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Transforming Family Law Through Same-Sex Marriage: Lessons from (and to) the Western World

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TRANSFORMING FAMILY LAW THROUGH SAME-SEX MARRIAGE: LESSONS FROM (AND TO) THE WESTERN WORLD

MACARENA SAEZ*

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The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹

You either break the paradigm, or the paradigm will break you.²

INTRODUCTION

While the topic of same-sex marriage has generated a lively academic debate,³ there is a lack of transnational comparative analysis of arguments

1. *W.Va. State Bd. Of Educ. v. Barnette*, 319 US 624, 638 (1943).

2. A Colombian mother, Ms. Marta Lucia Cuellar, advocating before the Colombian Congress on behalf of marriage equality, *YOUTUBE* (Apr. 18, 2013), http://www.youtube.com/watch?v=kXx7BhNrIO0&feature=player_embedded.

3. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996) [hereinafter *ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE*]; *SAME-SEX MARRIAGE: PRO AND CON* (Andrew Sullivan ed., 2004); JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* (2012). Outside the United States, European scholars have written extensively about the development of same-sex marriage in that region. *See, e.g.*, *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW*, (Robert Wintemute & Mads Andenæs eds., 2001); *CONTEMPORARY GENDER RELATIONS AND CHANGES IN LEGAL CULTURES* (Hanne Petersen, Jose María Lorenzo Villaverde & Ingrid Lund-Andersen eds., 2013); JENS RYDSTRÖM, *ODD COUPLES: A HISTORY OF GAY MARRIAGE IN*

commonly made by courts when granting same-sex couples access to marriage.⁴ Courts formulating decisions about same-sex marriage have the unique opportunity to reevaluate the privileged legal position of marriage in light of current constitutional or fundamental rights.⁵ As the number of claims about inclusion or equal recognition of unmarried couples grows, challenges to the rationality of marriage as a privileged institution become more relevant. Some courts understand that it is not possible to protect traditional notions of marriage without discussing the rationality of marriage as the institution that defines the types of families we ought to protect.⁶ Once marriage is reviewed through the lenses of equality and

SCANDINAVIA (2011). And rather recently, there is some literature on same-sex marriage in Latin America. *See, e.g.*, SAME-SEX MARRIAGE IN LATIN AMERICA: PROMISE AND RESISTANCE (Jason Pierceson, Adriana Piatti-Crocker & Shawn Schulenberg eds., 2013). In recent years there has been more literature looking internationally to the same-sex marriage debate. *See, e.g.*, MAN YEE KAREN LEE, EQUALITY, DIGNITY, AND SAME-SEX MARRIAGE: A RIGHTS DISAGREEMENT IN DEMOCRATIC SOCIETIES (2010); KELLY KOLLMAN, THE SAME-SEX UNIONS REVOLUTION IN WESTERN DEMOCRACIES: INTERNATIONAL NORMS AND DOMESTIC POLICY CHANGE (2013); SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014).

4. Several articles analyze decisions individually. *See, e.g.*, Alejandro Madrazo & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEX. L. REV. 1863, 1883–84 (2011); Daniel Bonilla, *Same-Sex Couples in Colombia: Three Models for Their Legal and Political Recognition*, in SAME-SEX MARRIAGE IN LATIN AMERICA: PROMISE AND RESISTANCE, *supra* note 3, at 111; Mauricio Albarracín Caballero & Juan Camilo Rivera Rugeles, *Jurisprudencia Fuera del Closet* [Case law out of the Closet], in CICLO ROSA DIEZ AÑOS: LECTURAS SELECTAS DE UN ESPACIO PARA LA DIVERSIDAD SEXUAL Y DE GÉNERO (José Fernando Serrano ed., forthcoming 2014), available at <http://www.scribd.com/doc/113120891/Malbarracin-Jrivera-Jurisprudencia-Fuera-Del-Closet-Final-October-2013-3>; Adilson José Moreira, *We are Family! Legal Recognition of Same-Sex Unions in Brazil*, 60 AM. J. COMP. L. 1003 (2012).

5. *See* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 25 (2010) (“A number of decisions that are not about lesbian and gay rights have fundamentally shaped the Court’s conception of families and love.”); Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1209–14 (2010) (making a similar argument about how the U.S. Supreme Court reshaped marriage through its sex discrimination jurisprudence); *see also* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 122 (2010).

6. The first decision on same-sex marriage by the Mexican Supreme Court is a good example:

[W]hat is constitutionally established is the protection of the family—its organization and development—leaving to the legislature to guarantee it in a way that specifically leads to its promotion and protection by the State but without such constitutional protection referring to or be limited to one type of family, such as the nuclear one (father, mother, and children), which would even require that the family was formed exclusively through marriage and that this may be a requirement for the constitutional protection of the family to “proceed.” Therefore, if the Constitution does not exclusively protect the family that comes from or that it is constituted through such institution [marriage], since the protection is to the family, then within a democratic rule of law in which the respect for plurality is of its essence, what must be understood as constitutionally protected is the family as social reality and, therefore, such protection must cover all forms and expressions existing in today’s reality, including those families formed through marriage, through *de facto* unions, by a father or mother with his or her children (mono-parental family), or any other that may represent a similar link.

autonomy rights, it becomes very difficult to justify its privileged treatment *vis a vis* other emotional associations.⁷ Other courts, however, have limited the discussion of same-sex marriage to the right of same-sex couples to access this institution, based on the value of marriage itself.⁸ Such a limitation is only possible when one assumes that marriage and family are one single institution.⁹ This conceptualization of marriage moves the debate on marriage from a normative area designed to recognize and value only the married family, to one based on equality and autonomy in which family law protects differently constructed families. By treating marriage and family as two sides of the same coin, countries are trapped in a rigid family law structure that leaves too many individuals unprotected.

This Article reviews decisions that have made marriage available to same-sex couples in different countries. In the short term, all of these decisions have an impact on the lives of same-sex couples that were denied access to marriage as the defining institution of family formation. In the long term, however, some of these decisions will have a more profound impact on family protection than others. Decisions from countries that have

Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Acción de inconstitucionalidad 2/2010, Novena Época, 10 de Agosto de 2010, *slip op.* (Mex.), available at <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=115026>.

7. See *id.* Even before the struggle for the legal recognition of same-sex couples, autonomy and equality were used to challenge the distinction between married and unmarried heterosexual couples. Individual claims for equal treatment in the area of torts show the tension between privileging marriage and recognizing that unmarried couples may be substantially equal to married ones. The conflict between protecting marriage and accepting the suffering of an unmarried partner as equally worthy of protection as the suffering of a married partner is well reflected in *Graves v. Estabrook*, 818 A.2d 1255 (2003). In many countries, heterosexual unmarried couples were granted benefits similar to married couples before the granting any benefits to same-sex couples. In the case of Australia, benefits to unmarried heterosexual couples started in the 1980s. See HOUSE OF REPRESENTATIVES COMMITTEES, ADVISORY REPORT, MARRIAGE EQUALITY AMENDMENT BILL 2012 AND MARRIAGE AMENDMENT BILL 2012 (Cth) 13 (Austl.), available at http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%20marriage/report/index.htm.

8. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 948 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384, 423 (Cal. 2008). These two cases accept that there is a right to choose who to marry. At the same time, both decisions analyze marriage as an institution essential to the well-functioning of society.

9. *In re Marriage Cases* seems to view marriage as the exclusive door to family formation:

Society . . . has an overriding interest in the welfare of children, and the role marriage plays in facilitating a stable family setting in which children may be raised by two loving parents unquestionably furthers the welfare of children and society It is these features that the California authorities have in mind in describing marriage as the “basic unit” or “building block” of society.

183 P.3d at 423. Many constitutional provisions as well as international conventions refer to marriage and family in the same provision and it is not clear if the intent is to treat marriage and family as one single concept, as two separate concepts, or as two connected concepts where marriage is viewed as a unique door to family formation. For an analysis of marriage and family in constitutional texts and conventions see *infra* Part II.B.

sanctioned same-sex marriage reveal deeper understandings of marriage and family law than just a simple score in favor of same-sex marriage. For example, there are two clear directions in the Western world.¹⁰ On the one hand, there is a movement to keep marriage as the paradigm of family law, maintaining its value as an institution that makes society better.¹¹ This is the direction that some courts, including the Supreme Court of the United States, appear to have taken thus far.¹² On the other hand, there is also a shift away from valuing marriage as the main gateway to family formation, and towards emphasizing the value of alternative social family constructions.¹³ This shift is the natural consequence of decisions based on equality and autonomy, as seen in decisions from Canada, South Africa, Mexico, Brazil, Portugal, Spain, and Colombia.

Further, the decisions analyzed below demonstrate that the arguments brought by parties for and against same-sex marriage are repeated across countries, regardless of cultural differences. They also show comparative law at work. Many decisions outside the United States cite decisions by foreign courts on same or similar topics. Even when foreign decisions are not cited, the briefs and amicus briefs presented to the court reference decisions by foreign courts. There is, therefore, an incontestable influence of foreign decisions when it comes to same-sex marriage litigation.

10. “Western world” can mean different things. In this paper, I use the term, following Harold Berman, as a cultural rather than a geographic term. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 2 (1983). Both Europe and the Americas, however, are also geographically part of the Western legal tradition. At the same time, South Africa has embraced a constitutional system influenced by the Western legal tradition. The influence of Roman-Dutch law in South Africa is well documented. See, e.g., SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 37–45 (Reinhard Zimmermann & Daniel Visser eds., 2012). South Africa’s constitutional law is also influenced by the West, especially by values of equality and dignity post-apartheid. See HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS* 45–82 (2010).

11. See, e.g., Jonathan Rauch, *Gay Marriage is Good for America*, WALL ST. J., June 21, 2008 at A9 (“[A world without marriage] is a world of fragile families living on the shadowy outskirts of the law; a world marked by heightened fear of loneliness or abandonment in crisis or old age; a world in some respects not even civilized, because marriage is the foundation of civilization.”). Many same-sex advocates embraced early on in the struggle for same-sex marriage the argument that marriage was good for same-sex couples because it was good for everyone. See, e.g., Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 855–56 (2014) [hereinafter Franklin, *Marrying Liberty*].

12. See, e.g., *In re Marriage Cases*, 183 P.3d at 425; *Goodridge*, 798 N.E.2d at 948; *United States v. Windsor*, 133 S. Ct. 2675, 2692–93 (2013).

13. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2009); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005).

This Article compares arguments made by courts that have protected same-sex marriage in order to demonstrate to future litigators and judges that expanding the definition of marriage to include same-sex couples can either strengthen marriage to the detriment of families formed outside marriage, or strengthen family diversity without having to sacrifice same-sex marriage at all.

Part I describes the main arguments found in decisions from South Africa, Europe, and the Americas granting same-sex marriage. Despite cultural differences, advocates and opponents of same-sex marriage have used similar arguments in different countries. This shows how courts have reinforced the marriage paradigm by affirming same-sex marriage, while others have granted same-sex marriage by reinforcing the rights to equality and autonomy. This second argument ultimately opens the door to equal recognition of the legal worth of married and unmarried families.

Part II explains why it is problematic to use marriage as the paradigm of family law and legal protection. It shows the current disconnect between families that exist regardless of their legal recognition, and the married family as the aspirational family that legal systems generally embrace and support. This section ends with two illustrations that reveal what happens when courts miss the opportunity to look at social families and conform to a legal structure based on marriage. It demonstrates that when decisions are based on the inherent value of marriage, they may end up ignoring real family ties formed between different individuals.

Part III analyzes the role of judicial borrowing in same-sex marriage adjudication. It shows how the most recent decisions on same-sex marriage use foreign law and international law—even when it is not binding—to support their own local decisions. In this context, comparative law is used in two different ways. First, courts use arguments used in foreign decisions that seem compelling and pertinent to the case at hand. Second, courts use comparative law to illustrate international trends in a particular area. This tendency reinforces the idea that the arguments presented to courts, and ultimately used by courts to support or reject same-sex marriage, may eventually transcend national borders.

Part IV summarizes the two main options for same-sex protection advanced so far by supreme or constitutional courts. On the one hand, there is the possibility of maintaining marriage as the most important institution for family formation, and on the other hand, courts can advance grounds for a new family law based on the rights of equality and autonomy.

Finally, Part V concludes that more courts are basing their decisions to uphold same-sex marriage on equality and autonomy than on marriage as an essentially good institution, although some courts still use the rationale

of marriage as the family law paradigm. Part V also concludes that most courts use the concept of human dignity to support same-sex marriage, although what human dignity means varies from court to court. At the same time, this Article shows that many decisions refer to the need for legal systems to adapt to social realities, which in turn will provide opportunities for unmarried families to be recognized as such. Finally, this Article concludes that comparative law matters to courts reviewing same-sex marriage, and that courts look to one another when deciding these important issues.

I. SIMILAR DISCOURSES ON SAME-SEX MARRIAGE

As of July 2014, same-sex marriage was available in eighteen countries.¹⁴ The shift from marriage as a union between a man and a woman to a union of two individuals regardless of their sex has been the result of legal decisions,¹⁵ or the consequence of a political process.¹⁶ In some cases, recognition has been the result of a legislative change later confirmed by supreme or constitutional courts.¹⁷ In rare cases, recognition has been triggered by courts mandating that legislatures seek a solution for same-sex couples, or rejecting political processes against same-sex marriage.¹⁸

14. Same-sex marriage is available in Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United Kingdom, Uruguay, parts of the United States, and parts of Mexico. On June 18, 2014 Luxembourg's legislature approved same-sex marriage. It will be available in 2015. *See* Loi du 4 juillet 2014 portant de réforme du mariage [Law of July 4, 2014 on the Reform of Marriage], JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG [J.O.] [OFFICIAL GAZETTE OF LUXEMBOURG], July 17, 2014, p. 1798, available at <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&id=6172A#>.

