribute to the evolution of a deep-rooted institution—the institution of family. These discourses, formed by the moral and legal claims of social agents, may produce effects that are difficult to predict.

The second goal of the Article is to argue that, when analyzing change, legal deterministic theories should be dismissed because they do not offer a satisfactory explanation of the factors that bring about change. Instead, constructivist approaches show that it is the combined effect of structure and agency that, in some specific circumstances, contributes to social and legal change. Nevertheless, constructivists perhaps underestimate the relevance, unpredictability, and influence—positive or negative—that transnational frameworks may have in such discourses. In particular, the EU and the ECtHR systems may facilitate the diffusion of certain ideas and norms that derive directly from the liberal

[5] *Id.* at 31.

[6] *Id.* at 38–42.

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paradigm. This paradigm acts simultaneously as a constraint and an incentive for change.

Constructivists do not view institutions as unitary entities: their preferences are not fixed but rather are prone to change. One constructivist school argues that institutions play a key role in the construction of ideas, norms, and values.[7] This view emphasizes the importance of discursive politics. Other versions of so-called "new institutionalisms" either prioritize structure over agency or are less able to explain incremental and transformative change, especially when it is non-linear in nature.[8] These others provide a good analysis of continuity but not change.[9] Yet, constructive or discursive institutionalism does not sufficiently emphasize the fact that social agents often reproduce and legitimate the forms of domination and prejudices in society.[10] This also impacts constitutional change. One particular strand of institutionalism, called "critical institutionalism," emphasizes not only the structural—the roles, norms, and forms of cognition imposed by the social system—but also the post-structural aspects of agency.[11] From this perspective, agency may sometimes not be wholly conscious, and more importantly, it is often influenced by power dynamics.[12] The same-sex marriage saga illustrates how the liberal paradigm that currently seems to empower gay couples is the same paradigm that, not long ago, disempowered them as individuals. This is typical of the often-contradictory premises of liberalism.[13]

The next sections consider case law development in the ECtHR, the CJEU, and the Supreme Court of the United States. Case law indicates that, within the same transnational framework, the courts' orientations have gradually changed to allow the once completely disallowed possibility of protecting same-sex couples using the principle of equal treatment or the right to privacy. This change was possible through the expansion of the concept of "family life." Moreover, in the U.S. courts, there are two categories of

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[7] *See* Peter M. Haas & Ernst B. Haas, *Pragmatic Constructivism and the Study of International Institutions*, 31 MILLENNIUM 573 (2002); Jeffrey Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324 (1998) (providing a different version of constructivism).

[8] For a distinction between sociological, historical, and rational choice institutionalism see Peter Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996). The literature on institutionalism is very large, however, and many more versions can be distinguished.

[9] *See generally* Jeffrey Stacey & Berthold Rittberger, *Dynamics of Formal and Informal Institutional Change in the EU,* 10 J. OF EUR. PUB. POL'Y 858 (2003).

[10] *See* PIERRE BOURDIEU, IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY (1990).

[11] *See* Francis Cleaver & Jessica de Koning, *Furthering Critical Institutionalism*, 9 INT'L J. OF THE COMMONS 1 (2015).

[12] *See* Jessica de Koning, *Unpredictable Outcomes in Forestry—Governance Institutions in Practice*, 27 SOC'Y & NAT. RESOURCES 358 (2014).

[13] *See* Duncan Bell, *What is Liberalism?,* 42 POL. THEORY 682, 682 (2014).

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narratives: One is extra-legal and based on values such as morality or religion; the other is legal and draws on public and private spheres of normativity. In Europe, narratives instead seem to focus on more specific aspects such as social benefits and equal treatment, or on the concept of family life. In both U.S. and European courts' case law, there are two distinct periods, each marked by landmark rulings of influential courts. In the first period, the pace of change is rather slow, but it is increasingly faster in the second period. While the role of overlapping discourses that have infiltrated contemporary society should be taken into account, discourses are always ambiguous and are ultimately discourses of power. Courts' rulings, lawyering, activists' initiatives, media, and political leaders all play a significant role in the construction of these discourses.

B. The European Experience

The same-sex marriage discourse in Europe is a laboratory of variegated experiments. Currently within the Council of Europe, thirteen countries—eleven of which are also EU countries—have legalized same-sex marriage.[14] Other countries, such as Germany, recognize civil unions, registered partnerships, and unregistered cohabitation.[15] In the remaining countries, such as Poland, Lithuania, and Latvia, the traditional definition of marriage as a union between man and woman is enshrined in their respective constitutions, the civil codes, or other forms of legislation.[16] The Netherlands was the first country in the world to recognize same-sex marriage on April 1, 2001.[17]

European institutions have helped forge this landscape. In the 1990s, the European Parliament (EP) adopted several resolutions on equal treatment between homosexuals and heterosexuals that affected countries at the national level.[18] This was part of a broader

[14] The Netherlands (2001), Spain (2005), Portugal (2010), France (2013), Belgium (2003), Luxembourg (2014), Denmark (2012), Sweden (2009), the United Kingdom (2014), Ireland (2015), and Finland (2015) (EU) as well as Norway (2009) and Iceland (2010). In Slovenia a bill legalizing same-sex marriage was passed in 2015, but needs to be confirmed by a referendum. *See International Laws: Europe*, MARRIAGE EQUAL. USA (July 10, 2015), http://www.marriageequality.org/international_laws_europe.

[15] *E.g.,* Germany (2001, registered life partnership), Croatia (2014, life partnership), Estonia (2016, cohabitation agreement), Austria (2010, registered partnership), Hungary (2009, registered partnership), Slovenia and Czech Republic (2006, registered partnership), Italy (2016. civil unions). *See supra* note 14.

[16] *See e.g.*, CONST. OF THE REPUBLIC OF POLAND art. 18, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[17] *See Same-Sex Marriage Legalized in Amsterdam*, CNN.COM (Apr. 1, 2001), http://transcripts.cnn.com/TRANSCRIPTS/0104/01/sm.10.html.

[18] Resolution on Equal Rights for Homosexuals & Lesbians in the European Community, EUR. PARL. 1994 O.J. (C 61) (which was in favor of access to marriage or equivalent legal framework); Resolution on Equal Rights for Gays and Lesbians in the European Community, EUR. PARL. 1998 O.J. (C 313).

approach in the fight against discrimination generally.[19] For example, the "free movement and non-discrimination" approach has recently been expanded to cases concerning pregnancy. The CJEU recognized that a woman who gives up work, or gives up seeking work, during the late stages of her pregnancy is still a "worker" for the purposes of Article 45 TFEU, provided that she resumes her job or finds another job within a reasonable period of time following her child's birth.[20]

The extent of this logic's application to homosexual relationships is not yet clear. More recently, the new EP's directive on the free movement of workers has raised issues of sex discrimination during negotiations.[21] For example, one proposed amendment calls for Member States to ensure mutual recognition of various legal partnerships and their rights.[22] The 2012 EU Roadmap on Gender Equality expresses the awareness that the institution of marriage, or an equivalent legal framework, is key to facilitating acquisition of benefits and free movement rights.[23] One significant flaw of the EU free movement law is that it seems to be built on what is considered "normal," so that deviations from normalcy are not contemplated. For example, the *Jessy Saint Prix* case revealed that pregnancy and childbirth are not considered legitimate absences from work in the same way that illness or injury are. The court focused exclusively on the impact the woman's absence had on the labor market instead of the social and health-related aspects of pregnancy.[24]

The next sections consider the development of case law by the ECtHR and CJEU respectively. The two transnational frameworks, while both inspired by a liberal agenda, reflect opposite attitudes regarding the resistance, or acceptance, of the recognition of same-sex relationships during two different periods.

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[19] *See e.g.*, Recommendation on the Future of the Area of Freedom, Security and Justice, EUR. PARL. 2005 O.J. (C 166).

[20] Case C-507/12, Saint Prix v. Sec'y of State for Work & Pensions, 2014 http://curia.europa.eu/juris/liste.jsf?num=C-507/12&language=EN; *See* Nicole Busby, *Crumbs of Comfort: Pregnancy and the Status of Worker under EU Law's Free Movement Provisions*, 44 INDUS. L.J. 134 (2015).

[21] Proposal for a Directive of the European Parliament and of the Council on Measures Facilitating the Exercise of Rights Conferred on Workers in the Context of Freedom of Movement for Workers, COM (2013) 236 final.

[22] Report of the European Parliament on the Proposal for a Directive on Measures Facilitating the Exercise of Rights Conferred on Workers in the Context of Freedom of Movement for Workers, A7-0386/2013, 8.

[23] VANESSA LEIGH ET AL., JUSTICE, FREEDOM AND SECURITY, TOWARDS AN EU ROADMAP FOR EQUALITY ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY 462, 482 (2012).

[24] *See* Busby, *supra* note 20, at 138–40; *see generally* Case C-507/12, *Saint Prix*, 2014 E.C.R. ECLI:EU:C:2014:2007 http://curia.europa.eu/juris/liste.jsf?num=C-507/12&language=EN.

I. The European Court of Human Rights

The ECtHR has only recently dealt with homosexual marriage. The court's approach has gradually developed, in two stages, during the last decades of the twentieth century. During the first stage, gay marriage recognition fell completely outside the human rights discourse that the Court led. It was only towards the beginning of the twenty-first century, the second stage, that the court began reinterpreting the concept of "family" and, along with it, Article 12 of the European Convention on Human Rights (ECHR) which discusses the right to marry.[25]

The early cases that dealt with gay rights, dating back to the 1950s, were far from addressing the configurability of a right to marry. Criminalizing homosexuality was not seen as a breach of the ECHR—not even a breach of Article 8 which provides the right to respect for private life—as long as the criminalization was justified by public health or morality reasons.[26] These first claims met no success, despite being formulated in terms of Articles 8 and 14 of the ECHR. It was not sufficient to present homosexuality as individual conduct in the private sphere that should be left untouched by the state, nor was it enough to argue that targeting only male homosexuality amounts to sex discrimination. To the court, state interference was easily justified by a need for social protection. States could not afford to incorporate sexual anomalies in their legal practices because this would undermine their social fabric. As the Commission on Human Rights remarked, studies in Germany confirmed

> the existence of a specific social danger in the case of masculine homosexuality. This danger results from the fact that masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytize adolescents and that the social isolation in which it involves the latter is particularly marked.[27]

[25] Eur. Convention on Human Rights art. 12, Nov. 4, 1950 (stating, "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").