15. Brazil has adopted this approach. *See infra* note 26. For a complete account of decisions in the United States, *see* FREEDOM TO MARRY, www.freedomtomarry.org (last visited Feb. 4, 2015). The Supreme Court of Mexico has also issued three decisions allowing same-sex marriage in the State of Oaxaca, and there are several writs of *amparo* [protection] claiming marriage equality pending throughout the country. Since Mexican decisions only affect the direct claimants, these decisions don't have the effect of overruling the Civil Code's definition of marriage in Oaxaca, or any other Mexican State. Same-sex couples wishing to marry must apply for a marriage license and be rejected. After being rejected, they are eligible to file a writ of *amparo* and wait for a favorable decision. *See infra* note 28.

16. This was the case in Argentina, Belgium, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Uruguay, England and Wales, Luxembourg, the State of Quintana Roo in Mexico (through a mandate of its Secretary of State), and the states of New Hampshire, Vermont, New York, Maine, Maryland, Washington, Rhode Island, Delaware, Minnesota, Hawaii, Illinois, and the District of Columbia in the United States.

17. This occurred in Canada, Federal District of Mexico, Spain, Portugal, and France.

18. *See, e.g.*, Civil Union Act 17 of 2006 (S. Afr.). Colombia's Constitutional Court followed South Africa's model but its Congress failed to follow the Constitutional Court's decision when it rejected a same-sex marriage bill on April 24, 2013. *See* Isabel Colonna, *Plenaria de Senado no*

By the end of 2014, there were more than thirty decisions reasoning that same-sex marriage is either constitutionally mandated or allowed. This Article analyzes eight decisions from state supreme courts or circuit courts in the United States that have resulted in legal marriage for same-sex couples,¹⁹ and *United States v. Windsor*, the United States Supreme Court decision that declared Section 3 of the Defense of Marriage Act (“DOMA”) unconstitutional.²⁰ This Article also analyzes a majority of available decisions from the highest courts in countries outside the United States that provided substantive rulings in favor of same-sex marriage.²¹ In chronological order these are: Canada,²² South Africa,²³ Portugal,²⁴ Mexico (for the Federal District of Mexico),²⁵ Brazil,²⁶ Colombia,²⁷ Mexico (for the State of Oaxaca),²⁸ and Spain.²⁹

respaldo matrimonio Igualitario (Apr. 24, 2013), <http://www.senado.gov.co/sala-de-prensa/noticias/item/16987-plenaria-no-aprobo-matrimonio-igualitario>. In *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), the New Jersey Supreme Court recognized that same-sex couples were entitled to the same rights and benefits as heterosexual couples. Like the Colombian Constitutional Court, the New Jersey Supreme Court gave the legislature the option of amending the marriage statutes or enact a parallel system. *See id.* The New Jersey legislature chose the latter and established a civil union system. In 2013 the New Jersey Supreme Court declared that dual system unconstitutional. *See Garden State Equal. v. Dow*, 82 A.3d 336, 368–69 (N.J. Super. Ct. Law. Div. 2013). California is a combination of change triggered by legal decisions and decisions rejecting political processes against same-sex marriage. *See*; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

19. *See Garden State*, 82 A.3d 336; *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 941 (Mass. 2003); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

20. *See United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

21. I excluded from this analysis the decision by the Constitutional Council of France issued in 2013, since it mostly discusses whether the Constitution would allow the legislature to amend the concept of marriage. *See generally* Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2013-669, May 17, 2013 (Fr.).

22. Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).

23. Minister of Home Affairs v. Fourie 2005 (1) SA 524 (CC) (S. Afr.).

24. S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2^a SÉRIE [D.R.] 28.4.2010, 22367 (Port.).

25. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Acción de inconstitucionalidad 2/2010, Novena Época, 10 de Agosto de 2010, *slip op.* (Mex.), available at <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=115026>.

26. S.T.F., No. 4.277, Relator: Min. Ayres Britto, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 611 (Braz.); *see also* Resolução No. 175, 14 de Maio de 2013, CONSELHO NACIONAL DE JUSTIÇA (Braz.) (basing its decision on the ruling by the Supreme Federal Tribunal and prohibiting public officers from rejecting same-sex marriages).

27. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11, Gaceta Judicial [G.J.] (No. 30) (Colom.).

28. Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo

Decisions on same-sex marriage tend to utilize similar arguments regardless of cultural and legal differences. This Part focuses specifically on three sets of recurring arguments. The first set is composed of pro-marriage arguments centered on the idea that marriage makes society better. These arguments do not challenge the premise that family law should be anchored primarily in the institution of marriage. Rather, they adopt a “conformist” position that accepts the status quo. The second set of arguments centers on the role of equality and autonomy in making marriage available to couples of the same sex. The third recurring argument in these decisions uses dignity as a type of basic constitutional value or right upon which to base the grant of same-sex marriage. Dignity in the context of same-sex marriage decisions has been used to emphasize different constitutional rights or values. For example, South Africa and Mexico use dignity differently from Mexico and Brazil, who in turn differ from the United States Supreme Court’s use of the concept. The combination of equality and autonomy arguments with the concept of dignity provides a new framework for family law that has the potential to transform it by abandoning the marriage paradigm.

A. Reinforcing the marriage paradigm

The first set of recurring arguments assumes that marriage is essentially good for society and individuals.³⁰ The argument advances a pro-marriage perspective that disagrees over who should enter marriage, but nevertheless supports marriage as the paradigm of family formation. Among pro-marriage advocates, some consider heterosexuality central to the view of marriage as an essentially “good” institution, especially as a

en Revisión 581/2012, Décima Época, 5 de Diciembre de 2012 (Mex.), *available at* <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=143969>; *see also* Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo en Revisión 152/2013, Décima Época, 23 de Abril de 2014, *slip op.* (Mex.) (favoring 39 plaintiffs from the State of Oaxaca and declaring the Civil Code unconstitutional for discriminating against gay and lesbian individuals who were afforded protection as a suspect category). This decision, like previous decisions on writ of *amparo*, only benefitted the plaintiffs in this particular case.

29. S.T.C., Nov. 6, 2012, (B.O.E., No. 286, p. 168) (Spain).

30. *See* Franklin, *Marrying Liberty*, *supra* note 11, at 855–56 (providing a brief account of these arguments by advocates of same-sex marriage); *but see* Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Acción de inconstitucionalidad 2/2010, Novena Época, 10 de Agosto de 2010, *slip op.* ¶ 25–183, *available at* <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=115026> (outlining the arguments provided by Mexico’s Attorney General challenging same-sex marriage in Mexico City); *see also* SAME-SEX MARRIAGE: PRO AND CON, *supra* note 3 (summarizing arguments pro and against same-sex marriage by scholars, civil society and religious actors).

precondition to procreation.³¹ Others promote same-sex marriage precisely because marriage as an institution makes society better.³² For both sides, however, marriage remains at the center of family law as an institution that societies should embrace. Although there are some variations, these arguments either assume or eventually conclude that marriage is a good thing for society and for the individuals who enter into a marriage. At its core, this argument represents the idealist view of marriage and its purposes.

The United States has an extensive history of protecting marriage based on an argument advancing marriage for marriage's sake. Three decisions from different periods demonstrate that U.S. courts have treated marriage as vital to the structure of American society.³³ As early as 1888, the Supreme Court in *Maynard v. Hill* stated that marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."³⁴

By the mid twentieth century, the Court maintained its narrative of marriage as essential to American society and the survival of humankind. In *Skinner v. Oklahoma*, the Court declared that "[m]arriage and procreation are fundamental to the very existence and survival of the race."³⁵ Finally, in 1978, the Court affirmed marriage as a constitutional right in *Zablocki v. Redhail*. In *Zablocki*, the Court referred to marriage as a foundational institution: "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in

31. See, e.g., SCJN, Acción de inconstitucionalidad 2/2010, ¶ 93–95; Conseil Constitutionnel, No. 2013-669, ¶ 17; *Varnum v. Brien*, 763 N.W.2d at 882; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 951 (Mass. 2003); *Griego v. Oliver*, 316 P.3d 865, 871 (N.M. 2013).

32. American Foundation for Equal Rights (AFER) was the sponsor of the constitutional challenge to Proposition 8 in California that amended California's Constitution to define marriage as a union between a man and a woman. On their website, AFER states that "[n]o one should be denied the freedom to marry the person he or she loves. Using the latest polling and medical research, AFER has put together the best materials that make the case for *why marriage equality is important and a fundamental right that benefits society*." AM. FOUND. FOR EQUAL RIGHTS, *Resources*, <http://www.afer.org/our-work/resources/> (last visited Mar. 11, 2015) (emphasis added). Among scholars supporting same-sex marriage for the quality of marriage, see ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 3, at 8. Eskridge, however, does not advocate for a monolithic system where marriage should be the exclusive gateway to family formation. See, e.g., William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1890 (2012).

33. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Maynard v. Hill*, 125 U.S. 190 (1888).

34. *Maynard*, 125 U.S. at 211.

35. *Skinner*, 316 U.S. at 541.

our society.”³⁶

1. Conforming to the *status quo*.

Same-sex marriage advocates have employed the argument that marriage is essentially good in order to justify expanded access to marriage. The first paragraph of the Massachusetts Supreme Court’s decision in *Goodridge v. Department of Public Health* leaves no doubt about the value that the Massachusetts Supreme Court ascribed to marriage.³⁷ Writing for the majority, Chief Justice Margaret Marshall began the decision by stating “[m]arriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society.”³⁸ The decision was a full-throated defense of marriage that ultimately extended the right to marry to same-sex couples.³⁹ Several paragraphs were devoted to explaining the benefits of marriage.⁴⁰

Given that marriage in the U.S. is an undisputed constitutional right, the court could not have advocated for same-sex marriage while criticizing an institution placed by the Supreme Court at the top of the family law structure. The Massachusetts Supreme Court, however, had a choice of narrative: one based on equal access to an institution that provides tangible legal benefits to couples, or one based on an idea of marriage as essentially good. The court acknowledged the former when it stated that “[s]imply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution.”⁴¹

This was the cue that would have allowed the court to move away from the marriage paradigm and argue that similarly situated people should have access to the same secular legal creation and the benefits to which married couples are entitled. The focus, then, would have been on discussing whether same-sex couples were indeed similarly situated to heterosexual couples with access to marriage. The court could have further elaborated on the state-created benefits of marriage⁴²

The equal access line of reasoning would have allowed the Court to reach the same holding, while leaving the following chapters of the

36. *Zablocki*, 434 U.S. at 386.

37. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 948 (Mass. 2003).

38. *Id.*

39. *Id.* at 968–69.

40. *Id.* at 955–57.

41. *Id.* at 954.

42. *See id.* at 955–57.

Dworkinian chain novel the option to expand on protections for families formed outside marriage. Instead, the court focused on the need for marriage in society:

Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.⁴³

Only after explaining how important marriage was for society, did the court move to the reasoning for equality.⁴⁴ The decision stated that the Massachusetts Constitution “affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.”⁴⁵ Although the need to affirm the dignity and equality of all individuals may be obvious, it is less clear whether marriage perfects society, or whether it only benefits individuals by providing state-granted benefits.

It is easy to analyze decisions after they are issued and claim that the litigants could have chosen a different strategy. *Goodridge* was one of the first successful cases on same-sex marriage in the U.S. and as such, the landscape was completely different when compared with the litigation environment in the last few years.⁴⁶ The litigants chose the strategy that likely had the best possibility of success, given the legal environment in that particular moment in time.⁴⁷ For the litigants, marriage was desirable for both idealistic and pragmatic reasons.⁴⁸

43. *Id.* at 954–55.

44. *See id.* at 958–68.

45. The decision has two paragraphs about the tangible benefits of marriage and it affirms that “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.” *Id.* at 955–56.

46. For an account of the background and history of the *Goodridge* litigation, see Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 69 (2005).

47. Mary Bonauto explains how Massachusetts had moved towards an environment more favorable to LGBT rights and the need to litigate same-sex marriage before detractors of same-sex marriage started to push for a constitutional amendment to restrict marriage to one man and one woman. *Id.* at 27.

48. Mary Bonauto tells us that Gay & Lesbian Advocates & Defenders (GLAD) encountered many same-sex couples who “wished to make [their] commitments legally binding and to share in the community of those who have made marriage vows. This should not be surprising, because LGBT people are part of the larger culture in which marriage represents the ideal institution of connection and commitment.” *Id.* at 4. At the same time, she recognized that “the fifty dollars a couple spends on a

The Supreme Court of California also used a narrative that reinforced a differentiated status between married and unmarried couples.⁴⁹ Citing a prior decision, the court in *In re Marriages Cases* linked marriage and the family as if they were one unique institution:

The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.⁵⁰

The narrative of marriage as an institution that makes society better is also found in more recent decisions on same-sex marriage. In *Geiger v. Kitzhaber*, the court's description of the parties starts by stating, "[a]ll of the plaintiffs share in the characteristics that we would normally look to when we describe the ideals of marriage and family."⁵¹ Later, the court turns to an argument provided by the State in the plaintiff's favor:

Simply put, marriage matters. It matters not only for the individuals who decide to enter into the civil union, but also for the state. This is why the state links so many rights and protections to the decision to marry. Strong, stable marriages create unions in which children may be raised to become healthy and productive citizens, in which family members care for those who are sick or in need and would otherwise have to rely on government assistance, and through which community is built and strengthened.⁵²

The conformist approach to marriage makes little sense in light of the oft-cited quote from *Planned Parenthood v. Casey*, also cited in *Lawrence v. Texas* and *Goodridge*, on the role of the judiciary: "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."⁵³ How is the protection of marriage over all other emotional associations *not* a mandate of a particular moral code?

marriage license will buy them more protection than any set of lawyers' documents ever will." *Id.* at 6.

49. See *In re Marriage Cases*, 183 P.3d 384, 423 (Cal. 2008); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010).

50. *In re Marriage Cases*, 183 P.3d at 422. The same decision cites *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1998), in which the California Supreme Court, citing prior decisions, stated that "[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *In re Marriage Cases*, 183 P.3d at 422.

51. *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1133 (D. Or. 2014) (citations omitted).

52. *Id.* at 1137.

53. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992); see also *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 948 (Mass. 2003).

Nevertheless, *Goodridge* triggered a positive outcome by allowing hundreds of people to access benefits that were restricted to married individuals.⁵⁴ However, *Goodridge* did not make same-sex marriage an issue about the protection of families. Instead, *Goodridge* reinforced the primacy of families formed by marriage, leaving out any mention of families formed outside of marriage. Moreover, the court employed a narrative of assimilation between same-sex couples and heterosexual couples. The decision ensures that readers see the plaintiffs as “equal” to the typical heterosexual middle class American family when it states that “[t]he plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups.”⁵⁵

Some of the most recent state decisions on same-sex marriage follow the same strategy of describing the plaintiffs as people who the reader may see as one of their own.⁵⁶ As Kenji Yoshino states, “gays ‘acting straight’ are more likely to win straight acceptance.”⁵⁷ Showing that same-sex couples that want to get married look just like any other heterosexual couple is a double-edged sword that the LGBT rights movement is constantly struggling with. On the one hand, the movement wants to show that there is nothing different about same-sex couples that would prevent them from functioning in society. On the other, it is difficult to determine how much of this depiction corresponds with a description of individuals as they truly are, or how much it is an act of surrender to the dominant heterosexual culture. Equalizing depictions are more easily accepted by the mainstream, helping to gain more support for a particular cause.⁵⁸ Assimilation into the mainstream, however, can also end up destroying the

54. According to the Pew Research Center, between 2004 and 2012 there have been 22,406 marriages by same-sex couples in Massachusetts. Drew Desilver, *How many same-sex marriages in the U.S.? At least 71,165, probably more*, FactTank, News in the Numbers, PEW RESEARCH CENTER (June 26, 2013), available at <http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more/>.

55. See *Goodridge*, 798 N.E.2d at 948.

56. See, e.g., *Griego v. Oliver*, 316 P.3d 865, 873–75 (N.M. 2013); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 416–18 (M.D. Pa. 2014); *Geiger*, 994 F. Supp. 2d at 1133.

57. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 80 (2006).

58. “‘When you’ve got an appealing litigant, it makes you want to side with them,’ Michael Klarman, a professor at Harvard Law School and a former clerk for Ruth Bader Ginsburg, said. ‘Of course, you are deciding a case for a much broader group of litigants, so it ought to be irrelevant, but it’s not. With school desegregation, the N.A.A.C.P. accepted only plaintiffs who were middle class, from the best families, well educated, well dressed. When the American Jewish Congress was thinking about school-prayer challenges, they much preferred a Jew to an atheist.’” Ariel Levy, *The Perfect Wife*, THE NEW YORKER (Sept. 30, 2013) <http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife>.

acceptance of diversity that LGBT individuals have longed for.⁵⁹

2. Using the concept of human dignity to expand the protection of the state to other emotional associations.

The concept of human dignity has been used in other countries to overturn discriminatory statutes and practices.⁶⁰ The use of human dignity reinforces the principles of equality and autonomy that lend themselves to the protection of diverse families, and not exclusively married families. In the United States, human dignity is not a novel concept. Although there is no explicit “dignity clause” in the U.S. Constitution, U.S. courts, like courts in other countries, have based or at least supported constitutional decisions on the premise of human dignity.⁶¹ As Jeremy Waldron points out, “there does not seem to be any canonical definition of ‘dignity’ in the law.”⁶² Its use, therefore, has varied throughout history and was only consistently used as a universal value beginning in the second half of the twentieth century.⁶³ Furthermore, dignity and human dignity are two different concepts that can easily be associated with different historical phases. We learn from Erin Daly that dignity was often used by the Supreme Court in the first half of the twentieth century as a feature of certain institutions that enjoyed special respect, such as courts, the Constitution, or the courthouse.⁶⁴ The second half of the twentieth century, however, marked the Court’s shift from institutional dignity to human dignity.⁶⁵

59. See generally Franke, *supra* note 13, at 239 (critiquing the problem of marriage and assimilation, writing, “The creation of new gay publics outside City Hall, on the pages of the *New York Times*, and on the six o’clock news are not exactly the gay publics the drag queens at Stonewall had in mind.”).

60. Paolo Carozza, *Human Dignity in Constitutional Adjudication* in RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW 459–66 (Tom Ginsburg and Rosalind Dixon eds., 2011).

61. See, e.g., Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1737 (2008) (noting the invocation of dignity in opinions interpreting individual rights guarantees in the Fifth and Fourteenth Amendments); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 16 (2004) (explaining that though the Constitution does not refer to dignity explicitly “there are some cognate concepts in the Constitution’s text, such as the ban on cruel and unusual punishments, the protections of the due process clause, and others that have been developed in the U. S. Supreme Court’s constitutional jurisprudence.”).

62. JEREMY WALDRON, DIGNITY, RANKS, AND RIGHTS 15 (2012).

63. The first mention of dignity by the U.S. Supreme Court in an individual rights case was in *Skinner v. Oklahoma*, but its use did not flourish in the Court’s case law until after the 1940s. ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 82, 87 (2012).

64. *Id.* at 71–79.

65. Although American courts pay less attention to international trends and developments than their foreign colleagues, it seems that the narrative of human dignity in the U.S. was influenced, just as other countries were, by the new international world order after Second World War. *Id.* at 82.

In the last few decades, the United States Supreme Court and state courts have employed the concept of human dignity to inform their decisions on an array of issues.⁶⁶ For example, Justice Kennedy has used the concept of human dignity to enhance his decisions on the issues of abortion and same-sex couples.⁶⁷ In *Goodridge*, the Massachusetts Supreme Court also used human dignity as a core element to support same-sex marriage.⁶⁸ Unfortunately, that court's development of the concept was blurred by its concurrent defense of marriage as an essentially good institution.⁶⁹

Human dignity is a complex concept that can have different meanings.⁷⁰ The possibility for different interpretations becomes clear when one compares the use of dignity by the South African Constitutional Court to Justice Kennedy's use of dignity in *Lawrence*⁷¹ and *Windsor*.⁷² South Africa's idea of dignity is closely related to a concept of equality before the law.⁷³ In contrast, Justice Kennedy used a concept of human dignity related to liberty and autonomy in *Lawrence*, and shifted to an institutional concept of dignity enjoyed by the married couple in *Windsor*.⁷⁴ This seems to be a return to the early twentieth-century approach

66. See Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202 (2008) (explaining that since the 1940s the Supreme Court has increasingly employed dignity to broaden, explain and develop Constitutional protections); Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of A Right*, 37 OHIO N.U. L. REV. 381, 381 (2011).

67. Siegel, *supra* note 61, at 1737 (discussing abortion).

68. *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 948, 965 (Mass. 2003). It may not be a coincidence that Justice Marshall is from South Africa where dignity is a core constitutional concept.

69. *Id.* at 957.

70. Daly, *supra* note 66, at 61; see generally Stu Woolman, *The Architecture of Dignity*, in THE DIGNITY JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA: CASES AND MATERIALS 76 (Drucilla Cornell et. al. eds., 2013) (identifying five meanings of dignity in South African constitutional case law).

71. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

72. See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013).

73. See *Minister of Home Affairs v. Fourie*, 2005 (1) SA 524 (CC) at 49–50, ¶ 78 (S. Afr.) (“[W]hat the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law.”).

74. The first paragraph of *Lawrence* clearly states that the constitutionality of the sodomy statutes is a matter of liberty: “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.” *Lawrence*, 539 U.S. at 562. Later, the decision states that “[i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.” *Id.* at 567.

characterizing dignity as status or as respect owed to an institution. The Ninth Circuit employed a similar approach in *Perry v. Brown*, indicating that the state conferred dignity to the “highest form of a committed relationship [marriage] and to the individuals who have entered into it.”⁷⁵

Dignity has been conceptualized differently in other areas of the law. In the abortion context, Reva Siegel has identified three different meanings of dignity: “dignity of life, dignity of liberty, and dignity as equality.”⁷⁶ In *Lawrence*, Justice Kennedy also referred to dignity mainly as a consequence of liberty.⁷⁷ People who choose their partner and engage in sexual conduct “in the confines of their homes and their own private lives . . . still retain their dignity as free persons.”⁷⁸ Dignity in this context refers to the right of individuals to be fully autonomous in choosing their partners without diminishing their status as human beings worthy of recognition. The decision states that “[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice.”⁷⁹

In *Windsor*, Justice Kennedy was once again presented with the opportunity to advance an American constitutional concept of dignity. Adhering to *Lawrence*, he employed the concept of dignity as linked to liberty as a basis for overthrowing the Defense of Marriage Act (DOMA). The decision, however, added the concept of dignity as derived from marriage. In other words, people retain their dignity by having the possibility of entering into a marriage. It seems that dignity comes not so much from the ability to choose to marry (or to choose not to marry), but from the status of being married:

It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.⁸⁰

The idea of dignity derived from marriage is reinforced again when Justice Kennedy writes:

By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection

75. *Perry v. Brown*, 671 F.3d 1052, 1079 (9th Cir. 2012).

76. Siegel, *supra* note 61, at 1737.

77. *Lawrence*, 539 U.S. at 558.

78. *Id.* at 567.

79. *Id.* This is also the Mexican approach as discussed below. See *infra* I.B.2.

80. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.⁸¹

Although *Windsor* is not a decision on the constitutionality of same-sex marriage, it changed the landscape of same-sex marriage litigation.⁸² According to the organization Freedom to Marry, by October 2014, less than two years after *Windsor*, there were more than eighty cases challenging traditional marriage statutes, with more than forty decisions favoring same-sex marriage, and only two decisions rejecting same-sex marriage.⁸³ Of the twenty-four final decisions, two followed the institutional dignity narrative of *Windsor*.⁸⁴ Although both *Geiger* and *Whitewood v. Wolf* also reference the tangible rights and benefits that come with marriage, they use a strong institutional dignity narrative based on *Windsor*.⁸⁵ They speak of humiliation, degradation, and stigma,⁸⁶ and borrow from *Windsor*'s narrative on dignity to explain the humiliation faced by the children of the plaintiffs.⁸⁷

It is clear that U.S. courts are using dignity to justify decisions in

81. *Id.* at 2692–93.

82. A year after *Windsor*, more than 70 cases from all states/territories without same-sex marriage had been litigated or were pending in U.S. courts. For an accurate up to date account, see FREEDOM TO MARRY, www.freedomtommarry.org (last visited Feb. 5, 2015).

83. *See id.* The two decisions against same-sex marriage are *Borman v. Pyles-Borman*, No. 2014CV36, 2014 WL 4251133 (Tenn. Cir. Ct. Aug. 5, 2014), and *Robicheaux et. al v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014). In *Borman* the plaintiff challenged Tennessee's Anti-Recognition Law that declares void and unenforceable in Tennessee out of state valid marriages if prohibited by Tennessee. The decision states that *Windsor* did not "give an opinion concerning whether a State must accept as valid a same-sex marriage allowed in another State." *Borman*, 2014 WL 4251133, at *3. The opinion found that "the laws and the Constitution of Tennessee do not deny equal protection because they do not burden a fundamental right, target a suspect class or intentionally treat one differently than others similarly situated without any rational basis or difference." *Id.* In *Robicheaux* a U.S. District Court decided that "[t]he State of Louisiana has a legitimate interest under a rational basis standard of review for addressing the meaning of marriage through the democratic process," dismissing the challenge to Louisiana's ban on same-sex marriage and lack of recognition of out-of-state same-sex marriages. *Robicheaux*, 2 F. Supp. 3d at 913.

84. *See Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

85. *Geiger*, 994 F. Supp. 2d at 1128.

86. *Id.* at 1136, 1139; *Whitewood*, 992 F. Supp. 2d at 421.

87. *Geiger*, 994 F. Supp. 2d at 1144; *Whitewood*, 992 F. Supp. 2d at 417 ("In the words of Deb Whitewood, '[the lack of same-sex marriage] sends the message to our children that their family is less deserving of respect and support than other families. That's a hurtful message.'").

different areas. It is not clear, however, that all courts are using dignity as a univocal concept. In the case of gay and lesbian rights, we see a concept of human dignity attached to freedom of choice, and a concept of institutional dignity attached to marriage. Which one will prevail depends on how this concept continues developing in the future.

The second use of dignity harkens back to institutional dignity as applied by the Court in the first half of the twentieth century. This is not a universal concept of dignity. Rather, it is selective because it does not apply to all institutions. According to the Court, only some institutions possess dignity, and marriage is one of them. The use of dignity in *Windsor* as derived from marriage curtails freedom. As the rationale goes, some choices are better than others, even if the alternatives do not violate equality, due process, or any other constitutional right. Under this theory, marriage provides couples with a kind of dignity that unmarried couples cannot access.

B. Dignity, equality, and autonomy: the transformation of family law through same-sex marriage

The second set of arguments in litigation dealing with same-sex marriage is based on a claim for equality and autonomy. This argument supports extending marriage to same-sex couples because it is the right thing to do, and not because marriage is essentially good, but because similarly situated groups of people should be treated equally. Arbitrarily depriving one group of people a right that another group enjoys cannot have a reasonable aim. Same-sex marriage advocates within this debate agree that marriage should be expanded, but not all of them assert as a primary reason that marriage is essential to society.⁸⁸ At the forefront of equalization between married and unmarried individuals, it is thus possible to find same-sex marriage advocates for pragmatic reasons and advocates of equal treatment between married and unmarried people. These arguments do not require courts to take a position on the importance of marriage as an institution. These arguments reinforce individual rights, such as equality and autonomy, as core elements of society. Whether it is marriage, contraceptives, jobs, or healthcare, a benefit granted to heterosexuals should be granted to everyone else that is similarly situated.