[26] W. B. v. Germany, App. No. 104/55 (Dec. 17, 1955), http://hudoc.echr.coe.int/ (judging application inadmissible).

[27] X v. Germany, App. No. 5935/72, para. 56 (Sept. 30, 1975), http://hudoc.echr.coe.int/ (judging application inadmissible).

This Article later questions whether labeling homosexuals as a distinct socio-cultural group is appropriate. Suffice it to note that the ECtHR was not necessarily in favor of homosexuals For example, in *Dudgeon v. United Kingdom* it argued that "some form[s] of legislation," including criminal law, can be justified as "necessary in a democratic society" to ensure adequate safeguards, namely "to protect particular sections of society as well as the moral ethos of society as a whole."[28] The ECtHR left it to the national authorities to establish what types of safeguards are necessary, including the age of consent. *Dudgeon* revealed signals of change that, at least in some instances, homosexuals may face an unjustified interference with respect to their right to private life—to the point of criminalizing homosexual conduct.

Although that sounds like a *pro forma* statement, privacy was a fundamental issue when gay and lesbian relationships went under scrutiny. In several cases during the 1980's, the ECtHR did not consider the United Kingdom's failure to grant residence permits to same-sex couples for their non-British partners a breach of Article 8.[29] The Commission was firm that "[d]espite the modern evolution of attitudes towards homosexuality, the Commission finds that the applicants' relationship does not fall within the scope of the right to respect for family life ensured by Article 8."[30] In other words, the family, as an institution deeply embedded in the social and cultural life of a community, must be preserved and prioritized over the values and needs of smaller, less important socio-cultural groups. In *S. v. United Kingdom*, the Commission dismissed the applicant's argument that her inability to succeed the tenancy of her home following her partner's death amounted to interference in her private life.[31] Such legal effects—such as the ability to succeed tenancy—would exist only if the surviving partner qualified, first and foremost, as a family member. Because no explicit reference to homosexual partners was present in UK law, the relevant domestic provisions could not be extended to cover the applicant's situation. There is, according to the Commission, a very clear reason why that is:

> [T]he family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society and it sees no reason why a High Contracting Party should not afford particular assistance to families. The

[28] Dudgeon v. United Kingdom, Series A No. 45 Eur. Ct. H.R., para 45 (1981).

[29] *See e.g.*, X & Y v. United Kingdom, App. No. 9369/83, 32 Eur. Comm'n H.R. Dec. & Rep. 220 (1983); W. J. & D. P. v. United Kingdom, App. No. 12513/86, 11 Eur. H.R. Rep. 49 (1987); C. & L. M. v. United Kingdom, App. No. 14753/89 (Oct. 9, 1989), http://hudoc.echr.coe.int/.

[30] *X & Y*, App. No. 9369/83.

[31] S. v. United Kingdom, App. No. 11716/85, 47 Eur. Comm'n H.R. Dev. & Rep. 274 (1986).

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> Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified.[32]

Up until the turn of the century, the attitude of the ECtHR was firmly against qualifying same-sex relationships as "family life." Although same-sex partnership complaints reached the Court throughout the first decade of the twenty-first century, the Court's approach remained the same. The Court admitted that although there was a growing tendency in Europe to legally recognize stable *de facto* same-sex partnerships, Member States should be left wide discretion to regulate due to the absence of common consensus in this area.[33] In *Mata Estevez*, ineligibility for survivors' allowances—while clearly discriminatory against homosexuals—was justified by the legitimate aim of the state's interest in protecting the traditional family.[34]

A few years later, in two cases about the succession of tenancy of a deceased partner—*Karner* and *Kozak*—the ECtHR reversed its position and held that the state's action was disproportional between the aim sought—protecting the traditional family—and the means employed.[35] In these two cases, in contrast to *Mata Estevez*, Article 8 of the ECHR was successfully used in conjunction with Article 14 of the ECHR. These cases laid a foundation.

For more to progress, the ECtHR needed to reexamine and reinterpret another crucial provision of the ECHR—Article 12 on the right to marry. The Court showed that even mountains can move when it examined some complaints concerning gender reassignment. While in *Rees v. United Kingdom*, the right to marry only provided for the "traditional marriage between persons of opposite biological sex" because the protection of marriage was considered the basis of the family,[36] the Strasbourg judges in *Cossey v. United Kingdom* conceded that same-sex marriage was valid in some countries. This concession,

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[32] *Id.* at para. 7.

[33] Estevez v. Spain, 2001 VI Eur. Ct. H.R. 311.

[34] *Id.*

[35] Karner v. Austria, 2003 IX Eur. Ct. H.R., 38; Kozak v. Poland, App. No. 13102/02 (Mar. 2, 2010), http://hudoc.echr.coe.int/.

[36] Rees v. United Kingdom, Series A No. 106 Eur. Ct. H.R., para. 49 (1986).

however, was not sufficient to completely dismiss the traditional concept of marriage.[37] Additionally, the Court in *Goodwin v. United Kingdom* made two major statements worth mentioning: (1) The ability to procreate was no longer considered a precondition of the right to marry,[38] and; (2) that the institution of marriage had undergone major social changes since the ECHR's adoption, as confirmed by the reformulation of Article 9 of the Charter of Fundamental Rights of the European Union (CFR) which removed the specific reference to "men and women."[39] The Court suggested that law should take into account the fact that gender is no longer determined merely by biological criteria. Because of this now accepted fact, the Court felt compelled to intervene for two reasons: First, there was deadlock at the national level; while domestic courts expected the legislature to act, the latter hesitated too much.[40] Second, there was "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."[41] As a result, courts should attach less importance to the lack of evidence of a common European approach, and stop leaving states a wide discretion in this area.

And so it happened. In *Schalk and Kopf*, an Austrian couple claimed that both their right to respect for private life and their right to respect for family life were violated when local authorities' refused to recognize their marriage.[42] In addition, their complaint focused on the principle of discrimination and their right to the peaceful enjoyment of their possessions. Their substantive argument was that marriage was no longer primarily directed at procreating children—as was back in the original formulation of the 1812 Civil Code—but instead was much broader and should encompass homosexual relationships. The Court should accept this reality, especially after acknowledging that discrimination on the basis of sexual orientation could only be justified by serious reasons. In succession cases, sexual orientation discrimination would be especially serious because, upon the death of one partner, the fiscal situation of the surviving partner would be more disadvantageous than in an ordinary marriage. In *Schalk* and *Kopf*, the ECtHR had to re-interpret Article 12 of the ECHR in light of Article 9 of the CFR, which had become legally binding following the Treaty of Lisbon's entry into force. In particular, the scope of Article

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[37] *See* Cossey v. United Kingdom, Series A No. 184 Eur. Ct. H.R., para. 46 (1990); *see also* Sheffield & Horsham v. United Kingdom, 1998 V Eur. Ct. H.R.

[38] Goodwin v. United Kingdom, App. No. 28957/95, para. 98 (July 11, 2002), http://hudoc.echr.coe.int/.

[39] Charter of Fundamental Rights of the European Union, Mar. 30, 2010 O.J. (C 83/02); *Goodwin*, App. No. 28957/95 at para. 100.

[40] *See Goodwin*, App. No. 28957/95 at para. 102.

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

[42] *See* Schalk & Kopf v. Austria, App. No. 30141/04, (June 24, 2010), http://hudoc.echr.coe.int/eng?i=001-99605.

12 of the ECHR could no longer be limited in all circumstances to heterosexual marriage. That being said, the margin of appreciation of the Member States still had to be respected, especially considering the deep socio-cultural connotations of marriage.[43] Therefore, the Court did not go so far as to find a violation of Article 12, but instead left the door open for future re-elaborations of the concept of marriage.[44]

Furthermore, contrary to previous case law—especially *Karner*—the Strasbourg judges decided to directly address the question of whether same-sex relationships constitute "family life." In *Karner*, the Court pointed out that the exclusion of specific categories of people, such as cohabiting homosexual partners, from provisions on the right to succeed a tenancy must be justified through a strict application of the principle of proportionality.[45] In *Schalk and Kopf*, however, the ECtHR decided to delve into the core issue of the nature of a gay relationship. The Court could not help but note that social attitudes had changed since *Mata Estevez*, as evidenced by the legal recognition of same-sex couples in one way or another in several European countries. This shift may surprise the external observer; it seems that a mere ten years were sufficient to convince the judges that the same provision could be understood in a radically different way.[46] The Court's conclusion was just as puzzling. Although Articles 8 and 14 of the ECHR applied to the Austrian couple, the articles were not violated because the rights and obligations derived from registered partnerships fell within Austria's margin of appreciation.[47] It seems as if the Court was willing to ascertain violations only when a particularly high threshold was passed. In any case, however, the Court was prepared to recognize that a homosexual couple was entitled to enjoy property rights just as traditional families do. Finally, when comparing *Schalk and Kopf* with *Goodwin*, it is interesting to observe that the ECtHR found the international trend towards acceptance of transsexuals more significant than the trend towards legal recognition of same-sex marriage. Therefore, the Court restricted states' margin of appreciation only in the former case.

In fact, the Court's refusal to impose an obligation to allow same-sex marriage using Article 12 of ECHR can also be seen in the context of two second-parent adoption cases: *Gas and*

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[43] On the doctrine of the margin of appreciation, and related criticism, see Yuval Shany, *Towards a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L LAW 907 (2006); Eyal Benvenisti, *Margin of Appreciation, Consensus & Universal Standards*, 31 N.Y.U.J. OF INT'L LAW & POL. 843 (1999).

[44] *See Schalk*, App. No. 30141/04 at paras. 60–64.

[45] *See* Karner, 2003 IX Eur. Ct. H.R. at 37.

[46] *See Schalk*, App. No. 30141/04 at paras. 93–95.

[47] *See Schalk*, App. No. 30141/04 at paras. 109–110.