Within this context, the focus of the same-sex marriage debate shifts from the legal meaning of marriage to the meaning of equality, autonomy, or both. The decisions analyzed below share a similar rationale. Each one allows constitutional principles to take on an evolving role to accommodate

88. See Polikoff, *supra* note 13, at 593.

new situations. All of these decisions tackle different arguments presented to the court by the parties to the litigation. However, they all refer to concepts of equality and autonomy as the grounds for providing rights to same-sex couples, and moving towards the recognition of same-sex marriage. This is the case in Canada, South Africa, Mexico, Spain, Portugal, Brazil, Colombia, and, with some limitations, the U.S. state of Iowa.

Additionally, most of these decisions refer to dignity as a foundation for granting same-sex marriage.⁸⁹ Unlike the U.S. Supreme Court in *Windsor*, other courts have linked dignity to equality and autonomy.⁹⁰ South Africa mostly refers to dignity as a quality that provides all individuals with equality of worth.⁹¹ Mexico, Brazil, Spain, and Colombia refer to dignity as linked to the right to autonomy, especially in the context of making decisions on family formation.⁹² Finally, all of these decisions refer to constitutional principles that adapt to new realities, or refer to a constitutional protection of the family in which what constitutes a family depends on the social construction of that concept.⁹³

89. The exception to this trend is Canada. *Reference re Same-Sex Marriage* does not mention dignity as a part of its reasoning. See *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.). The Supreme Court of Canada has struggled with the use of human dignity as a constitutional value. Although it was a common ground in decisions until the 1990s, the “Law test” established in the case *Law v. Canada* required the party arguing discrimination to show injury to dignity. See *Law v. Canada*, [1999] S.C.R. 497 (Can.). In 2008, the Canadian Supreme Court confirmed that “the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity.” *R. v. Kapp*, [2008] S.C.R. 483, 504 (Can.). It did, however, criticize it as “an abstract and subjective notion” that can “become confusing and difficult to apply;” and a standard that had “proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.” *Id.* For an analysis of the use of dignity by the Supreme Court of Canada, see James R. Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, 70 SASK. L. REV. 1–27 (2007).

90. See *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) (S. Afr.); Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Acción De inconstitucionalidad 2/2010*, Novena Época, 10 de Agosto de 2010, *slip op.* ¶¶ 260, 262, 269, 315 (Mex.); S.T.C., *Acórdão No. 121/2010*, 82, DIÁRIO DA REPÚBLICA, 2ª SÉRIE [D.R.] 28.4.2010, 22367 (Port.); S.T.C., Nov. 6, 2012 (B.O.E., No. 286, p. 168) (Spain); Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, *Sentencia C-577/11*, *Gaceta Judicial [G.J.]* (No. 30) (Colom.).

91. See *Fourie*, SA 524 ¶¶ 11, 15, 26, 28, 31, 47, 50, 53, 78, 79, 80, 108, 114 and 115. In a few paragraphs, like 36 and 54, the decision seems to link dignity with privacy. *Id.* ¶¶ 36, 54. In paragraphs 36, 48, and 95, the Court mentions dignity, equality and privacy. *Id.* ¶¶ 36, 48, 95. Finally, there are a few paragraphs where it is unclear if the Court is referring to dignity as privacy, equality, or even as status derived from marriage. *Id.* ¶¶ 57, 61, 80 and 88. Paragraph 115, however, leaves no doubt that dignity for the Constitutional Court is closely linked to equality. *Id.* ¶ 115.

92. SCJN, *Acción De Inconstitucionalidad 2/2010*, ¶¶ 260, 262, 269, 315; S.T.C., Nov. 6, 2012; Corte Constitucional, *Sentencia C-577/11*.

93. *Fourie*, SA 524 ¶¶ 15, 52, 57; SCJN, *Acción De Inconstitucionalidad 2/2010*, ¶¶ 235, 240, 242, 254, 311; S.T.C., *Acórdão No. 121/2010*, ¶ 23; S.T.C., Nov. 6, 2012.

Transforming the debate from marriage to equality opens up different fronts for advancing the protection of unmarried families. Equality arguments require a comparison between the behaviors of married couples with that of the group seeking equal protection. An equality discussion requires an elevation of the actual substance of relationships over the formality of a marriage certificate. A review of substantive reasons for protecting certain associations over others forces us to look into the functions that each association performs. Real change is triggered by discussions on the basis of equality and autonomy. If societies value the right of each individual to autonomously determine her personal life, denying the right to family life outside the married family becomes difficult to justify.

1. The right to equality of family associations: the South African and Colombian approach to dignity and equality.

Several courts have used equality and equal protection arguments in their decisions to allow same-sex marriage. Two of these stand out for the richness of their analysis on equality and dignity. Both South Africa and Colombia's constitutional courts have based their decisions on same-sex marriage in the constitutional value of dignity. Both courts provide an analysis of equal protection based on the idea of human dignity. Colombia's 2011 decision on same-sex marriage created a legal limbo that has ended with new cases on the Court's docket.⁹⁴ This section analyzes the use of dignity and equality in both South Africa and Colombia. It ends with brief analyses of other decisions worth mentioning in this context such as those from Brazil, Portugal, and some U.S. courts.

- a. South Africa

In 2005, the Constitutional Court of South Africa decided *Minister of Home Affairs v. Fourie*, giving the legislature one year to pass legislation that would allow same-sex couples to marry.⁹⁵ The decision issued by Justice Albie Sachs used a narrative based on equality and dignity from beginning to end.⁹⁶ It started by telling the story of Ms. Marié Adriaana Fourie and Ms. Cecelia Johanna Bonthuys, applicants in the first of the two cases that were decided together.⁹⁷ The decision did not say anything about

94. Redacción Justicia, *Corte Constitucional Revive Discusion sobre Matrimonio Gay* [Constitutional Court revives discussion on gay marriage], ELTIEMPO.COM (Feb. 20, 2014), <http://www.eltiempo.com/archivo/documento/CMS-13528410>.

95. *Fourie*, SA 524 ¶ 156.

96. *See id.*

97. The second case against the Minister of Home Affairs was a case launched in the

who the plaintiffs were or what they did for a living. The reader was only told that they were both women.⁹⁸

Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.⁹⁹

The Court did not labor to present the plaintiffs as similar to heterosexual married couples. The plaintiffs were presented as just two people who “eventually decided to set up home together.”¹⁰⁰ This narrative of the facts is very different from the one that the Massachusetts Supreme Court presented in *Goodridge*. The South African story is about two people who care for each other and want to get married. *Goodridge*, however, is about how same-sex couples seeking to get married were similar to all other heterosexual middle-class couples with access to marriage. In *Fourie* we do not know whether the women in the case are professionals or on welfare, nor do we know if they are active members of a church or agnostics. In *Fourie*, the Court first addressed if the law “den[ie]d equal protection to and discriminate[d] unfairly against same-sex couples by not including them in the provisions of the Marriage Act.”¹⁰¹ The government advanced two arguments against the plaintiffs. First, the government argued there was no constitutional right to marry.¹⁰² The Constitution “merely guaranteed to same-sex couples the right to establish their own forms of family life without interference from the state.”¹⁰³ Second, marriage was historically and by nature a heterosexual institution.¹⁰⁴ The Court answered both claims in a way that reinforced the principles of equality and the role of the South African Constitution in protecting families over marriages. The Court reasoned that although the right to marry may not be in the Constitution, “[i]t does not follow . . . that the Constitution does nothing to protect that right, and with it, the concomitant

Johannesburg High Court on July 8, 2004 by the Lesbian and Gay Equality Project and eighteen others in the Equality Project. *See id.* ¶ 44.

98. *Id.* ¶ 1.

99. *Id.*

100. *Id.*

101. *Id.* ¶ 45.

102. *Id.* ¶ 46.

103. *Id.*

104. *Id.*

right to be treated equally and with dignity in the exercise of that right.”¹⁰⁵ These words marked the beginning of the court’s transformational approach to same-sex marriage. *Fourie* did not dismiss marriage as an institution that should not be protected. On the contrary, it devoted several paragraphs to explaining the benefits of marriage. There were, however, no arguments advocating that marriage is by its very nature good for society. The Court’s arguments were all based on tangible and intangible benefits and duties attached to legal marriages. Among them, the duty to support one another was explained as one of the most important consequences of marriage.¹⁰⁶ The decision also referred to consequences for the distribution of property and parental obligations.¹⁰⁷ The overall tone of the decision emphasized that the meaning of marriage is not as important as the fact that it is a private choice that should be available, for the sake of equality and dignity, to same-sex couples.

Fourie, therefore, was not a decision that rested on marriage, but rather on equality. More important still, it was a decision that incorporated a concept of equality which did not demand assimilation into the heterosexual majority. To the contrary, the decision embraced diversity not only with regard to individual choices, but also concerning the families that South Africa is willing to protect. The lack of information about Ms. Fourie and her partner Ms. Bonthouys is essential to the point the court is making about diversity, both on the individual and familial levels.

In particular, three full paragraphs of the decision were devoted to explaining “the right to be different.”¹⁰⁸ This section of the decision started with an explanation of the role of the modern South African Constitution in representing “a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.”¹⁰⁹ The decision went on to embrace individual diversity as a main component of equality: “[e]quality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference.”¹¹⁰

Here, it is important to note what the *Fourie* Court did not do. Accepting the right to be different does not prevent a country from favoring one type of family association over others. Marriage, therefore, could have been defended as the preferred family association and the Court could have

105. *Id.* ¶ 47.

106. *Id.* ¶ 65.

107. *Id.* ¶ 66–67.

108. *Id.* ¶ 59–61.

109. *Id.* ¶ 59.

110. *Id.* ¶ 60.

granted it a privileged status while at the same time embracing individual diversity.¹¹¹ Yet it refrained from doing so, stating that the “family as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change . . .”¹¹² Explaining why marriage is not a constitutional right, the decision states, “South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.”¹¹³

It could be argued that the multiculturalism specific to South Africa forms the basis for the Court’s decision to allow same-sex marriage. From this perspective, the Court’s decision could be viewed as a discussion based on local traditions that cannot be used to establish any commonalities with foreign decisions. In 2005, however, no ethnic South African groups performed same-sex marriages as part of their traditions.¹¹⁴ In addition to the Marriage Act of 1961, there was also a statute recognizing customary marriages.¹¹⁵ Therefore, the Court could have concluded that associations not included in the two statutes regulating marriage were foreign to the South African Constitution. It decided, however, to rest its decision on the constitutional principles of dignity and equality, and broaden the scope of family protection.

111. Although there is no express right to marriage in the South African Constitution, the document establishes under Article 15 on Freedom of Religion, Belief and Opinion that its protection “does not prevent legislation recognizing marriages concluded under any tradition, or a system of religious, personal or family law.” There is enough textual foundation to justify a protection of marriage over other associations. *See* S. AFR. CONST., 1996.

112. *Fourie*, SA 524 ¶ 15.

113. *Id.* ¶ 59.

114. The first traditional same-sex wedding in South Africa was celebrated on April of 2013. *See Africa’s first traditional gay wedding: Men make history as they marry in full tribal costume*, DAILYMAIL.COM (Apr. 9, 2013, 4:06 AM), <http://www.dailymail.co.uk/news/article-2306180/Africa-s-traditional-gay-wedding-Men-make-history-marry-tribal-costume—say-t-wait-parents.html#ixzz3GYIJJh5D>. According to South African LGBT rights advocate Melanie Judge, when the bill on same-sex marriage was before the South African Parliament in 2006, “the Congress of Traditional Leaders of South Africa (Contralesa) submitted that ‘the institution of traditional leadership is the sole and authentic voice of the overwhelming majority of the people of South Africa living in traditional communities . . . [and that] same-sex marriage is against nature, culture (all types of culture), religion and common sense, let alone decency.’” Melanie Judge, *The culture of the chiefs is a set-back for gender and sexual rights*, QUERY: QUESTIONING THE (NOT SO) OBVIOUS (Apr. 18, 2012), <http://query.oia.co.za/2012/04/the-culture-of-the-chiefs-is-a-set-back-for-gender-and-sexual-rights/>.

115. Marriage Act 25 of 1961 (S. Afr.). South Africa regulates customary marriages through the Recognition of Customary Marriages Act N. 120 of 1998 (S. Afr.). The Act regulates marriages “concluded in accordance with customary law.” *Id.* § 1. Customary law “means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.” *Id.*

South Africa is famous for using dignity as a main pillar of constitutional doctrine.¹¹⁶ The 2005 *Fourie* decision referred more than forty times to the concept of dignity as a justification for opening marriage to couples of the same sex.¹¹⁷ Dignity, as used by the South African Constitutional Court, is closely tied to the inherent equality of all human beings. In the words of the late Justice Arthur Chaskalson,

Acknowledging that dignity is a difficult concept to capture in precise terms, the Constitutional Court has held that the constitutional protection of dignity requires us at the least “to acknowledge the value and worth of all individuals as members of our society” and to treat all with “equal respect and concern.” Building on that has given dignity a central role in the Court’s evolving jurisprudence.¹¹⁸

The strong protection of dignity as a form of equality comes from an explicit reference to dignity in the South African Constitution,¹¹⁹ and a history of massive racial discrimination under apartheid.¹²⁰ Dignity is a principle of equality of worth.¹²¹ Early in the *Fourie* decision, Justice Sachs cited Justice Cameron’s lower court decision:

The sting of the past and continuing discrimination against both gays and lesbians’ lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they “do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.” This “denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity” namely that “all persons have the same inherent worth and dignity,” whatever their other differences may be.¹²²

Fourie also characterizes dignity as autonomy. Justice Sachs wrote, “the capacity to choose to get married enhances the liberty, the autonomy

116. Chief Justice Arthur Chaskalson, *Human Dignity as a Foundational Value of Our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193, 196 (2000) [hereinafter Chaskalson, *Human Dignity*]; see also Woolman, *supra* note 70, at 73.

117. *Fourie*, SA 524.

118. Chief Justice Arthur Chaskalson, *Dignity As A Constitutional Value: A South African Perspective*, 26 AM. U. INT’L L. REV. 1377, 1382 (2011) (internal citations omitted).

119. See S. AFR. CONST., 1996. §10 of the South African Constitution states that: “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” *Id.*

120. “Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection is the touchstone of the new political order and is fundamental to the new Constitution.” Chaskalson, *Human Dignity*, *supra* note 116, at 1381.

121. *Id.*

122. *Fourie*, SA 524 ¶ 15.

and the dignity of a couple committed for life to each other.”¹²³ In other words, it is not marriage *per se* that gives individuals dignity, instead, dignity is derived from the capacity to *choose* to marry. Most of *Fourie*’s references to dignity, however, relate to a sense of equality of worth that necessarily leads to equality of treatment.¹²⁴

The test, according to Justice Sachs, “whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.”¹²⁵ Recognition of a human being’s worth and the equality of treatment that follows from this recognition are at the core of the South African concept of dignity.

Fourie not only opened the space for same-sex couples to access marriage, but on its way to accomplishing that, it created the conditions necessary for future decisions to focus on the protection of diverse families outside the marriage paradigm.

b. Colombia

In 2011, the Colombia Constitutional Court (CCC) was asked to review whether marriage limited to heterosexual couples was unconstitutional. This development was inevitable, given the number of decisions that the CCC had issued in the previous fourteen years regarding the rights of same-sex couples.¹²⁶ It was only a matter of time until the right to marriage was also placed on the Court’s docket. Decision C-577/11, however, fell short of declaring the lack of marriage for same-sex couples unconstitutional. The CCC’s decision created a double standard for the constitutional protection of LGBT rights.¹²⁷

Similar to the Constitutional Court of South Africa’s decision in *Fourie*, the CCC’s ruling recognized a lack of protection for same-sex couples.¹²⁸ Both courts considered that their role was to acknowledge and confront the inequality between same-sex and heterosexual couples, but to leave the specific remedy for this inequality to the legislature.¹²⁹ The CCC, however, was less emphatic in its instructions to the Colombian Congress

123. *Id.* ¶ 16.

124. *Id.* ¶ 80.

125. *Id.* ¶ 94.

126. For an analysis of Colombian case law on LGBT rights *see also* Albarracin and Rivera, *supra* note 4.

127. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11, Gaceta Judicial [G.J.] (No. 30) (Colom.).

128. *Id.*

129. *Fourie*, SA 524 ¶ 101; *see also* Corte Constitucional, Sentencia C-577/11.

than the South African Constitutional Court. The Colombian decision did not mandate the legislature to open up marriage to same-sex couples. Instead, the Court explained that the legislature was the exclusive branch with the freedom to choose specific protections for same-sex relationships and to define the scope of those protections.¹³⁰ Thus, the legislature was instructed to grant same-sex couples wishing to formalize their union all rights and obligations derived from the heterosexual marriage, either through marriage, or through a different institution.¹³¹

The reasoning of the CCC is interesting because the Colombian constitutional framework, like the South African Constitution, but unlike most Latin American constitutions, openly recognizes the potential for diverse family associations.¹³² The constitutional “family” therefore, is not only the married family. The Colombian Constitution states that, in addition to the legal ties of marriage, a family is formed by the responsible desire to establish one.¹³³ Consequently with the constitutional mandate, the CCC reinforced its case law on family diversity, stating:

[T]he family that comes from the free union is also worthy of constitutional protection and the Constitution places it on an equal basis with the one that comes from marriage, because the State and society guarantee an integral protection of the family “regardless of its constitution by legal or natural ties” and, therefore, the honor, dignity, and intimacy of the family are inviolable [and] the legislator “cannot issue regulations that create a differentiated treatment of rights and obligations between those who are married and those who are part of a permanent union.”¹³⁴

The decision could have followed the South African model, which reasoned that as long as there were benefits attached to marriage, same-sex couples that wanted to marry should have access to that institution.¹³⁵ The CCC, however, restricted itself to a more literal interpretation of the Constitution that recognized heterosexual marriage as constitutionally protected and, at the same time, honored its case law on equality and the protection of the unmarried family.¹³⁶ In order to do this, it affirmed that the heterosexual nature of constitutionally protected marriage did not hinder the possibility of protecting same-sex couples.¹³⁷ Furthermore, the

130. *Id.*

131. *Id.*

132. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 42.

133. *Id.*

134. Corte Constitucional, Sentencia C-577/11.

135. *Fourie*, SA 524 ¶ 138–154.

136. Corte Constitucional, Sentencia C-577/11.

137. The Portuguese Constitutional Tribunal had used the same reasoning before. The Tribunal

CCC accepted the petitioner's basic claim that the lack of a legal means for same-sex couples to formalize their unions was unconstitutional.¹³⁸ It did not, however, accept the obvious result of that reasoning: that marriage must be made available to same-sex couples. Instead, the CCC gave a vague mandate to the legislature to provide same-sex couples with a formality:

The legislature . . . has the task of finding a way to formalize and solemnize a legal link between members of a same-sex couple who may freely want to make use of it and, thus, the Court understands that the freedom to give the name it may deem appropriate to that link, as well as to define its scope, provided that, more than the name, what matters are the specific provisions that identify the rights and obligations distinctive to that legal relationship and the way such relationships are formalized and solemnized is reserved to the representative organ.¹³⁹

The CCC thus referred the matter to the Colombian Congress, just as other courts around the world have done before it. The CCC, however, already had a robust case law in favor of equality and dignity of individuals of different sexual orientations and gender identities.¹⁴⁰ Accordingly, the

summarizes its options about the constitutionality of same-sex marriage as follows: a) same-sex marriage can be a constitutional mandate, b) same-sex marriage is constitutionally forbidden, or c) the constitution neither mandates nor prohibits same-sex marriage, and therefore Congress may regulate it. S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2^a SÉRIE [D.R.] 28.4.2010, 22367, 22370 (Port.). The Tribunal decided that the constitutional protection of heterosexual marriage did not forbid the legislature from opening marriage to same-sex couples. *Id.*

138. Corte Constitucional, Sentencia C-577/11. Same-sex couples already had access to *de facto* unions.

139. *Id.*

140. *See also* Corte Constitucional [C.C.] [Constitutional Court], noviembre 30, 1994, Sentencia T-539/1994 (Colom.) (declaring unconstitutional the censorship of TV ads showing same-sex couples kissing); Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 1998, Sentencia C-481/1998 (Colom.) (declaring unconstitutional the discrimination of gays in the military); Corte Constitucional [C.C.] [Constitutional Court], septiembre 18, 2003, Sentencia T-808/2003 (Colom.) (declaring unconstitutional the exclusion of gays from the Boy Scouts organization in Colombia); Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, Sentencia C-075/07 (Colom.) (declaring that the property regime established for *de facto* heterosexual marital unions applied to same-sex couples); Corte Constitucional [C.C.] [Constitutional Court], octubre 3, 2007, Sentencia C-811/2007 (Colom.) (expanding to same-sex couples the right to include their partners into health care insurance plans); Corte Constitucional [C.C.] [Constitutional Court], abril 16, 2008, Sentencia C-336/2008 (Colom.) (expanding survivor's pension benefits to same-sex couples); Corte Constitucional [C.C.] [Constitutional Court], agosto 20, 2008, Sentencia C-798/2008 (Colom.) (declaring the right to alimony for members of a same-sex couple after it separates); Corte Constitucional [C.C.] [Constitutional Court], enero 28, 2009, Sentencia C-029/2009 (Colom.) (declaring 26 different statutes constitutional only if applied on equal terms to same-sex couples). These statutes covered the concept of "family," and "family group," among others. For a detailed explanation of these decisions *see* Natalia Ramirez and Daniel Bonilla, Universidad de Los Andes Public Interest Law Group, *Colombia*, 19 AM. U. J. GENDER SOC. POL'Y & L. 97, 97 (2011).

CCC's decision fell short of its own precedents at the very last moment. The Court reasoned that same-sex couples were a family. It provided an analysis that made same-sex couples and different-sex couples indistinguishable from one another. The decision was moving towards one and only one direction: marriage equality. At the last moment, however, the Court chose to bypass its logical conclusion, choosing instead to fully defer to the discretion of the Colombian Congress.

Interestingly, the Court established a deadline for the Colombian Congress to act.¹⁴¹ If by June 20, 2013, Congress did not reach a statutory solution, same-sex couples could go to a notary public "to formalize and solemnize a contractual link that may allow them to constitute a family, according to the scope that, by then, may be legally attributable to this type of union."¹⁴² With this sentence, the Court made its decision completely circular. On the one hand, same-sex couples were like different-sex couples with one difference—marriage. Congress had to treat same-sex couples and different-sex couples equally, but it did not have to open marriage up to same-sex couples. Congress' failure to find a solution by June 20, 2013 would allow same-sex couples to become eligible to formalize their relationships before a notary public. This formalization would have legal effect, but in the absence of Congress' action, there would be no law to legally recognize such formalizations. The decision, therefore, would only produce confusion if Congress did not comply with the Court's mandate.

The June 20, 2013 deadline passed. Not only did the legislature not pass a same-sex marriage statute, the Colombian Senate rejected a same-sex marriage bill by a vote of fifty-one to seventeen.¹⁴³ After a few weeks of uncertainty, notaries began issuing legal marriage certificates to same-sex couples and some judges began to solemnize same-sex marriages.¹⁴⁴ However, other judges declared the same same-sex marriages performed by these judges as null and void.¹⁴⁵ The situation was again brought to the

141. Corte Constitucional, Sentencia C-577/11.

142. *Id.*

143. Eduardo Garcia & Carlos Vargas, *Colombia lawmakers reject controversial gay marriage bill*, REUTERS (Apr. 24, 2013), <http://www.reuters.com/article/2013/04/24/us-colombia-gaymarriage-idUSBRE93N1DIT20130424>. The Colombian Congress is formed by the Senate and the Chamber of Representatives. A bill has to be approved by both chambers in order to pass. Since the Senate rejected the bill, the Chamber of Representatives never had the chance to discuss it.

144. See Kimberly Bennett, *Colombia judge orders notary to perform same-sex marriage*, JURIST, (July 29, 2013), <http://jurist.org/paperchase/2013/07/colombia-judge-orders-notary-to-perform-same-sex-marriage.php> (explaining how a Colombian appeals judge ordered a notary to perform a same-sex marriage after refusing to do so).

145. *Anulan segundo matrimonio entre parejas gay en Colombia*, EL ESPECTADOR (Oct. 18, 2013), <http://www.elespectador.com/noticias/judicial/anulan-segundo-matrimonio-entre-parejas-gay-colombia-articulo-453213>.

CCC under two constitutional claims presented by same-sex couples.¹⁴⁶ Currently, it is unclear when the CCC will issue a decision that ends the current legal confusion.¹⁴⁷

c. Other examples of dignity and equality: Brazil, Portugal, and the United States.

In 2011, the Federal Supreme Tribunal (STF), the highest court of Brazil, granted same-sex couples the right to enter into permanent unions, a right that heterosexual couples already enjoyed.¹⁴⁸ This decision paved the way for the National Justice Council of Brazil to prohibit Brazilian authorities from refusing to perform same-sex marriages.¹⁴⁹ The 2011 STF decision was based on several grounds, including the right to equality.¹⁵⁰ Namely, the Court concluded that all individuals must be treated with equal respect.¹⁵¹ A different opinion in the same decision referred to dignity in a way that implied a right to equality: “one is no more or less dignified by the fact of having been born a man or a woman.”¹⁵² The decision, however, placed a greater emphasis on dignity as linked to autonomy.¹⁵³

Also in 2011, the Constitutional Tribunal of Portugal (TCP) decided if legislation amending Portugal’s marriage statute to include same-sex marriage was a constitutional violation.¹⁵⁴ The court arrived at the conclusion that its Constitution did not prohibit same-sex marriage and, therefore, the legislature could amend the definition of marriage to include same-sex couples.¹⁵⁵ The Constitution of Portugal states that all

146. *Corte Constitucional Revive Discusión sobre Matrimonio Gay*, EL TIEMPO (Feb. 20, 2014), <http://www.eltiempo.com/archivo/documento/CMS-13528410>.

147. *Id.*

148. S.T.F., No. 4.277, Relator: Min. Ayres Britto, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 611 (Braz.).

149. Resolução No. 175, 14 de Maio de 2013, CONSELHO NACIONAL DE JUSTIÇA (Braz.).

150. S.T.F., No. 4.277, Relator: Min. Luis Fux, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 659 (Braz.).

151. *Id.*

152. S.T.F., No. 4.277, Relator: Min. Ayres Britto, ¶ 14.

153. S.T.F., No. 4.277, Relator: Min. Luis Fux (“[A] Constituição de 1988 consagrou a família como instrumento de proteção da dignidade dos seus integrantes e do livre exercício de seus direitos fundamentais, de modo que, independentemente de sua formação—quantitativa ou qualitativa—serve o instituto como meio de desenvolvimento e garantia da existência livre e autônoma dos seus membros.” “[T]he 1988 Constitution enshrined the family as a means of protecting the dignity of its members and the free exercise of their fundamental rights, so that, regardless of its constitution—quantitative or qualitative—the institute serves as a means of ensuring the guarantee of free and autonomous existence of its members.”).