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Dubois v. France and *X and Others v. Austria*. Furthermore, the Court did not allow a right to same-sex marriage to be derived from the combination of Articles 8 and 14 of the ECHR.[48]

The trend in ECHR law seems to lean towards a limited expansion of the concept of "family life" as applied to same-sex couples. In *Vallianatos v. Greece*, the ECtHR found it unjustified to draw a distinction between applicants who live together and applicants who do not merely for professional or social reasons. In the eyes of the Court, the stability of a couple does not depend on whether the two partners cohabitate or not.[49] In that specific case, given that a new Greek law on civil unions excluded homosexual couples from its application, the ECtHR held that Articles 8 and 14 of the ECHR had been jointly violated because "differences based solely on considerations of sexual orientation are unacceptable under the Convention."[50] In fact, the Court added that "same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples."[51] In this sense, the Court seems to be favoring economic rationales in its more recent case law by, for example, considering property rights or economic benefits. Therefore, even though the traditional family deserves protection and recognition, the state "must necessarily take into account developments in society and changes in the perception of social and civil status issues and relationships, including the fact that there is not just one way or choice when it comes to leading one's family or private life."[52]

As discussed later in this Article, recognizing same-sex unions has not only symbolic but also practical significance. This was evident in *Hämäläinen v. Finland*,[53] where an applicant changed gender and wished to have her heterosexual marriage converted into a homosexual marriage. At that time, Finnish legislation did not allow same-sex marriage, and the applicant's wife's lack of consent to transforming their marriage to a registered partnership meant that the applicant's new gender could not be recorded in the local registry office.[54] The applicant argued, in addition, that divorce would run contrary to the couple's religious beliefs and that simply registering the partnership, and not continuing

[48] Gas et Dubois v. France, 2012 II Eur. Ct. H.R. 245, para. 66; X & Others v. Austria, 2013 II Eur. Ct. H.R. 73, para. 106.

[49] Vallianatos v. Greece, 2013 VI Eur. Ct. H.R. 163, para. 73.

[50] *Id.* at paras. 77, 92.

[51] *Id.* at para. 81.

[52] *Id.* at para. 84.

[53] *See* App. No. 37359/09, (July 16, 2014), http://hudoc.echr.coe.int/eng?i=001-145768.

[54] *See id.* at para. 39–40.

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their marriage, would have undesired consequences, especially for their children. The applicant was left to choose between her right to sexual self-determination and her right to marry which, as a result, affected her private and family life.[55] Nevertheless, the Court was not prepared to intrude into states' powers in light of the lack of a consensus throughout Europe on this issue.[56] According to the *Schalk and Kopf* ruling, Article 8 of the ECHR cannot oblige a state to allow same-sex marriage.[57] In this area, the Court simply adhered to its typical cautious jurisprudence. After all, the options of divorce and registered partnership are still open and offer an "almost identical" legal protection.[58]

Because the ECtHR does not enjoy an overarching federal framework—unlike in the United States—this is probably as far as the ECtHR can currently go. It cannot proclaim the existence of a right to same-sex marriage unless the overwhelming majority of states decide to come to a consensus via similar legislation.

Ultimately, however, both the increasing social acceptance of same-sex marriage in Europe and legalization of same-sex marriage in a growing number of countries[59] imply that at least a minimal level of acknowledgment exists. This is why the Strasbourg judges have recently ruled, in *Oliari and Others v. Italy*, that the Italian government ought to ensure that a specific legal framework for the recognition and protection of same-sex relationships exists.[60] The most striking feature in *Oliari* is perhaps the readiness of the Court to reduce the margin of appreciation of the Italian government. Two factors would advise against a too narrow margin: (1) The lack of consensus among Member States and; (2) the deeply sensitive moral and ethical issues involved. Nevertheless, the Court distinguished *Oliari* from past cases; It gave priority to the same-sex partners' need to be legally recognized because the recognition of a same-sex couple represents an essential element of an individual's existence and identity.[61] The trend points towards social

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[55] *See id.* at paras. 14, 15, 41, 42.

[56] *Id.* at para. 75.

[57] *Schalk*, App. No. 30141/04.

[58] *Id.* at para. 87. As pointed out earlier, Finland recognized same-sex marriage in 2015.

[59] *See* Henry McDonald, *Ireland Becomes First Country to Legalize Gay Marriage by Popular Vote*, THE GUARDIAN, May 23, 2015, http://www.theguardian.com/world/2015/may/23/gay-marriage-ireland-yes-vote (following a referendum in which an overwhelming 62% of people voted in favor of gay marriage).

[60] *See* Oliari & Others v. Italy, App. Nos. 18766/11 and 36030/11, para. 185 (July 21, 2015), http://hudoc.echr.coe.int/eng?i=001-156265.

[61] *Id.* at para. 177.

acceptance of same-sex unions not only in Europe in general, but specifically among the Italians as well.[62] The recent adoption of legislation on same-sex civil unions in Italy marks another significant step in this direction.[63]

The case (which preceded the Act later passed by the Italian Parliament) originated from six Italian nationals who claimed that the Italian state violated Articles 8, 12, and 14 of the ECHR by preventing them to marry or to enter into a civil union. The Italian context was peculiar because Italian legislation did not recognize same-sex marriage; protection of same-sex partners derived from judicial interpretation of Article 2 of the Italian Constitution which protects the "inviolable" and developmental rights of the individual, either alone or as part of "social groups."[64] Article 2, however, offers merely a superficial form of protection, especially because the legislature has ignored for a long time the judiciary's multiple calls to intervene, including calls from the constitutional court.[65] According to the court, in such a legal vacuum, same-sex couples are *de facto* discriminated against because they cannot enjoy the same specific rights available to other couples in stable, committed relationships.[66] Nor can the Government reasonably employ the "national identity argument" and play the "we are not ready" card. Italy argued that delicate matters can only be regulated appropriately by the state because it is "the only entity capable of having cognizance of the 'common sense' of its own community" and the only entity required to develop such common sense.[67] The government was prepared to concede that there was a growing consensus towards recognizing homosexual families, but that, in the meantime, other forms of protecting same-sex couples' rights were being developed, such as the registration of unmarried couples in some municipalities.[68] These arguments did not convince the Court, noting that "there exists a conflict between the social reality of the applicants . . . and the law, which gives them no official recognition on the territory."[69]

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[62] *Id.* at para. 181.

[63] Elisabetta Povoledo, *Italy Approves Same-Sex Civil Unions*, N.Y. TIMES (May 11, 2016), http://www.nytimes.com/2016/05/12/world/europe/italy-gay-same-sex-unions.html?_r=0. Italy was the last Western European country to introduce legislation which officially recognizes homosexual relationships.

[64] Art. 2 Costituzione [Cost.] (It).

[65] Corte Cost. (Constitutional Court), 14 April 2010, Decision 138/2010 Foro it. I (It.).

[66] Oliari a.o. ,Eur. Ct. H. R. App. nos. 18766/11 and 36030/11 at para. 167.

[67] *Id*. at para. 123.

[68] *Id*. at para. 130. See also, as regards the possibility to register marriages concluded abroad, *Nozze gay: Angelino Alfano contrario alla trascrizione dei registri nei Comuni: 'I sindaci non lo possono fare'*, HUFFINGTON POST (Oct. 1, 2014), http://www.huffingtonpost.it/2014/10/01/nozze-gay-alfano-contrario-registrazione_n_5914116.html.

[69] *Id.* at para. 173.

This brief overview of the ECtHR's reasoning allows us to conclude that the *Schalk and Kopf* approach, as confirmed by *Vallianatos* and *Oliari*, uses a cautious "revolving door" mechanism. This door allows states to confer marriage rights on gay couples but also leaves them free to restrict these rights. At the same time, differential treatment between same-sex and heterosexual couples must be proportionality justified (*Karner*). As noted by Wintermute, Member States may either stay behind the "marriage wall" or step outside it and establish rights for unmarried heterosexual couples—in which case they would have to establish analogous rights for unmarried gay couples.[70] The Court's innovations—for example, an increased elasticity of "family life"—is counter-balanced by the Court's necessarily deferential attitude towards national governments. From this perspective, innovation and change are paradoxically discouraged; states might refrain from introducing a form of registered partnership precisely because, by doing so, their sphere of discretion is reduced.[71] The ECtHR has thus been urged to apply strict scrutiny and non-discrimination more explicitly, following the U.S. Supreme Court's example.[72]

II. The Court of Justice of the European Union

The CJEU has also showed signs of being concerned with societal changes. For example, in the 1990s, in a case concerning the dismissal of a transsexual person for reasons related to gender reassignment, the Advocate General (AG) Tesauro remarked that the law "cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise, the law risks imposing outdated views and taking a static role."[73]

The prohibition of discrimination on the grounds of sex is a recurring theme. Nevertheless, because the competence of the EC and EU in the field of discrimination was limited prior to the Treaty of Amsterdam, the CJEU was wary of opening the door to gay couples. For example, in *Grant v. South West Trains*, the Court argued that the rule of non-discrimination on the grounds of sex did not cover discrimination based on sexual

[70] *See* Robert Wintermute, *Marriage, Adoption, and Donor Insemination for Same-Sex Couples: Does European Case Law Impose Any Obligations on Italy?*, 1 GENIUS 35, 39 (2014).

[71] *See* Emmanuelle Bribosia, Isabelle Rorive & Laura Van den Eynde, *Same-Sex Marriage—Building an Argument Before the European Court of Human Rights in Light of the US Experience*, 32 BERKELEY J. OF INTL. L. 1, 41 (2014).

[72] *Id*.

[73] Opinion of Advocate General Tesauro at para. 9, Case C.13/94, P. v. S. and Cornwall County Council (Dec. 14 1995), http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99596&doclang=EN.

orientation.[74] Similarly, in *Sweden and D. v. Council*, the CJEU held that the rejection of a same-sex registered partner's application to claim a household allowance did not breach the rule of non-discrimination on the basis of sex because registered partnerships could not be considered equal to marriage.[75] In other words, the general principle of equality justifies the different treatment of different forms of partnership; like things ought to be treated alike, and unlike things ought to be treated differently.