154. S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2ª SÉRIE [D.R.] 28.4.2010, 22367 (Port.).

155. *Id.* ¶ 22.

constitutional rights are based on the respect for human dignity.¹⁵⁶ The TCP decision, therefore, mentions dignity several times.¹⁵⁷ It is not clear, however, if the TCP is equating dignity with equality or autonomy. Overall, however, it is clear that the decision was based on the right to equality.¹⁵⁸ Interestingly, the Spanish Constitutional Court took a similar approach.¹⁵⁹ Using a parallel framework, it reached a comparable decision by relying mainly on the right to equality.¹⁶⁰

In the United States, two decisions post-*Windsor* granted same-sex marriage without entering into the institutional dignity argument provided by *Windsor*.¹⁶¹ Neither decision argued that marriage is a societal need that ought to be protected. The Supreme Court of New Jersey and the Supreme Court of New Mexico decided these cases by focusing on the fact that same-sex couples were deprived of tangible benefits that came with the institution of marriage.¹⁶² This analysis is more apparent in *Garden State Equality v. Dow* than in *Griego* because the New Jersey Civil Union Act already granted all of the rights and benefits of marriage to same-sex couples in civil unions except the label of “marriage.” The plaintiffs in *Garden State* argued that after *Windsor*, civil union couples did not have access to the federal benefits afforded to married couples.¹⁶³ The New Jersey Supreme Court could have followed *Windsor* and engaged with the institutional dignity that comes with marriage. However, it did not talk about the humiliation faced by children, or the role of marriage in perfecting society. It only focused on the benefits same-sex couples were

156. See CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] [Constitution of the Portuguese Republic] art. 1 (Por.) (“Portugal é uma República soberana, baseada na dignidade da pessoa humana e na vontade popular e empenhada na construção de uma sociedade livre, justa e solidária.” [“Portugal is a sovereign Republic based on the dignity of the human being and on the popular will and committed to building a free, just and mutually supportive society.”]).

157. S.T.C., Acórdão No. 121/2010 ¶¶ 19, 22, 26.

158. See *id.* ¶ 25.

159. See generally S.T.C., Nov. 6, 2012 (B.O.E., No. 286, p. 168) (Spain) (referencing the concept of individual equality throughout the opinion).

160. See *id.* at 200 (holding there is nothing unconstitutional about the reforms to the Spanish Civil Code which allowed marriage between partners of the same sex).

161. See generally *Griego v. Oliver*, 316 P.3d 865, 865 (N.M. 2013) (refraining from citing any institutional dignity-based rationale for the court’s holding); *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (refraining from citing any institutional dignity-based rationale for the court’s holding).

162. See *Griego*, 316 P.3d at 874 (explaining numerous “hardships” on the family as a result of not being able to marry); *Garden State*, 82 A.3d at 361 (“In the wake of the *Windsor* decision, plaintiffs have shown that civil union partners in New Jersey are being denied equal access to federal benefits, thus requiring that the right to marry be extended to same-sex couples under the equal protection guarantee of the New Jersey Constitution.”).

163. *Garden State*, 82 A.3d at 342.

deprived of by not having access to the label of “marriage,” and whether this deprivation violated the court’s previous decision in *Lewis v. Harris*.¹⁶⁴

In *Griego*, the Supreme Court of New Mexico determined that New Mexico was constitutionally required to allow same-sex marriage.¹⁶⁵ The court’s equal protection analysis did not focus on institutional dignity or on the need to protect marriage. It only focused on whether heterosexual and “same-gender” couples were similarly situated and, therefore, whether they should be afforded the same treatment.¹⁶⁶ The decision did not focus on the purpose of marriage, but on the purpose of New Mexico’s marriage laws.¹⁶⁷ The court indicated that the purpose of these laws was “to bring stability and order to the legal relationships of committed couples by defining their rights and responsibilities to one another, their children if they choose to raise children together, and their property.”¹⁶⁸ It concluded that barring same-gender couples from marrying based on their sexual orientation violated the Equal Protection Clause of the New Mexico Constitution.¹⁶⁹

Both *Garden State* and *Griego* took a pragmatic approach towards marriage. Both courts reasoned that as long as there were specific rights and obligations derived from marriage, there should be equal access to the institution that sets those rights and obligations.

2. The right to choose a family: the Mexican approach to dignity and autonomy

Dignity attached to autonomy provides a solid ground for future recognition of unmarried families. The Supreme Court of Mexico has developed a strong case law on dignity as attached to autonomy and its decisions on same-sex marriage reflect this approach. Other countries that have based their same-sex marriage decisions on an idea of autonomy as attached to dignity include Spain and Brazil. The cases analyzed below all focus on the right of individuals to make decisions as long as other constitutional rights are respected.

a. Mexico: dignity and individuality

In a 2008 decision, the Mexican Supreme Court (SCJN) elaborated on the concept of dignity as linked to the free development of one’s

164. See generally *id.* (referencing *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)).

165. *Griego*, 316 P.3d at 872.

166. *Id.* at 877–79.

167. See generally *id.* (analyzing New Mexico’s statute).

168. *Id.* at 872.

169. *Id.*

individuality (*libre desarrollo de la personalidad*).¹⁷⁰ This right includes, among others, the freedom to choose freely and autonomously to marry, to have children, and the right to sexual identity.¹⁷¹ The SCJN concluded, therefore, that choosing to live with a person of the same or of a different sex was also part of the free development of one's individuality and therefore one's human dignity.¹⁷² In a previous case recognizing sexual identity, the SCJN had already included a person's sexuality within the concept of dignity as autonomy by stating that:

[S]exuality is an essential component of a person's life and her psyche; it forms part of the most personal and intimate sphere of human life. That is why sexual self-determination is transcendental to the recognition of human dignity and its full development; and that is why the constitutional protection includes a free decision regarding sexuality.¹⁷³

In 2010, the SCJN was confronted with the question of whether the Mexican Constitution limited marriage to heterosexual couples.¹⁷⁴ If that were the case, the Federal District Congress would have overstepped its authority by amending the definition of marriage established in Mexico's Civil Code to include couples of the same sex. That was the position of Mexico's Attorney General, who challenged the constitutionality of the amendment.¹⁷⁵ The Attorney General claimed that, although the Mexican Constitution did not contain a definition of marriage, Article 4 of the Constitution implies that marriage is an association that can only take place between a man and a woman when it states that a foreign woman who marries a Mexican man or a foreign man who marries a Mexican woman can only become Mexican citizens by naturalization.¹⁷⁶ The Constitution, therefore, did not contemplate the option of a man marrying a man or a

170. Alejandro Madrazo & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEX. L. REV. 1863, 1883–84 (2011) (citing Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Acción de amparo directo civil 6/2008, Novena Época, 6 de enero de 2009, *slip op.* 97 (Mex.)). The literal translation of “libre desarrollo de la personalidad” is “free development of personality.” I have translated it, however, as “free development of one's individuality” because I think it better fits the meaning of this principle. Many countries include this principle (as principle or as a right) within their constitutions. In this paper we see this principle in the Mexican and Spanish decisions.

171. *Id.*

172. *Id.* at 1883.

173. SCJN, Acción de amparo directo civil 6/2008.

174. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Acción de inconstitucionalidad 2/2010, Novena Época, 10 de Agosto de 2010, *slip op.* (Mex.).

175. *Id.*

176. *Id.* (referring to the Constitución Política de los Estados Unidos Mexicanos [C.P] art. 30(B)(II) (Mex.)).

woman marrying a woman.¹⁷⁷

According to the Attorney General, this provision necessarily meant that the Mexican Constitution limited marriage to heterosexual couples.¹⁷⁸ Therefore, the only family protected by the Mexican Constitution was the heterosexual, married family.¹⁷⁹ Given that sexual orientation and identity had already been declared part of human dignity by the SCJN in 2008, the exclusion of same-sex couples from marriage in 2010 would have to come from a distinction that did not offend human dignity.¹⁸⁰ As has been done in other countries, the Attorney General looked to procreation for the answer.¹⁸¹ This approach did not convince the SCJN, which disregarded procreation as essential to marriage.¹⁸² Instead, the court focused on the right to dignity as autonomy, in other words, the right to the free development of one's individuality.¹⁸³ The court concluded that this right included the right to choose to marry.¹⁸⁴ If sexual orientation is included in the concept of dignity, people consequently have the right to choose whom to marry.¹⁸⁵

The SCJN established a framework of dignity as related to the free development of one's individuality, and only after that did it analyze constitutionality of same-sex marriage under an equality framework. Like the South African Constitutional Court, the SCJN highlighted that the Mexican Constitution prohibits any discrimination based on sex or any other reason that may attack human dignity.¹⁸⁶

b. Other uses of dignity and autonomy: Brazil and Spain

Brazil's STF followed a similar rationale. The STF concluded that the 1988 Brazilian Constitution referred to the family as an instrument to protect the dignity of family members and their freedom to enjoy

177. *Id.*

178. *Id.*

179. *Id.*

180. Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], *Acción de amparo directo civil 6/2008*, Novena Época, 6 de enero de 2009, *slip op.* 97 (Mex.).

181. Transnationally procreation has been the most recurrent argument against same-sex marriage. *See e.g.*, SCJN, *Acción de inconstitucionalidad 2/2010*, ¶ 93–95; Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2013-669, May 17, 2013 ¶ 17 (Fr.); *Varnum v. Brien*, 763 N.W.2d at 882; *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 951 (Mass. 2003); *Griego v. Oliver*, 316 P.3d 865, 871 (N.M. 2013).

182. SCJN, *Acción de inconstitucionalidad 2/2010*.

183. *Id.* ¶ 263.

184. *Id.* ¶ 269.

185. *Id.* ¶ 265.

186. *Id.* at ¶ 315.

fundamental rights.¹⁸⁷ Accordingly, the family is not a unit that restricts rights to adapt to other legal or even social obligations.¹⁸⁸ On the contrary, the family fosters the development and autonomy of its members.¹⁸⁹

The idea of dignity was present in each of the opinions that form the Court's final decision. Dignity, the decision stated, is at the core of individual autonomy.¹⁹⁰ The right to dignity means the right of an individual to choose how to live his life, and the creation of emotional associations that have "legal dignity."¹⁹¹ The Court also reasoned that dignity is part of a core group of rights associated with autonomy: "[g]uarantees of liberty of religion and secular state prevent religious moral conceptions from guiding the state treatment of fundamental rights such as the right to dignity, the right to self-determination, the right to privacy or the right to freedom of sexual orientation."¹⁹²

In 2012, Spain's Constitutional Court also used the concept of dignity as autonomy to declare the constitutionality of the same-sex marriage statute passed by its Congress in 2005.¹⁹³ The Court only referred to dignity once, stating that the new statute did not affect marriage for heterosexual individuals.¹⁹⁴ For the Court, marriage was still the same institution; the new statute gave individuals the new option of marrying persons of the same sex.¹⁹⁵ The Court reasoned that the statute respects "the guarantee of dignity and free development of one's individuality," as mandated by Article 10.1 of the Spanish Constitution.¹⁹⁶

3. The role of reality in the creation of legal concepts: the social family and the legal marriage

In addition to focusing on autonomy and equality, several decisions on same-sex marriage refer to the need to recognize families, as they already exist.¹⁹⁷ None of these decisions provide a concept of what families are,

187. S.T.F., No. 4.277, Relator: Min. Ayres Britto, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 611 (Braz.).

188. S.T.F., No. 4.277, Relator: Min. Marco Aurelio, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 808 ¶ 14 (Braz.).

189. *Id.*

190. S.T.F., No. 4.277, Relator: Min. Ayres Britto, ¶ 15–16, 20, 26, 35.

191. S.T.F., No. 4.277, Relator: Min. Carmen Lucia, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 695 ¶ 8 (Braz.).

192. S.T.F., No. 4.277, Relator: Min. Marco Aurelio, ¶ 7.

193. S.T.C., Nov. 6, 2012, (B.O.E. No. 286, p. 168, 180) (Spain).

194. *Id.* at 199.

195. *Id.*

196. *Id.*

197. Justice Ayres Brito stated that the Brazilian Constitution does not give a technical definition of the family and it is concept open to reality. S.T.F., No. 4.277, Relator: Min. Ayres Britto, ¶ 37. The

but they do recognize the existence of social constructions of family associations outside the limits imposed by legal systems.¹⁹⁸ The highest courts in Canada, Mexico, Portugal, and Brazil interpreted their constitutional norms as adapting to new realities. The decision of the Iowa Supreme Court in *Varnum v. Brien* also deserves recognition in this section for interpreting equality as an evolving concept.¹⁹⁹ The remainder of this section shows how different courts view their legal institutions, including their constitutional frameworks, as evolving in nature. These courts do not only embrace a concept of marriage that can change, but more importantly, they accept that the family as a legally protected unit changes in time, and constitutional concepts evolve along with these institutions. The idea of an evolving constitution is present in the discussions of the Canadian Supreme Court, as well as Mexico, Portugal, Brazil, and some U.S. courts.

a. The constitution as an evolving instrument: Canada and the U.S. states of Iowa and Connecticut

Canada's courts have on several occasions analyzed the institution of marriage.²⁰⁰ The ultimate decision on same-sex marriage came from the Canadian Supreme Court's 2004 decision in *Reference re Same-Sex Marriage*.²⁰¹ This decision arose from a request by the Governor in Council that the Court hear a reference on the legal amendment to the concept of marriage as "the lawful union of two persons to the exclusion of all others."²⁰² The Governor in Council posed several questions for the Court to answer, including whether Parliament could modify the meaning of marriage.²⁰³

The Court stated that Canada was a pluralistic society and one of the

Mexican Supreme Court stated that the Mexican Constitution protects the family as a social reality. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Acción de inconstitucionalidad 2/2010*, Novena Época, 10 de Agosto de 2010, *slip op.* ¶ 235 (Mex.). The South African Constitutional Court stated that "South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one." *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) ¶ 59 (S. Afr.).