Following the Treaty of Amsterdam's entry into force in 1999, the EU was given the power to directly enact measures against discrimination.[76] The adoption of the Framework Directive[77] was one of the first measures adopted. It was in light of this directive that the CJEU found against German legislation precluding the survivor in a registered civil union to receive, after the death of his homosexual partner, a benefit granted under an occupational pension scheme.[78] This heteronormative reasoning prioritizes the conventional image of the family on the basis of the division of male and female roles. The cases mentioned above suggest a formalistic approach whereby differential treatment of homosexual and heterosexual couples should be treated as direct discrimination because such reasoning assumes that matrimonial benefits and traditional marriage are the "normal" model that all other types of relationships should be compared to.[79]

This approach also appears in the *K.B*. case, where the court decided that K.B. and R's inability to marry breached the principle of non-discrimination on the grounds of sex[80] because it prevented K.B., as well as all other heterosexual partners, from receiving a survivor's pension,[81] precisely because K.B. was still considered a heterosexual partner despite his transition from female to male.

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[74] Case C-249/96, Grant v. South West Trains, 1998 ECR I-621, para. 47. The case concerned the refusal by a railway company to reduce the price of a train ticket to the homosexual partner of one of its employees.

[75] Joined Cases C-122 and 125 /99, D and Sweden v. Council, 2001 ECR I-4319.

[76] Art. 13 Treaty on the European Union (TEC), now Art. 19 Treaty on the Functioning of the European Union (TFEU).

[77] EC Directive 2000/78 of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (the "Framework Directive"), OJ 2000 L 303.

[78] Case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 ECR I-1757.

[79] Jule Mulder, *Some More Equal Than Others? Matrimonial Benefits and the CJEU's Case Law on Discrimination on the Grounds of Sexual Orientation* 19 MAASTRICHT J. EUR. & COMP. L. 505 (2012).

[80] Currently Art. 157 TFEU.

[81] Case C-117/01, *K. B.*, 2001 ECR I-541.

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Similarly, the Court decided that a supplementary retirement pension provided by German law must be given to a registered life partner because that partner is—regarding the pension—in a legal and factual situation comparable to that of a married person.[82] Despite AG Jääskinen's consideration that the need to protect marriage and family cannot justify a difference of treatment on the basis of sexual orientation, the CJEU did not rule explicitly on this aspect.[83] It is not clear whether the prohibition against discrimination on grounds of sexual orientation is a general principle of EU law, as suggested by AG Jääskinen, or a fundamental right under Article 21 of the CFR.[84]

The general attitude of the CJEU—that whenever same-sex and opposite-sex partners are in a comparable and particular situation they should be treated equally—is a recurring feature of its case law. The CJEU took account of Directive 2000/78/EC again in *Hay v. Crédit agricole* to judge whether French legislation that allowed derogations of the principle of sexual non-discrimination only on some specific grounds was compatible with the Directive.[85] In this case, a bank had not awarded one of its employees, Mr. Hay, special leave days and a bonus, as was normally granted to married employees under a national collective agreement. Mr. Hay had entered into a civil solidarity pact (PACS) and, at that time, marriage in France was only available to opposite sex couples. This justified the Court holding that the situation of homosexual partners who enter into PACS is comparable to that of married heterosexual partners,[86] but because gay couples cannot marry, they are excluded from certain privileges provided for married couples. As a result, rules restricting benefits in terms of pay or working conditions to married employees amount to direct discrimination on the grounds of sexual orientation,[87] and would therefore need to be justified under one of the grounds indicated in Article 2 (5) of the Directive.[88] *Hay* is

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[82] Case C-147/08, Römer v. Freie und Hansestadt Hamburg, 2011 ECR I-3591.

[83] Opinion of Advocate General Jääskinen para. 175, Case C-147/08, Römer v. Freie und Hansestadt Hamburg (July 15, 2011), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CC0147.

[84] *See id.* at para. 131. *See* Laurent Pech, *Between Judicial Minimalism and Avoidance: the Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez*, 49 C.M.L.R. 1841 (2012).

[85] Case C-267/12, Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, Judgment of 12 December 2013.

[86] *Id*. at para. 36–37.

[87] *Id*. at para. 44.

[88] The grounds enumerated in Art. 2 (5) Directive 2000/78/EC are: public security; the maintenance of public order; and the prevention of criminal offences, the protection of health, and the protection of the rights and freedoms of others.

relevant because this is the first time that the CJEU reserved for itself, and did not give to the national court, the competence to determine whether or not the situation of a PACS couple was comparable to that of a marriage.

Ultimately, what does EU law have to say about same-sex relationships? Certainly, its influence over Member States' legislation is limited because they are free to regulate this area in accordance with their own domestic law.[89] This is no doubt the case in so-called "purely internal situations," when Member States' nationals have not exercised free movement rights. In all other situations, as far as same-sex couples, including at least one EU citizen, are concerned, neither the Member State of origin nor the Member State of destination may breach free movement rights. Nevertheless, by leaving the Member State of destination free to decide whether, and to what extent, a same-sex relationship may be recognized in its territory, either as a married or as a registered couple, EU law—much like the ECtHR—refrains from entering into the domestic sphere. This, of course, raises questions of compatibility with free movement law as well as the principle of non-discrimination.[90] In addition, problems may arise from the application of conflict of law rules. How should one Member State's territory recognize a union that is not qualified as marriage by domestic law? How should the consequences of a marriage concluded abroad but not recognized under domestic law be regulated—for example, regarding social benefits, inheritance rights, divorce, and so forth?[91] These questions are still open for discussion but lie outside the scope of this Article. It is important, however, to point out that the CJEU's approach towards non-discrimination is structurally limited. For example, individuals find it much easier to access the ECtHR to protect their fundamental rights, especially because the CJEU protects individual rights against the EU institutions and the Member States only when they are implementing EU law.[92] As some scholars have pointed out, ultimately, the ECtHR seems "fitter" and "braver" than the CJEU when it comes to

[89] This was made clear by the European Court of Justice (CJEU), e.g., in Römer.

[90] Art. 21 Charter of Fundamental Rights of the European Union (CFR). *See also* Alina Tryfonidou, *EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition*, 21 COLUMBIA J. EUR. L. 195 (2015).

[91] 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 143 (Katharina Boele-Welki & Angelika Fuchs eds., 2012).

[92] Art. 51(1) Charter of Fundamental Rights of the European Union, OJ C 83/389, 30.3.2010. Other limits of the CJEU are discussed in Robert Wintemute, *In Extending Human Rights, which European Court is Substantively 'Braver' and Procedurally 'Fitter'?*, *in* FUNDAMENTAL RIGHTS IN THE EU – A MATTER FOR TWO COURTS 179 (Sonia Morano-Foadi & Lucy Vickers, eds.,2015).

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protecting the rights of same-sex couples.[93] Yet the ECtHR, as seen above, applies its margin of appreciation doctrine very cautiously and avoids stepping into the states' shoes.

III. The Supreme Court of the United States

The debate on same-sex marriage in the United States is, like in Europe, a part of the broader debate on the treatment of homosexuals, including the criminalization of gay and lesbian sexual practices. Issues concerning access to benefits by same-sex couples were addressed as far back as the 1970s. Just like in Europe, the most contentious aspect was the extent to which the institution of marriage was considered ingrained in modern society and, as such, restricted to heterosexuals. In this regard, everyone's eyes have turned to the U.S. Supreme Court, which has for a long time not only upheld marriage as a fundamental right,[94] but also emphasized that individual decisions involving marriage are very much a matter of personal choice. For example, in *Cleveland Board of Education v. LaFleur*, the court confirmed its previous precedent that freedom to marry is protected by the due process clause of the Fourteenth Amendment;[95] in *Moore v. City of East Cleveland*, the court clarified that whenever the government intervenes in family matters, the court must balance the importance of the government's interests and the extent to which they are satisfied by the legislation at issue.[96] In *Zablocki v. Redhail*, the court added that the right to marry is important to all individuals. More recently, in *Lawrence v. Texas*, the court went even further by pointing out that personal decisions relating to marriage, procreation, family relationships, and so forth were constitutionally protected and that homosexuals may seek autonomy for these purposes just as heterosexuals do.[97] Until 2013, no case before the Supreme Court discussed same-sex marriage directly.[98]

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[93] Robert Wintemute, *supra* note 92; Kees Waaldijk, *Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe*, 1 GENIUS 42 (2014).

[94] *See*, *e.g.*, Maynard v. Hill, 125 U.S. 190, 210 (1888) ("[I]t [marriage] is the foundation of family and society, without which there would be neither civilization nor progress."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that marriage is protected by the Due Process Clause); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (describing how marriage is "fundamental to the very existence and survival of the race"); Loving v. Virginia, 388 U.S. 1, 11 (1967) (discussing how freedom to marry is necessary to pursue happiness).

[95] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[96] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[97] *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Lawrence v. Texas, 539 U.S. 558 (2003).

[98] Significant cases concerning gay rights were Bowers v. Hardwick, 478 U.S. 186 (1986); Romer v. Evans, 517 U.S. 620 (1996); Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Lawrence v. Texas, 539 U.S. 558 (2003). *But see* Baker v. Nelson, 409 U.S. 810 (1972).

Nevertheless, between the '70s and the early '90s, state courts refused to include same-sex marriage in the definition of marriage and left domestic statutes untouched. Quite often, the explicit reason adduced by the judges was that the traditional idea of a man and woman living together by virtue of an affective and symbolic bond, and producing children, should prevail. Thus, according to *Baker v. Nelson*, the Minnesota legislation defining marriage as the union of a man and a woman was constitutional: "The institution of marriage as between a man and a woman, uniquely involving the procreation of children within a family, is as old as the book of Genesis."[99] In *Jones v. Hallahan*, homosexual marriage was not allowed even though Kentucky legislation did not explicitly exclude it, and the court in *In Re Estate of Cooper* found a compelling interest in fostering traditional marriage.[100]

Not much later, starting in the '90s, equal protection arguments were taken more seriously when assessing the constitutionality of same-sex marriage bans. The Hawaii Supreme Court was the first to find that such bans amounted to discrimination on the basis of sex,[101] remanded the case to the lower court, and then affirmed its decision that the state ought to show a compelling interest in order to justify the discrimination.[102]

The gates were open and the flood was about to come, but it was a slow movement. In subsequent years, although judgments in different states went in both directions, quite a few courts followed the Hawaii Supreme Court. For example, in *Brause v. Bureau of Vital Statistics*, an Alaska Superior Court held that the state must show a compelling interest in order to justify discriminating in marriage and equal protection implied that there exists a fundamental right to choose a partner to create a non-traditional family.[103] In some states, judicial decisions in favor of same-sex couples triggered prompt legislative response. Thus, following *Baker v. Vermont* in 1999, Vermont was the first state to enact civil unions. *Baker* ruled that statutory benefits should be available both for same-sex and different-sex couples regardless of how this option would be implemented.[104] In the same period,

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[99] Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). Neither the equal protection nor the due process clauses were said to be affected by the statute. *Id*. at 186. Moreover, *Loving v. Virginia,* applicable to discriminations on the basis of race, was not considered relevant.

[100] *See* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); In Re Estate of Cooper, 564 N.Y.S.2d 684 (Fam. Ct. 1990); *see also* Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111; De Santo v. Barnsley, 476 A.2d 952 (Pa. Sup. Ct. 1984).

[101] *See* Baher v. Lewin, 852 P.2d 44 (Haw. 1993).

[102] *See* Baher v. Miike, 950 P.2d 1234 (Haw. 1997).

[103] *See* Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Al. 1998).

[104] *See* Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

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Massachusetts became the first state to recognize same-sex marriage after its high court held in *Goodridge v. Department of Public Health* that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violate[d] the Massachusetts Constitution."[105]

In particular, the state violated rights to liberty and equality because its legislation lacked any rational relation to a legitimate state interest. As shown below, this is an important judgment. Nevertheless, the court fell short of making a bold decision, perhaps out of political restraint. Not only did the court decline to qualify the freedom to marry as a fundamental right, but it also held the Massachusetts statute unconstitutional under rational basis review instead of strict scrutiny.[106] In other words, the government's arguments failed to show sufficient rationality between the ends and the means selected to achieve them. There were three main arguments: (1) The defense of traditional marriage; (2) the need to protect children's welfare; and (3) the need to reduce the state's fiscal burden by allowing fewer couples to marry—an economic argument. The traditional marriage argument failed because Massachusetts did not prohibit heterosexual couples that were not able or did not wish to procreate from marrying.[107] The protection of the welfare of children argument failed because there was no evidence that same-sex couples were incapable of looking after and educating children.[108] Finally, the economic argument failed because the financial dependence or independence of partners cannot constitute a criterion to exclude them from marriage, and there was no evidence that same-sex couples were less dependent on each other than different-sex couples.[109]

On a different wavelength, in *Varnum v. Brien*, the Iowa Supreme Court unanimously struck down the statute prohibiting same-sex marriage because equal protection required conferral of full marriage rights.[110] The Iowa Supreme Court did not have the same degree

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[105] Goodridge v. Department of Public Health, 798 N.E.2d 941, 969 (Mass. 2003).

[106] *Id*. at 948–59. In the US, the analysis of equal protection and due process is normally done by distinguishing between strict, or heightened, intermediate and rational-basis scrutiny. In the first case, a classification will qualify as "suspect" (as in the areas of race, alienage, gender, age) if it is not supported by a compelling government interest by way of legislation, which results as the least restrictive means to achieve the declared purpose. In the second case, a classification will be "quasi-suspect" if it is not justified by an important interest that is substantially related to the classification. In the third case, it is merely required that state action be rationally linked to a legitimate government interest.

[107] *Id*. at 961–62.

[108] *Id*. at 962–63.

[109] *Id*. at 964.

[110] *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

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of cautiousness as its Massachusetts counterpart and argued that the same-sex marriage ban could not withstand strict scrutiny. Note that the prohibition had again been justified through the use of the classic trilogy—traditional marriage, protection of the welfare of children, and fiscal burden arguments. Not one of these arguments was tenable, and all were rejected.[111] The traditional marriage argument was also employed in *Kerrigan v. Commissioner of Public Health*, but an additional justification was given for the prohibition: Marriage needed to be restricted to different-sex couples in order to ensure uniformity and consistency with other state and federal laws.[112] Both arguments were countered by the Connecticut court, which applied a strict scrutiny standard instead of rational basis. Disadvantages for one specific group of people cannot be justified using mere moral disapproval, especially when no relevant government objective was being substantially furthered.[113] Rational basis review was again the chosen standard in *Perry v. Schwarzenegger*, where a California-based federal court ruled that an amendment to the Californian Constitution "Proposition 8," discriminated against gays and lesbians by suggesting that the only difference between same-sex and different-sex couples was the capacity to procreate by natural means.[114] The court held that the state should have no qualms about allowing social changes to occur in this case because there was ample evidence that same-sex marriage would benefit the institution of marriage.[115] Relying on *Lawrence v. Texas*, the district court found that moral and religious disapproval could not be reasons to discriminate without other grounds based on health, safety, or welfare.[116]

A parallel development took place at the U.S. Supreme Court level at the end of the '70s. Interestingly, while in Europe in the same period the ECtHR addressed homosexuality mainly in terms of privacy and family life, in the United States the focus was more explicitly on protection from discrimination, as can be deduced from the analysis of the case law above. Initially, the U.S. Supreme Court regarded same-sex marriage as little more than an extravagance. In *Baker v. Nelson*, a 1972 appeal by an individual following a judgment by the Minnesota Supreme Court was dismissed "for want of a substantial federal question."[117] There were neither oral arguments nor explanations for the decision. Because the ruling follows from a mandatory appellate review, however, it has been

[111] *Id.* at 898–903.

[112] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 476 (2008).

[113] *Id.* at 476 and 479.

[114] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010).

[115] *Id.* at 999.

[116] *Id.* at 1002–03.

[117] Baker v. Nelson, 409 U.S. 810, 810 (Minn. 1972).

considered adjudication on the merits and, therefore, a precedent confirming the inexistence of a right to marry for same-sex couples.[118]

Generally speaking, it is fair to say that the U.S. Supreme Court and the state courts preferred to tread cautiously on this ground, much in the same way that the ECtHR did by invoking its margin of appreciation doctrine. Yet, a considerable step forward was made in 2013. First, in *U.S. v. Windsor*, Section 3 of the Federal Defense of Marriage Act (DOMA), which defined marriage as the union of a man and a woman—with the consequence that, for example, the applicant did not qualify for exemption from the federal estate tax—was struck down for violating the Fifth Amendment's guaranty of due process as a result of the deprivation of the equal liberty of persons.[119] Second, in *Hollingsworth v. Perry*, the U.S. Supreme Court rendered a final judgment supporting the 2010 judgment of the California Supreme Court.[120] In *Windsor*, the Court ruled that the liberty interest protected by the Fifth Amendment required that law's main purpose could not be signaling that same-sex marriage was less worthy than heterosexual marriage.[121] The judgment's debate on the definition of marriage is particularly relevant. As Justice Kennedy observed in his opinion, marriage is not merely a question of individual liberty and the right to privacy; it reflects the dignity both of couples and their children.[122] The judges were very much divided and left many questions unresolved. For example, do same-sex couples have a constitutional right to marry? As a result, may a state legitimately prohibit same-sex marriage? What standard of review should be adopted for sexual orientation discrimination cases—rational-basis or strict scrutiny?

This case law shows that the debate in the United States was still open. For example, in *Kitchen v. Herbert*, an amendment to the Utah Constitution was found to violate due process and equal protection.[123] Just as in *Loving*'s right to interracial marriage, so same-sex marriage was to be considered a specific aspect of the fundamental right to marry—

[118] *See Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1274 (1980).

[119] *See* United States v. Windsor, 133 S. Ct. 2675 (2013).

[120] *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[121] *Windsor*, 133 S. Ct. at 2695–96.

[122] *Id.* at 20.

[123] *See* Kitchen v. Herbert, 2013 WL 6697874 (D. Utah, Dec. 23, 2013).

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but a rational-basis, instead of a strict scrutiny standard, was applied.[124] Similar conclusions were drawn in *Bishop v. Holder*, *Bostic v. Rainey*, and *De Leon v. Perry*.[125]

Given this precedent, the decision of the U.S. Supreme Court in *Obergefell* in 2015 is perfectly in line with the trend described above.[126] Here, it is in the light of both the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment[127] that the fundamental right to same-sex marriage was upheld with a majority of five judges against four. One interesting aspect of the arguments made before the court was the relevance of marriage itself. The court ruled that the respondents' view—that marriage as an institution would be demeaned if homosexual couples were allowed to wed—was untenable, because the situation of a gay couple is comparable to that of a heterosexual couple, including the characterization of marriage as a keystone of social order.[128] The institution of marriage has evolved over time, and the court claims it, in legalizing same-sex marriage, merely recognized this state of affairs. [129]

C. Narratives from Two Worlds

Many perspectives might aid an attempt to grasp the factors that produce socio-legal change as well as the circumstances that favor or prevent it. Two main perspectives may be distinguished. The first perspective is discursive and allows us to examine two types of narratives in particular; one legal, one extra-legal.

The first, principally legal type of narrative, frequent in pro-gay rights actors' speech acts, plays along republican tenets and the "we" approach, stating that "they are like us," or that "they also prioritize community values, like the family." There are two spheres of normativity in this type of narrative; the private and the public. The private sphere takes into account privacy and family life, whereas the public sphere employs arguments related to non-discrimination, equality, and due process.

The second, extra-legal type of narrative, employed mostly by anti-gay rights actors plays along an inclusion and exclusion line of reasoning, stating "they are not like us," or "us and

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[124] *Id.* at 20.

[125] *See* Bishop v. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); De Leon v. Perry, 975 F. Supp. 2d 632 (W. D. Tex. 2014).

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

[127] *Id.* at 2591.

[128] *Id.*

[129] *Id.* at 2593–94.

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them." In this category, three spheres of normativity, each with its own distinctive sets of values, emerge: (1) Morality and religion, emphasizing traditional marriage; (2) social, focusing on children's welfare; and (3) economic, relying on fiscal burden.