198. *Id.*

199. *See Varnum v. Brien*, 763 N.W. 2d 862, 877 (Iowa 2009) ("For sure, our nation has struggled to achieve a broad national consensus on equal protection of the laws when it has been forced to apply that principle to some of the institutions, traditions, and norms woven into the fabric of our society. This observation is important today because it reveals equal protection can only be defined by the standards of each generation.").

200. *See EGALE Canada Inc. v. Canada*, [2003] B.C.J. 994 (Can. B.C. C.A.); *Halpern v. Canada*, [2003] O.R. 3d 161 (Can. Ont. C.A.); *Hendricks v. Québec*, [2002] R.J.Q. 2506 (Can. Que. C.S.).

201. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.).

202. *Id.* ¶ 1.

203. *Id.* ¶ 2.

main pillars of Canada's constitutional interpretation was the idea of the Constitution as "a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."²⁰⁴ The Court explained how the idea of the Constitution as a living tree applies to the concept of marriage by referring to other situations that were not originally contemplated by the Constitution such as women's participation in public life, or Canada's legislative competence over telephones through a power established before telephones were invented.²⁰⁵

The Canadian Supreme Court's decision did not expand on the notion of the family; instead, it was limited to answering the questions posed by the Governor in Council. The decision, therefore, could be viewed as a conformist one that refers only to the possibility of expanding marriage to same-sex couples. However, arguably, the decision did more than just expand marriage to same-sex couples. First, it affirmed that Canada's Constitution adapts to new social realities. Second, it rejected the idea of a natural or supra-legal concept of marriage that can only be modified within the limits of its own nature. The Canadian Court did not advance a functionalist concept of marriage, nor did it link marriage to the protection of the family. Nevertheless, the Court rejected heterosexuality as essential or natural to marriage.²⁰⁶ Furthermore, it seems that the court's interpretation of marriage only recognized that marriage is composed of two individuals as a natural aspect of the institution, and the free will of the parties to enter into it.²⁰⁷ Underlying the Canadian Court's decision is the tenet that constitutional concepts evolve.

Canada's decisions on same-sex marriage came after several legal changes that minimized the difference between married and unmarried couples.²⁰⁸ The role of family law in Canada had already started moving towards recognition of families outside marriage and statutes ensured that those relationships were legally protected. *Reference re Same-Sex Marriage*, therefore, should also be read in conjunction with Canada's prior decisions and regulations to understand the acceptance of functionalist

204. *Id.* ¶ 22.

205. *See id.* ¶¶ 22–23.

206. *See id.* ¶¶ 21–30.

207. *See id.* ¶ 27 ("The only objective core which the interveners before us agree is 'natural' to marriage is that it is the voluntary union of two people to the exclusion of all others. Beyond this, views diverge. We are faced with competing opinions on what the natural limits of marriage may be.")

208. In 1995, the Supreme Court of Canada held that for some purposes, the term "spouse" should apply to long-term cohabitants. *See Miron v. Trudel*, [1995] 2 S.C.R. 418, 421 (Can.). As early as 1999, Canada's Supreme Court recognized the property rights of same-sex partners after dissolution. *See M. v. H.*, [1999] 2 S.C.R. 3, ¶¶ 1–6 (Can.).

approaches towards families within Canada's legal system.²⁰⁹

Two cases in the U.S. also show a possible shift towards an evolution in constitutional interpretation. The Iowa Supreme Court's decision in *Varnum v. Brien*,²¹⁰ and the Connecticut Supreme Court's decision in *Kerrigan v. Commissioner of Public Health* demonstrate the use of a living constitution approach towards same-sex marriage.²¹¹

Varnum could be viewed as reinforcing the marriage paradigm.²¹² Like the Massachusetts Supreme Court in *Goodridge*, the Iowa Supreme Court emphasized the good qualities of the plaintiffs to highlight their similarities with opposite-sex couples.²¹³ The only difference between the plaintiffs and most Iowans, the court reasoned, was that they were "sexually and romantically attracted to members of their own sex."²¹⁴ The issue for the court was, therefore, to decide if same-sex couples were similarly situated to opposite-sex couples with regard to marriage.²¹⁵ The court decided that restricting marriage to same-sex couples was a violation of the equal protection clause of the Iowa Constitution.²¹⁶ The decision referred to marriage as a framework that provides stability: "[s]ociety benefits, for example, from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples."²¹⁷

Varnum accepted marriage as a beneficial institution for society. However, it did so based on practical terms more than on an idealistic view of marriage. The court did not say anything about marriage making individuals better, or marriage giving a special dignity to the parties. More importantly, along with its analysis on marriage, the court affirmed that constitutional interpretations evolve. Citing a prior decision, it stated that Iowa's "constitution is not merely tied to tradition, but recognizes the changing nature of society."²¹⁸

The Connecticut Supreme Court in *Kerrigan* also acknowledged the

209. See Joanna Radbord, *Lesbian Love Stories: How We Won Equal Marriage in Canada*, 17 YALE J.L. & FEMINISM 99, 102-03 (2005).

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

211. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 407 (Conn. 2008).

212. See *Varnum*, 763 N.W.2d at 872.

213. See *id.*

214. *Id.*

215. See *id.* at 883.

216. *Id.* at 906.

217. *Id.* at 883.

218. *Id.* at 876 (quoting *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999)).

possibility of more realistic conceptions of the family in the future. The court recognized that constitutional norms must be interpreted according to the context in which they are being applied:

In short, the [State] constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness The Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens.²¹⁹

Both courts begin their analyses by accepting the possibility that legal and constitutional concepts evolve as society evolves.

b. The family as a social construct: Mexico, Brazil, and Portugal

In *Accion de Inconstitucionalidad 2/2010*, the SCJN had the task of interpreting the Mexican Constitution either in line with the Attorney General's constitutional claim limiting the definition of family to the married family, or advancing a different position.²²⁰ The SCJN chose the latter and in doing so, it chose a transformative analysis of the role of family law over a conformist approach to legal regulations based on a narrow concept of marriage. The Court based its decision not on how important marriage was for the Mexican people, but on a constitutional interpretation of the family that declined to privilege one type of family over others.²²¹

According to this, the role of the Constitution with regard to the family is not to encourage people to fit into one particular model of family, which is the result if only married families enjoy constitutional protection, or if married families are afforded more legal benefits and rights than unmarried ones. The Constitution assumes, therefore, the role of protector of families that may or may not be desired by the democratic majority. The reasoning is that as long as these families exist in Mexico, and if they are based on the principle of equality between men and women, they should be recognized as constitutionally protected.²²²

219. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008) (alteration in original) (quoting *State v. Dukes*, 547 A.2d 10, 19 (Conn. 1988)).

220. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Acción de inconstitucionalidad 2/2010*, Novena Época, 10 de Agosto de 2010, *slip op.* ¶ 13 (Mex.).

221. *See id.* ¶ 235.

222. Even before analyzing the institution of the family, the court analyzes the principle of equality between men and women. *See id.* ¶ 233. Challenging polygamy as a constitutionally protected family unit on the basis of violating equality between men and women is beyond the extent of this paper. Under some constitutional schemes, however, it may be possible to advance a substantive equality argument that looks at actual polygamous social constructions and rejects them as structurally

The SCJN also analyzed the social relevance of marriage, and ultimately concluded that it was also a mutable concept that needed to adapt to social realities.²²³ The SCJN, therefore, is another high court that sees the law adapting to social needs rather than demanding that society adapt to a normative idea of the family. The Court confirmed this when it stated:

Social reality demands an answer from the legislature . . . it is an undeniable fact that society and even marriage's secularization and the transformation of human relations have gradually led to different forms of emotional, sexual, and mutually supportive relationships. At the same time, they have led to legal changes with regard to the institution of marriage, which has resulted in the redefinition of the traditional concept [of marriage] used during different periods of time²²⁴

The Mexican decision began with an explanation of the role of the constitution as protecting families instead of mandating that people conform to a specific model of family.²²⁵ The Court then went on to explain that it was also incorrect to believe that the Mexican Constitution would only allow people to marry individuals of a different sex.²²⁶ On the contrary, the Court, like the South African Constitutional Court and the Canadian Supreme Court, considered that its own Constitution had to adapt to social changes.²²⁷ It analyzed marriage as an institution that could no longer be connected to procreation and, therefore, marriage could not be limited to heterosexual couples on the basis of that feature.²²⁸

In a later decision, the SCJN had the opportunity to test its decision on the constitutionality of same-sex marriage in a case that challenged the traditional concept of marriage in the Mexican state of Oaxaca's Civil Code.²²⁹ The SCJN not only reaffirmed its prior case law, but went further, stating that sexual orientation, as a suspect category, was subject to strict scrutiny.²³⁰ As such, Oaxaca needed to demonstrate that a measure limiting

discriminating against women and unacceptable in a secular system.

223. *Id.* ¶ 242.

224. *Id.*

225. *See id.* ¶ 235.

226. *See id.* ¶ 250.

227. *See id.* ¶ 254.

228. *Id.* ¶¶ 249, 250, 270.

229. Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo en Revisión 581/2012, Décima Época, 5 de Diciembre de 2012 (Mex.).

230. Mexico's Supreme Court uses two different standards of review: ordinary scrutiny and strict scrutiny. The ordinary scrutiny "applies to issues that do not directly affect human rights and have a broad margin of action and appreciation for the authority from a normative perspective such as on financial and economic matters." *Id.* In contrast, strict scrutiny is used when the Court considers that

constitutional rights based on sexual orientation responded to a constitutionally imperative objective.²³¹ The measure also had to relate directly to the State's objective.²³² The SCJN found that the regulation of marriage by the State of Oaxaca was aimed at protecting the family and concluded that this was an imperative objective.²³³ However, because the Mexican Constitution does not just protect the traditional family, comprised of a married father, mother, and their respective biological children, the Court did not consider the measure to be directly linked to the objective.²³⁴ Instead, the Constitution protects the family as understood by "social reality."²³⁵ The SCJN is another example of a high court that has chosen not to focus on the right to marry, but on the right to a family.

The same approach was adopted by Brazil's STF and Portugal's TCP. In addition to a narrative on autonomy and equality, several of the opinions that formed the STF's decision spoke specifically about the need to recognize reality as the foundation for legal constructions, rather than the traditional ideal of a married family.²³⁶ Just like the Mexican decisions, the Brazilian opinions also conceptualized the family as a unit of mutual support.²³⁷ The major contribution of the 2011 Brazilian STF decision was

there is a fundamental right at risk, for example, the right to equality and non-discrimination under Article 1 of the Mexican Constitution. *See* Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo en Revisión 202/2013, Décima Época, 26 de junio de 2013, 10 (Mex.). In the Oaxaca decision on same-sex marriage, the Court stated that heightened scrutiny was necessary because the law distinguished who could marry "based on the sexual preferences of individuals," which is a suspect category. *Id.* The Court explained that a suspect category is implicated when a law "affects one of the criteria mentioned in the last paragraph of Article 1, [such as] . . . ethnic origin, nationality, gender, age, disability, social condition, health, religion, opinions, sexual preferences, marital status "or any other quality that may threaten human dignity and may have as an objective to destroy or undermine the rights and liberties of individuals." *Id.* For the Court, heightened scrutiny requires clear constitutional support: "[the statute] must pursue a constitutionally important objective." *Id.* In addition, strict scrutiny requires that the challenged measure be directly connected to those constitutional objectives and be the least restrictive measure to effectively achieve that objective. SCJN, Amparo en Revisión 581/2012, at 33–34.

231. *Id.*

232. *Id.* at 35.

233. *Id.* at 36.

234. *Id.* at 37.

235. *Id.*

236. Justice Luis Fux stated in his decision that "homosexuals create continuous and lasting relationships of love and mutual support to share means and life projects. This simply happens, as it has always happened (though in many cases secretly), and for sure it will continue happening." S.T.F., No. 4.277, Relator: Min. Luis Fux, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 659 ¶ 9 (Braz.). Justice Ayres Brito stated that the concept of family in the Brazilian Constitution has no orthodox meaning, but that it should have some basis in reality. S.T.F., No. 4.277, Relator: Min. Ayres Brito, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 625 ¶ 37 (Braz.).

237. *Id.* ¶ 12.

the equalization of married and unmarried families. By recognizing that there was no constitutional difference between the married and the unmarried family, the decision made marriage a real option, ensuring that any rights provided to married couples would also have to be granted to unmarried families in the future.²³⁸ The STF left the door wide open for the recognition of family units beyond the divide between same-sex and different-sex couple when it stated that the family was a cultural construction that evolves with time.²³⁹ The opinion criticized the patriarchal family unit and gave a historical account of the unit's evolution towards an egalitarian concept of the family.²⁴⁰

Portugal's TCP used similar reasoning to justify the constitutionality of same-sex marriage. The TCP argued that the Portuguese Constitution uses open concepts that allow the legislature to maintain a connection between legislation and social reality.²⁴¹ The Constitution, the Court stated, enshrines a flexible concept of marriage that allows the inclusion of different social, political, and ethical convictions in different historical moments.²⁴²

The decisions analyzed above leave the door open for couples to keep pushing for greater legal protection and recognition of non-traditional families beyond what has already been advanced.

II. THE DISCONNECT BETWEEN MARRIAGE AND FAMILY

The increased litigation over same-sex marriage gives societies an opportunity to review the reasons behind the divide between married and unmarried families. Marriage, undoubtedly, serves some purposes. It is a bundle of rights, benefits, and obligations that are allocated *ex ante*. The question, however, is if there are any legitimate reasons to keep treating this bundle as a privileged institution instead of a pre-packed family association option that does not guarantee privileged treatment over other family associations. A brief analysis of the purposes that marriage has served in the past, and the purposes it continues to serve today, demonstrates that when societies create a special status for the married family, they nevertheless fail to protect most real families.

Marriage has served several purposes in the Western legal tradition.

238. *Id.* ¶ 44.