The two categories of narratives recur on a regular basis in U.S. case law and as part of the overall strategies U.S. courts use to address the issue of same-sex marriage.[130] In *U.S. v. Windsor,* the two categories of narrative draw close to each other.[131] On the one hand, the majority emphasized not just privacy and family life, but also dignity, all with related extra-legal layers of meaning. On the other hand, the minority stopped using overtly strong language, which previously associated same-sex relationships with illegality and immorality.[132] In *Obergefell,* the debate revolved mainly around a court's right to change a long-established institution like marriage, which responded to the vital need to ensure that children were born and raised in a stable and safe environment by a father and a mother. While the dissenting opinions denied that the court could hold such a right, arguing such a judicially created right would violate a sort of "law of nature,"[133] the majority referred to the liberal-democratic principles of the U.S. Constitution, which would allow such right.

In Europe, by way of contrast, narratives focus mostly either on social benefits and equal treatment of comparable situations—such as with the CJEU—or on the concept of family life, as opposed to privacy, and the extent to which same-sex partnerships may be included within such a category—as with the ECtHR. The non-discrimination argument does play a role in the European courts but perhaps with less emphasis than in the United States and with many more limits.[134] This, of course, has relevant practical significance.

The second perspective requires the analysis of social realities. One classic assumption in this inquiry would be that there is a stronger resistance to change in more traditional and religious societies. Individual and collective identities, along with the deep layers of human

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[130] *See e.g. Baker*, 191 N.W.2d at 187. Neither the equal protection nor the due process clause were said to be affected by the statute: Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); United States v. Windsor, 133 S. Ct. 2675 (2013).

[131] *See Windsor*, 133 S. Ct. at 2679.

[132] Adam Joyce, *The Micropolitics of Change in the Battle Over Gay Marriage* (APSA 2013 Annual Meeting Paper, 2013).

[133] *See Obergefell*, 135 S. Ct. 2584 (dissenting opinion of Justice Roberts, with whom Justice Scalia and Justice Thomas join).

[134] *Id.* at 2593–604.

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psyche, reflexivity, and societal self-organization, all contribute to family relations. Growing in a family, according to standard values and conventions, is itself a value because that growth is a mechanism that enhances security and stabilizes societies. As mentioned earlier in this article, one could argue that the institutionalization of marriage, including same-sex marriage, is not really a change, but a consolidation of the old heteronormative scheme of social control that creates the fictitious image of the good, law-abiding married couple, possibly with children.[135] This scheme forms discourses of power that develop along the line of inclusion and exclusion by using the language of fundamental rights. While proclaiming formal equality, they actually reestablish traditional distinctions between the "normal" and the "other." Many factors influence processes of isomorphism or institutional homogenization, including power and competition, which can create either convergence or divergence.[136]

Patterns of change in European countries seem to confirm the classic assumption that there is more resistance to change in traditional societies. Most northern European countries, where societies tend to be more secularized and less traditional, have institutionalized homosexual partnerships in one way or another, whereas most southern and eastern European countries have not. And yet, there are some notable exceptions; Hungary, Slovenia, the Czech Republic, and Croatia have enacted legislation on civil unions, and Spain and Portugal have legalized same-sex marriage.

D. Europe and the United States: Differing Shades of Change

One important question that needs to be addressed is why change has occurred so rapidly. Comparing Europe and the United States may provide some help. We need to understand at least some of the factors that prompted such rapid change. Both the EU and the United States may be described roughly as forms of multi-level governance. While the U.S. is a federalist structure between the federal government and its semi-autonomous states, the EU is characterized by a complex interaction between the EU institutions, the ECHR, and Member States' legislation and policies.[137]

Starting from the 1990s, there are two distinguishable periods of development of same-sex marriage recognition in Europe and the United States. Two aspects should be emphasized: First, the passage from one period to another is marked by landmark rulings of influential

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[135] *See* Chrys Ingraham, *The Heterosexual Imaginary: Feminist Sociology and Theories of Gender*, *in* QUEER THEORY/SOC. 168 (S. Seidman ed., 1996).

[136] *See generally* Jens Beckert, *Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change*, 28 SOC. THEORY 150 (2010).

[137] *See* ALEC STONE SWEET, A EUROPE OF RIGHTS—THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Helen Keller eds., 2008).

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courts; second, the changes in the second period took place at an increased speed. In Europe, the first significant turn took place at the end of the 1990s with the ECtHR decision *X, Y and Z v. UK* and the second took place in 2004 with the *Schalk and Kopf* decision[138]. In the U.S., the Hawaii Supreme Court delivered the first landmark decision ruling in the mid-'90s (*Baher v. Lewin*[139]) and the second with the Supreme Court's *US v. Winsdor* decision in 2013.[140]

Several factors contribute to the rapid change of pace in the second period. One may have been a sort of diffusion and imitation effect, in the sense that relevant foreign legislative and judicial steps encouraged similar steps at the domestic level. Imitation occurred because of the need not to lose ground or fall behind other courts or legislative actors as being "human rights guarantors." In fact, "actors may use institutionalized rules and accounts to further their own ends, seeking legitimation for changes that enhance their prestige and power."[141] Another factor may be the rapid shift in public opinion in recent years. Large percentages of the population, mainly young people, have turned in favor of homosexual rights in general.[142] A third set of factors may be the "coming-out" of important public figures, the positions explicitly taken by intellectuals, and the role of arts in shaping public perception of issues in the homosexual community.[143] In this context, the role of agency is particularly important.

I. The Existence of a Transnational Institutional Framework

One can draw parallels between the United States and Europe in the same-sex marriage saga. At the same time, their two different socio-political realities need to be contextualized.

From a transnational law perspective, cross-fertilization is an interesting phenomenon, although it takes place in various shapes. Countries differ as to their level of reception of

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[138] *See Schalk and Kopf v. Austria*, App. No. 30141/04 (June 24, 2010), http://hudoc.echr.coe.int/.

[139] *See* Baher v. Lewin, 852 P.2d 44 (Haw. 1993).

[140] *See Windsor*, 133 S. Ct. 2675.

[141] Walter W. Powell, *Expanding the Scope of Institutional Analysis*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 183, 194 (Walter W. Powell & Paul J. DiMaggio eds., 1991); *see also* DiMaggio & Powell, *infra* note 148 (discussing the concept of "isomorphism").

[142] *E.g.* PEWRESEARCHCENTER: RELIGION & PUBLIC LIFE, www.pewforum.org (last visited June 8, 2016).

[143] Andrew Roberts, *Shifting Attitudes on Homosexuality*, 61 HIST. TODAY 10 (2011).

international legal principles—for example, with the principle of non-discrimination.[144] Yet, the existence of a transnational institutional framework, such as the EU or the ECHR, allows greater penetration into the texture of Member States' domestic policies and legislation. The influence of the CJEU and the ECtHR has been particularly strong over the most recent decades.

European Parliament (EP) recommendations and EU-level networks of lobbying activists have prepared the ground for significant changes in some of the Member States, for example. In addition, some politicians at the national and local level have explicitly supported the recognition of gay unions in one way or another. This support has been a feature of both left-wing and right-wing coalitions and electorates and has sometimes been presented as a compromise between traditional family values and individual rights.[145]

II. The Role of Agents

Historians, comparative lawyers, sociologists, and anthropologists alike often agree that law influences society.[146] The way law contributes to, and is in turn shaped by, society is not always clear. Nor is it always clear to what extent various actors contribute to change and why. Furthermore, changes in society occurs at different levels, affecting roles and images, discourses and ideologies, or vocabularies and actions. Law as a domain of practical reason operates in a given context, and it is always instructive to investigate the factors that prompt social change, such as interaction between different societies, the rise and fall of social movements, and the rapid pace of technological development. For example, modern western cultures are subject to a high rate of social change.[147]

Some areas of law may be subject to change more quickly or easily than others. Institutionalized practices and processes tend to resist change because it might be costly, difficult, or might not lead to a visible outcome in the long term. When change does take

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[144] Brenda Cossman, *Migrating Marriages and Comparative Constitutionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 209 (Sujit Choudry ed., 2006).

[145] For example, in Italy, recent polls suggest that support for civil partnerships has been increasing among voters of almost all parties represented in Parliament. *See Unioni gay: Berlusconi apre alla proposta Renzi: La legge alla tedesca e' il giusto compromesso*, LA STAMPA (Oct. 23, 2014); G. Dupont, *L'adoption par les couples gays divise les Français*, LE MONDE (Nov. 7, 2012), http://www.lemonde.fr/societe/article/2012/11/07/l-adoption-par-les-couples-gays-divise-les-francais_1786973_3224.html.

[146] SIMON HALLIDAY & PATRICK SCHMIDT, CONDUCTING LAW AND SOCIETY RESEARCH—REFLECTIONS ON METHODS AND PRACTICES (2009); BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001); HERBERT H. WILSON, THE RELATIONSHIP OF HISTORY TO THE STUDY AND PRACTICE OF LAW, TRANSACTIONS AND REPORTS 5 (1887).

[147] *See e.g.* Ronald F. Inglehart & Wayne Baker, *Modernization, Cultural Change, and the Persistence of Traditional Values*, 65 AM. SOC. REV. 19, 40-42 (2000).

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place, it might be episodic or cause counterproductive reactions.[148] Family law, for example, is often quite resistant to change.[149] Not only is it an area of State sovereignty with its own complex set of normative rules intertwined with rules of various other branches of both public and private law, but family itself is a basic institution deeply rooted in traditions, customs, and values—a key mechanism of social engineering.[150] Because of the affective, cultural, and economic implications of the institution of family, law has always played a delicate role in its regulation. Some post-war scholars, for example, in Italy, emphasized the meta-legal nature of the family and its impermeability to legal intervention, characterizing the family as an "island that the sea of law could only lap against . . . [belonging] to the world of affections, primal instincts, morality, religion, not to the world of law."[151]

The emergence of new models of family, the reconfiguration of gender issues, and the alteration of entrenched social hierarchies have posed serious challenges to law, with the law lagging behind these developments. The evolution of the institution of family and the debate on heteronormativity are emblematic of this.[152] It is interesting to analyze the change of pace in legal terms. Why has same-sex marriage emerged as a relevant public debate issue in recent years, why has it happened so quickly, and where is this debate leading? Academic circles provide many explanations, and their theories lump roughly within two broad approaches: Determinism and constructivism.

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[148] *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63 (Paul J. DiMaggio & Walter W. Powell, eds., 1991).

[149] *See e.g.* CLAIRE YOUNG & SUSAN BOYD, CHALLENGING HETERONORMATIVITY? REACTION AND RESISTANCE TO THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS IN REACTION AND RESISTANCE—FEMINISM, LAW AND SOCIAL CHANGE 262 (D.E. Chunn ed., 2007).

[150] *See generally* COLIN ROSSER & CHRIS HARRIS, THE FAMILY AND SOCIAL CHANGE—A STUDY OF FAMILY AND KINSHIP IN A SOUTH WALES TOWN (2003).

[151] CARLO A. JEMOLO, 'LA FAMIGLIA E IL DIRITTO,' ANNALI DELLA FACOLTÁ DI GIURISPRUDENZA DELL'UNIVERSITÁ DI CATANIA 57 (1948) (my translation). Original Italian: "La famiglia appare sempre . . . come un' isola che il mare del diritto può lambire soltanto . . . la famiglia è la rocca sull'onda, ed il granito che costituisce la sua base appartiene al mondo degli affetti, agl'istinti primi, alla morale, alla religione, non al mondo del diritto."

[152] *See* Paul Johnson, *Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority*, 20 SOC. AND LEGAL STUD. 349 (2011). "Heteronormativity" is "the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent . . . but also privileged." *See* Lauren Berlant & Michael Warner, *Sex in* Public, 24 CRITICAL INQUIRY 547 (1998).

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III. Legal Determinism

Determinism exists in two major strands. A first strand of legal determinism relies upon the constitutional principles of liberty, equality, and dignity. These determinists believe that, whether one phrases arguments in terms of equal protection or fundamental rights, one should admit that a faithful reading of liberal-democratic constitutions should lead inevitably to the recognition of all same-sex marriage rights.[153] This pro-gay discourse places too much trust in the language of fundamental rights, as if the ideals of human progress and civilization evolve naturally from virtuous hermeneutics. This thinking amounts to little more than dressing wishes up in academic clothing.

A second deterministic strand elaborates a clear-cut pattern of legalization of same-sex marriage. These determinists believe that this legalization will not happen by chance, but instead follows a sort of quasi-causal chain of events that will eventually produce similar outcomes across the world. Rather than a random sequence of case law and legislation, an incremental process and its stages can be predicted as if it were a law of nature.

Scholars argue that the legalization of same-sex marriage will always occur in three steps, subdivided into sub-steps, each a prerequisite to the next: (1) The decriminalization of sodomy and equalization of the age of consent; (2) the prohibition of sexual discrimination, and (3) finally, legislation allowing registered partnerships, civil unions, or marriage.[154] The Netherlands, the first country in the world to legalize same-sex marriage, is an instructive case study. Its legal-cultural features such as a high level of secularization, respect for minorities, and an indirect democratic system seems to be able to keep populism at bay.[155] Other European countries are developing similarly, including the United Kingdom and Romania, but these societies require either that change be ostensibly small—emphasizing, for instance, rules on immigration, state pensions, social security, or fiscal policy—or that change be introduced along with a counter-weight, such as a legislative amendment that

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[153] *See* Martha Nussbaum, *A Right to* Marry, 98 CALIF. L. REV. 667, 688 (2010); Laurence H. Tribe, *Lawrence v. Texas, The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Laurence H. Tribe, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471 (2012); Deborah Hellmann, *Marriage Equality: A Question of Equality Rather Than Liberty*, SCOTUSBLOG (Aug. 26, 2011), www.scotusblog.com/2011/08/marriage-equality-a-question-of-equality-rather-than-liberty.

[154] *See* Kees Waaldijk, *Standard Sequences in the Legal Recognition of Homosexuality—Europe's Past, Present and Future*, 4 AUSTL. GAY AND LESBIAN L. J. 50 (1994); Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Adenas, eds., 2001) [hereinafter Waaldijk, *Small Change*]; Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569 (2004).

[155] See Waaldijk, *Small Change*, *supra* note 154, at 439.

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pulls in the opposite direction.[156] Another path to change can be seen by comparing the United States and Europe, which reveals legal differences such as the lack of laws at the federal level which prohibit discrimination on the basis of sexual orientation in the United States.[157] According to the proponents of the "small change" or "necessary process" theory, claims must not be merely descriptive, but also normative, because the path of full recognition of same-sex marriage must eventually be seen, by the various countries in the world, as a path towards enlightenment.[158] Before this can happen, "[b]road recognition in the form of registered partnership or civil union—not merely a version of U.S. domestic partner schemes as currently construed" must be permitted before enacting same-sex marriage legislation.[159]

The theory of small change is attractive but not entirely convincing. As a pseudo-scientific theory, it smacks of immodesty; it fails to find reassuring and well-tested schemes to explain contemporary phenomena. Aside from a few cases, mentioned below, there is little empirical or statistical data to support this approach's allegedly universal applicability. Moreover, some aspects of this theory seem to contradict its premises—for example, while the theory presumes that political and legal strategies are necessary for the perpetuation of the process, it mentions several significant exceptions, including Germany, Hungary, and Portugal, which lack such strategies.[160]

In other words, first, the focus seems limited mostly to northern Europe, especially the Nordic countries and the Netherlands; second, it underestimates the roles of agency, subjectivity, and chance. Even some legal determinists concede that the unpredictability of human events should not be underestimated because "depressions, wars, and technological developments . . . can derail this train of legal innovation,"[161] adding that "law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law."[162]

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[156] *Id.* at 440–41.

[157] YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 324 (2002).

[158] *Id.* at 327.

[159] *Id.* at 333.

[160] *See id.* at 330; Waaldijk, *Small Change*, *supra* note 154, at 447.

[161] William N. Eskridge, *Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition*, YALE L. SCH. FAC. SCHOLARSHIP SERIES 641, 655 (2000).

[162] WILLIAM N. ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 115 (2002).

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In addition, the consequentiality of progressing from civil unions to same-sex marriage is contested. Legal determinism's glorification of rapid change and unstoppable progress is, at best, unduly optimistic.[163] It does not take into account the complexity of social events, given that "each step [towards change] might require significant political mobilization and could generate increasing practical and symbolic opposition."[164] Due to the number of political, cultural, social, and historical factors at play, "the law of small change and its variant seem in some ways more like a political-legislative strategy for the gay and lesbian social movement."[165]

As a result, some scholars, taking their cue from theoretical and empirical studies on institutional economics, political science, and sociology, suggest that an "efficiency-conflict" approach is more suitable because it would better reflect how material change occurs.[166] The efficiency-conflict approach conceptualizes marriage as an efficiency-enhancing institution that is more likely than other institutions to attract same-sex couples who seek to reduce transaction costs while retaining social and political bargaining power. This means that where pro-gay marriage groups gain political power, recognition of gay rights is easier, although gay social movement organizations might be less inclined to promote change when the material importance of marriage is lower. These refined—ostensibly more realistic—approaches have merit. Yet, some key differences, such as the role of courts, the weight of social movements, and the meaning of marriage, vary from country to country and demand caution. Consequently, a small change in one context may instead be a big change in another context. Moreover, these nuanced versions of legal determinism contain inaccuracies and fail to consider that the recognition of marriage may only be considered a final goal of homosexual rights if the society in which it is being sought considers it as being particularly important.[167]

IV. Constructivism

The constructivist approach, on the other side of the spectrum, emphasizes the importance of discursivity. Discursivity and subjectivity are not separate, however. There is

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[163] *See generally Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex marriage in the United States and Europe*, 116 HAR. L. REV. 2004 (2003).

[164] M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience to the United States*, 17 YALE J.L.& FEMINISM 71, 75 (2005).

[165] *Id.*

[166] *Id.* at 76–80.

[167] Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. OF GENDER L. & POL'Y 105, 138, 155 (2010).

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no "all-powerful subject" within the discursive fields. Rather, the subject is situated within, and is a function of, the social, political, and legal environment of modern societies. All "discoursing subjects form part of a discursive field" and "discourse is not a place into which subjectivity irrupts; it is a space of differentiated subject-positions and subject-functions."[168] In the context of same-sex marriage the discursive field has varied across the years and the agents' activity is necessarily influenced and constrained by social, political and legal factors.

In the United States, scholars maintain that the shift from the traditional marriage paradigm exemplified by *Bowers v. Hardwick*, to the rights of married couples paradigm exemplified by *US v. Windsor*, took place because of a change in different public discourses. In classic constructivist parlance, this ongoing process is the result of the mutual and gradual constitution of agents and paradigms.[169] A new paradigm would not replace the old one abruptly, but elements of both would be expressed in the Supreme Court's majority and minority opinions. A re-conceptualization of homosexuals in American society would be accompanied by a redefinition of marriage as not merely being a part of the right to privacy, but also the right to dignity. Therefore, both structure and agency influence the development of same-sex couples legislatively. Family, as an institution and by nature, constrains future changes. Activists, campaigners, media pundits, lobbying groups, and courts act as agents.

The strategies that agents employ are key to promoting change. Starting with *Lawrence v. Texas*, the leading strategy has moved away from libertarian undertones and focused instead on a family-oriented representation of homosexual partnership.[170] The permeation of this representation throughout a society is dependent on these agents. In *Lawrence v. Texas*, for example, family life was configured as the prerequisite for a fully-fledged right to privacy.[171]

Other scholars prefer to rely on literature that tracks the dialog between movement and counter-movement, arguing that the emergence of same-sex marriage is the product of a

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[168] MICHEL FOUCAULT, POLITICS AND THE STUDY OF DISCOURSE IN THE FOUCAULT EFFECT—STUDIES IN GOVERNMENTALITY 58 (Graham Burchell, Colin Gordon, & Peter Miller eds., 1991).

[169] Joyce, *supra* note 132.

[170] *Id. at* 33.

[171] *See* Paul M. Smith, Transcript of Oral Argument at 23, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Charles A. Rosenthal, Transcript of Oral Argument at 35, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Stephen Breyer, Transcript of Oral Argument at 37, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

move from a dual type of interaction between movement and counter-movement organizations to a dynamic triangular type of interaction which includes grass-root supporters as well as the political elites.[172] From this perspective, local administrator actions, such as the administration of marriage licenses, and not just court decisions, constituted a "political opportunity structure" that prompted pro-gay activists to put same-sex marriage at the top of their agenda.[173] In addition to the institutional factors that accelerate this process, the so-called "anticipatory counter-mobilization" used by homosexual rights opponents also played a prevalent role.[174]

Importantly, the role of courts in promoting policy change cannot be discounted. The diffusion of discourses in favor of same-sex marriage did not take place only at the domestic level; international courts also had tremendous influence. In countries with low public support for homosexuality, ECtHR rulings can be very influential in affecting policy change. The ECtHR's effectiveness, however, is subject to the presence of favorable political and institutional conditions.[175] Some commentators warn that courts should not go too far ahead of public opinion, and that change always has to be slow and so that innovations have time to be accepted.[176] Be that as it may, other commentators believe that cross-fertilization among the courts of the world leads to a "global judicial community," which is more prevalent than in the past due to factors such as the amount of available information, political motivation, and, more generally, globalization.[177]

Similarly, lawyering has an important influence on policy change. On a wavelength similar to those theories emphasizing the dialectic between movements and counter-movements, many proponents of the so-called "backlash theory" maintain that lawyering, litigation, and, in particular, winning cases, do not necessarily have positive effects because they trigger counter-mobilization reactions and make it harder for gay rights activists to

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[172] *See* Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 LAW & SOC. INQUIRY 449 (2014).

[173] *Id. at* 462.

[174] *Id.* at 463.

[175] For example, national courts need to be ready to declare legislation invalid if it is found incompatible with the ECHR. Additionally, within the state, religious, nationalist, or rural party powers need to be relatively weak. *See* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

[176] *See* Lawrence Friedman, *Not the Usual Suspects: Suspect Classification Determinations and Same-Sex Marriage Prohibitions*, 50 WASHBURN L.J. 61, 74 (2010).

[177] *See generally* ANNE M. SLAUGHTER, A NEW WORLD ORDER (2004) (stating that cross-fertilization would take place not merely through mutual citation, but also, for example, through exchange of practices and regular meetings, for example between members of the U.S. Supreme Court and members of European courts.).

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promote change.[178] These approaches have a narrow view of social change. Not only is the evidence about the causal link between litigation and backlash contested, the backlash theory fails to connect litigation with the wide range of strategies that may be adopted by promoters of change. A multidimensional, fuller analysis may reveal that, although outcomes are difficult to predict, litigation is one of the relevant factors that should be accounted for.[179] Lawyering for causes is not a neutral activity that stands outside of the political arena. Rather it is a political and social practice.[180]

As seen above, the effect of policy-making within supra- or transnational institutions should also not be underestimated. Activists, including the International Lesbian and Gay Association (ILGA), employ the language of human rights to push their cause forward at the international level. According to some qualitative analyses, "transnational networks," such as the ILGA, affect national policies in three ways: by (1) setting national agendas, (2) facilitating elite learning, and (3) harmonizing policies within supranational organizations.[181] The perception that international norms are somehow more legitimate than domestic norms plays a relevant role in this process.

Finally, political leaders and members of political parties play an important role too. Unfortunately, most political leaders tend to be cautious and show their explicit support only when the public opinion is clearly in favor of some form of recognition of rights.

V. Discourses and Contexts

Law has a lot to do with discursivity, and, consequently, the promotion of change. Agents, although they are not necessarily aware of it, have a key role in promoting narratives and counter-narratives. Their contributions are part of a general scheme which follows no pre-determined path. The perspective adopted in this Article is both (1) ontological and (2) epistemic. (1) It is ontological because interests and power are very much shaped by identities and ideas. In the same-sex marriage saga, belonging or no belonging to a group, being represented or not being represented as family are crucial elements of the discourses of all agents involved. (2) This Article's perspective is epistemic because agents

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[178] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (2008); Michael J. Klarman, *Brown* and *Lawrence (and Goodridge*), 104 MICH. L. REV. 431, 452–482 (2005).

[179] *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010).

[180] *See generally* CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006); THE POLITICS OF SAME-SEX MARRIAGE (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

[181] Kelly Kollman, *Same-Sex Unions: The Globalization of an Idea*, 51 INT'L STUD. Q. 329, 340–42 (2007).

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shape their identities and ideas—such as the promotion of certain rights, for example, homosexual rights—partially through institutionalized meanings, i.e. meanings that can be derived from the institutions present in their societies. Normative institutional structures change and inter-subjective interpretations affect their evolution. The context where epistemic interactions take place is also important—it provides the platform for shifts in meaning, such as the definition of family or marriage. The stage is always set but, even if supreme courts or influential politicians are ready to step forward and play their part, their success is not guaranteed. Both in Europe and in the United States, the change in the definition of family and marriage has taken a long time and has not occurred across the states in a uniform way.

Yet, at some point, the pace of transformation increases as concurring factors appear, and the audience becomes more receptive—as observed, for example, after the landmark rulings of the United States Supreme Court (*US v. Windsor*) and the ECtHR (*Schalk and Kopf*). It is a circular, self-generating process; the very institutionalization of this process, through practices, codification, narratives, and political games contributes to the change itself.

In reality, it is not easy to detect and explain the dynamics of social and legal change. Small, seemingly insignificant moves may create ripple effects later on, or vice versa; what initially seems to be a revolution can turn into a modest innovation or even create resistance to innovation.[182] It is because of this unpredictability that normative claims made by agents may lie dormant for a long time before resurfacing in unexpected forms.

This dynamic can be seen in the attitudes of communities throughout Europe and the United States when it comes to same-sex rights and marriage.

One reason for the emergence of same-sex marriage as a dominant issue in public debates in recent decades is the socio-political context in which it has taken place. Contemporary developments of the liberal paradigm have shifted towards a more individualistic society, emphasizing the promotion and satisfaction of individual claims and the rights of marginalized groups. From this perspective, social agents have an important but limited role. No individual agent can present universal claims: yet, these claims may sometimes be successfully presented as different. Pluralism is not merely something that may be acknowledged by liberally-oriented minds, but must be a constitutive feature of democracies; unanimity and homogeneity are always "fictitious and based on acts of

[182] For example, despite the signing and entry into force of the UN Convention Against Torture (1984 and 1987 respectively), practices of torture in the world continue and some countries have failed to introduce the specific offence of torture in their criminal codes. One may also look at the constitutional developments following the so-called "Arab Spring" (2010–2012) with disenchanted eyes.

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exclusion."[183] Pluralism thus gives strength to different non-mainstream political and social claims precisely because they are different. This, however, does not give us a full picture of how same sex marriage came about.

Another factor propelling same-sex marriage to the top of policy priorities is globalization, which facilitates the flow of information and the impact of social events across the world. It is true that the dominant paradigm in two regions of the world, the EU and the United States, has facilitated change towards recognizing same-sex marriage. At the same time, one should not forget that the EU and the United States are the same regions where, until a few years ago, homosexual marriage was banned and, in some cases, homosexuality was criminalized. Therefore, change requires more than the existence of a formal liberal framework; it is the dominant moral, cultural, or social paradigm that ultimately promotes or impedes change.

E. Conclusion

A review of the socio-legal dimension of change in modern societies reveals the weaknesses and contradictions of the liberal paradigm, as illustrated by the progressive legalization of same-sex marriage throughout most of EU and the United States. Shifting structures of power in society determine change. Variations in one specific socio-cultural landscape may spill into other contexts resulting in a ripple effect. This phenomenon takes place through the development of human rights as discourses of power.

This Article also claims that, when analyzing change, legal deterministic theories, by themselves, provide an unsatisfactory explanation factors that affect change. Constructivist approaches look promising, because they focus on the combined effect of structure and agency. Still, constructivism underestimates both the relevance of unpredictable events and the influence—positive or negative—that transnational frameworks have in forming discourses of power. True, the EU and the ECtHR systems may diffuse ideas and norms across legal systems that derive directly from the liberal paradigm. In reality, however, the liberal paradigm does not necessarily promote individual rights, but may actually undermine them under a guise of formalism, as is the case with the principle of non-discrimination.

Courts in different socio-cultural landscapes, such as the United States and Europe, show parallel trends towards recognizing same-sex marriage. In both cases, a complex variety of

[183] CHANTAL MOUFFE, DEMOCRACY, POWER AND THE "POLITICAL" IN DEMOCRACY AND DIFFERENCE—CONTESTING THE BOUNDARIES OF THE POLITICAL 245, 246 (Seyla Benhabib ed., 1996).

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factors drive social and legal change. Nevertheless, development patterns in courts, advocacy, media campaigns, and social movements provide some explanation as to why this trend of recognizing same-sex rights is occurring now, and above all, why it has occurred so rapidly.

Legal determinism, however reassuring and solid it may appear, does not offer an adequate or reasonable explanation for this trend either. From a constructivist perspective, largely well-concocted strategies and collective action, gradual openings in courts' rulings, the multiplying effect of media attention, political opportunism, and the influence of transnational networks and supranational institutions have all led to the recognition of same-sex marriage and civil partnerships. They are part of a set of overlapping discourses that infiltrate contemporary society, pushing both rule-makers and rule-interpreters to make decisions recognizing same-sex marriage.

Contemporary globalization and the liberal paradigm have created in the particular case of same-sex marriage a favorable context for change because they position individual choice as the motivator of social progress. In other words, good trees have brought good fruit. Yet, when looking at discourses operating in liberal societies, some ambiguity remains. As the development of same-sex marriage case-law in Europe shows, the liberal paradigm allows for conditions that may simultaneously impede or promote the institutionalization of same-sex marriage, depending on societal factors that are independent from the political framework. As the dominant heteronormative scheme shows, the liberal agenda often masks authoritarian mechanisms of power distribution.