239. S.T.F., No. 4.277, Relator: Min. Marco Aurelio, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 808 ¶ 8 (Braz.).

240. *Id.* at ¶ 9.

241. S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2^ª SÉRIE [D.R.] 28.4.2010, 22367, 22377 (Port.).

242. *Id.*

For centuries, marriage was an essential part of the economic machinery, as a means of transferring and controlling property.²⁴³ Historically, children and wives were able workers with economic value *per se*, making them valuable to the production of wealth.²⁴⁴ Until recently, the control of women's sexuality through marriage was also essential to ensure legal paternity.²⁴⁵ Marriage also played an important role in the continuation of the patriarchal family. Historically, this meant that men were the heads of households and owners of everything inside their dwellings, from material goods, to slaves, servants, children, and wives.²⁴⁶ Lastly, because societies were structured on systems of class and race, marriage helped perpetuate racial and class homogeneity. In many Western countries these objectives were in place even beyond the 1960s.²⁴⁷ In all times and places, however, families have formed outside the marriage realm, but legal systems have failed to acknowledge them.

A. New reality

Today, the public narrative regarding family law and marriage in particular, has changed. Few actors would be willing to argue openly that marriage still has the social purpose of securing men's sexual monopoly over women and consequently securing legitimate offspring. Adultery is

243. LLOYD BONFIELD, *MARRIAGE SETTLEMENTS 1601-1740: THE ADOPTION OF THE STRICT SETTLEMENT* 93 (1983); STEPHANIE COONTZ, *MARRIAGE A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE* 45 (2005).

244. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 190 (2010).

245. See CHRISTINA SIMMONS, *MAKING MARRIAGE MODERN: WOMEN'S SEXUALITY FROM THE PROGRESSIVE ERA TO WORLD WAR II* 6 (2009).

246. The patriarchal family is common to most legal cultures regardless of historical periods. Until today we see its vestiges in different countries. The Roman family, inherited by countries of the continental legal tradition, was led by a *pater familias*, owner of everything within his household, and with power over his children until his death. BRUCE W. FRIER & THOMAS A.J. MCGINN, *A CASEBOOK ON ROMAN FAMILY LAW* 4–5 (Joel Lidov ed., 2004). In France, the wife owed obedience to the husband and the husband owed protection to the wife. The wife had an obligation to live with and follow her husband to wherever he decided to live. The wife could not trade or contract on her own. See CODE CIVIL [C. CIV.] art. 213–15 (1804) (Fr.), reproduced at <http://gallica.bnf.fr/ark:/12148/bpt6k1061517/f55.image>. Sir William Blackstone went even further in regulating the authority of the husband over his wife: “[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a *feme-covert*, *femina viro co-operta*; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.” WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* ¶ 442–445 (Wayne Morrison ed., vol. 1, 1765).

247. Although many states had already amended their statutes, a general ban on interracial marriage only came in 1967 with *Loving v. Virginia*, 388 U.S. 1 (1967).

scantly penalized and, when it is, rarely legally enforced in the Western world.²⁴⁸ Children may still be legally classified as legitimate or illegitimate, but DNA tests offer far better proof of paternity than marriage.²⁴⁹ Arguing that marriage complies with a community's interest in keeping races pure or social classes unmixed would also be virtually unthinkable in the modern era. Racial discrimination is blatantly unconstitutional in most Western countries, and constitutes a recognized violation of international human rights law.²⁵⁰

Property allocation and economic stability are the only remaining justifications for marriage. Before the massive entrance of women into labor markets, a woman's main source of income was her marriage.²⁵¹ Women can now, of course, acquire property on their own. Property allocation is thus no longer an objective of marriage but a consequence that flows from the existence of the institution. Economic gains are likely a prime motivator for many people to marry, but Western legal systems tend to reject profit as a valid reason for marriage.²⁵² Marriage serves as a force in the allocation of responsibilities for the welfare of individuals. A marriage certificate formally compels two individuals to care for one another, attempting to avoid or at least to delay the need for the government to provide basic care for those individuals.²⁵³ Public policies reinforcing or promoting marriage have been justified on reducing welfare

248. THE OXFORD ENCYCLOPEDIA OF WOMEN IN WORLD HISTORY VOL. I, ADULTERY: COMPARATIVE HISTORY 29 (Bonnie G. Smith ed., 2008). For adultery in the United States, see Kyle Graham, *Why Torts Die*, 35 FLA. ST. U.L. REV. 359, 406–07 (2008).

249. See LINDA A. MOONEY ET AL., UNDERSTANDING SOCIAL PROBLEMS 164 (2007).

250. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 1, 2, 23 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]; Organization of American States, American Convention on Human Rights art. 1, 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Human Rights Convention].

251. Prior to 1920s most women exited the work force at marriage. It was not until the 1950s that married women start participating in the work force almost in the same proportion as unmarried women. Claudia Goldin, *The Quiet Revolution That Transformed Women's Employment, Education, and Family*, 96 THE AMERICAN ECON. REV. 1, 2–5 (2006).

252. This is evident when comparing legal reasons for marriage annulment. An error in the economic conditions of one of the parties, even in the case of open deception from one party to the other, has rarely been accepted as grounds for annulment. The original Napoleonic Code included several articles regulating marriage annulment but none referred to a mistake in the economic conditions of one of the parties. See CODE CIVIL [C. CIV.] tit. V, ch. IV (1804) (Fr.). Today's French Civil Code also regulates marriage annulment in similar terms in Articles 180 to 202. See CODE CIVIL [C. CIV.] art. 213–15 (Fr.).

253. Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 4 (2010).

responsibilities.²⁵⁴ It is not, however, legal marriage that reduces welfare, but rather economic and social stability.²⁵⁵ It is not the marriage license that magically stops people from falling into poverty.

In the Western world, legal marriage in the twenty-first century is, for the most part, an individual choice. Western countries view arranged marriages as a violation of human rights.²⁵⁶ Communities largely define themselves through each member's individuality.²⁵⁷ Communal respect for an individual's autonomy has increased, and alongside it the concept of marriage has shifted from an institution for the realization of moral duties to one of privacy and freedom.²⁵⁸

More educational and labor opportunities have also created a notable increase in autonomy for women.²⁵⁹ By the end of the twentieth-century, men and women were shaping family structures that were increasingly more detached from traditional precepts and external controls.²⁶⁰ The development of the right to privacy and the concept of individual rights have also contributed to three significant changes in family structure: 1)

254. See, e.g., 42 U.S.C. § 601 (2000) (“The purpose of this part is to increase the flexibility of States in operating a program designed to—(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.”)

255. Judith Stacey, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families*, 23 QLR 529, 534 (2004) (“[t]here is considerable consensus among researchers that a disproportionate cause of the greater risks suffered by children in single-parent families derives from the lesser economic and educational resources that one adult, as compared to two, can normally offer a child.”); see also, LAWRENCE M. FRIEDMAN, *PRIVATE LIVES, FAMILIES INDIVIDUALS AND THE LAW* 128 (2005). As Friedman states, in Finland and Scandinavian countries, children are commonly born out of wedlock because their parents choose not to marry. *Id.* They, however, are not worse off than children born within a legal marriage under the same socio economic circumstances. *Id.* (“To children in a stable, loving household, it can hardly make much difference whether Mother and Father have a marriage license and went through a ceremony or not.”)

256. Universal Declaration of Human Rights, *supra* note 250, art. 16(1)–(2); American Convention on Human Rights, *supra* note 250, arts. 2, 17.1; European Human Rights Conventions, *supra* note 150, art. 12.

257. See Population Div. of Dep’t. of Econ. & Soc. Affairs, U.N. Secretariat, *Partnership and Reproductive Behaviour in Low-Fertility Countries*, 6, U.N. Doc. ESA/P/WP.177 (May 2003), available at <http://www.un.org/esa/population/publications/reprobehavior/partrepro.pdf> [hereinafter *Partnership and Reproductive Behaviour*].

258. “Where mid-nineteenth-century judges and other public spokesmen had hardly been able to speak of marriage without mentioning Christian morality, mid-twentieth-century discourse saw the hallmarks of the institution in liberty and privacy, consent and freedom.” NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 197 (2002).

259. *Partnership and Reproductive Behaviour*, *supra* note 257, at 5.

260. *Id.*

more children born out of wedlock, 2) more heterosexual cohabitation outside marriage, and 3) increased visibility of same-sex couples.

1. Marriage and children

Since the 1960s, the Western world has experienced a marked increase in children born out of wedlock.²⁶¹ According to statistics gathered by the U.S. Department of Health and Human Services in 2009, 41% of births in the United States were to unmarried women.²⁶² There has been a slight decrease since then to 40.7% of births to unmarried women in 2012.²⁶³ These figures are more than twice the number found in 1980.²⁶⁴ Most developed countries are experiencing comparable trends, with countries such as Iceland, Sweden, and Norway having more than 50% of births out of wedlock.²⁶⁵ Most European countries are experiencing the same phenomenon.²⁶⁶

A similar trend exists among Organization for Economic Cooperation and Development (OECD) countries, with more than 50% of children born out of wedlock in France, Mexico, Slovenia, and the Nordic countries.²⁶⁷ Even where the proportion of children born outside marriage is low, this percentage still represents an increase over prior decades.²⁶⁸ South America shares similar statistics. The percentage of births out of wedlock in Chile went from less than 16% in the 1960s to over 50% in the early twenty-first century.²⁶⁹ The entire Latin American region has experienced a significant decline in the number of births within marriage.²⁷⁰ In 1970, around 75% of all children in Latin America were born within a married family.²⁷¹ By the

261. *Id.* at 44.

262. JOYCE A. MARTIN ET AL., DIV. OF VITAL STATISTICS, BIRTHS: FINAL DATA FOR 2012 9 (2013), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf.

263. *Id.*

264. *Id.*

265. DIRECTORATE OF EMPLOYMENT, LABOUR AND SOCIAL AFFAIRS, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, FAMILY DATABASE: SHARE OF BIRTHS OUT OF WEDLOCK AND TEENAGE BIRTHS 1, available at www.oecd.org/els/social/family/database (last updated Feb. 24, 2012).

266. *Id.*

267. *Id.*

268. *Id.* at 2.

269. Ximena Valdés, *Notas sobre la Metamorfosis de la Familia en Chile*, Meeting of ECLAC and UNFPA experts, (Nov. 22–23, 2007) available at <http://www.eclac.cl/dds/noticias/paginas/9/30289/Resumen.XimenaValdes.pdf>.

270. Ximena Castro Martin et al., *Maternidad sin Matrimonio en América Latina: Análisis Comparativo a Partir de Datos Censales*, CEPAL NOTAS DE POBLACIÓN NO. 93, 48 (Jan. 2011), available at http://www.eclac.cl/publicaciones/xml/9/45549/lcg2509-P_2.pdf.

271. *Id.*

beginning of the twenty-first century, however, more than 50% of children were born out of wedlock.²⁷²

Historically, illegitimate children were not only social outcasts,²⁷³ but also legal outcasts.²⁷⁴ As the social stigma of having a child out of wedlock has faded, the legal treatment of legitimate and illegitimate children has balanced out to almost total equality.²⁷⁵ Marriage has thus become much less of a need and much more of a choice, at least when it comes to protecting children from legal disadvantages.

2. Marriage and cohabitation

Statistics on children born out of wedlock mirror a steady increase in the number of unmarried couples living together. In the United States, the number of unmarried couples living together increased from 1.6 million in 1980 to 4.1 million in 1997.²⁷⁶ In recent years marriage has continued to decline steadily with a 5% decrease in the number of married couples from

272. *Id.*

273. Kingsley Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215, 215 (1934) (“[t]he bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, an undeniable evidence of contramoral forces; in short, a problem—a problem as old and unsolved as human existence itself.”).

274. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 24 (1996).

275. The treatment of illegitimate children varies from country to country. The Convention on the Rights of the Child, which has 194 States Parties, establishes in Article 2.2 that “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the *status* . . . of the child’s parents, legal guardians, or family members.” Convention on the Rights of the Child art. 2.2, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added). In several cases the European Court of Human Rights has decided that the differentiation between legitimate and illegitimate children is a violation of the European Convention of Human Rights. See *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979); *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) (1987); *Mazurek v. France*, 42 Eur. Ct. H.R. 9 (2006); *Camp and Bourimi v. Netherlands*, Eur. Ct. H.R. 117 (2000); *Brauer v. Germany*, App. No. 3545/04, Eur. Ct. H.R. (ser. A) (2009), *Fabris v. France*, App. No. 16574/08, Eur. Ct. H.R. (2013). Article 17.5 of the American Convention of Human Rights states that “[t]he law shall recognize equal rights for children born out of wedlock and those born in wedlock.” American Convention on Human Rights, *supra* note 250, art. 17.5. Children in the United States born out of wedlock are subject to less stigma today, but they still experience some differences *vis a vis* children born within a legal marriage. As Richard Storrow points out, children born out of wedlock still “face legal obstacles to inheriting from their fathers.” See Richard F. Storrow, *The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 561, 577 (2012). For a detailed account on the differences between these children in the areas of inheritance, government benefits, and torts, see Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL’Y & L. 437, 465 (2012).

276. Table 66, STATISTICAL ABSTRACT OF THE UNITED STATES (118 ed. 1998), *cited in* D. A. Habbegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 IN. L. REV. 991, 991 (2000).

2009 to 2010.²⁷⁷ This is a trend outside the United States as well.²⁷⁸ In the last third of the twentieth century, cohabitation became popular among young professionals in Northern and Western Europe.²⁷⁹ In Latin America, cohabitation has increased and formal unions have decreased, especially among young couples.²⁸⁰ In Panama, Chile, and Mexico, the percentage of unwed cohabiting couples increased between 1985 and 2000, particularly amongst individuals between the ages of twenty-five and forty years old.²⁸¹ This trend cannot be interpreted as a total rejection of marriage, since numbers do not show if cohabitation is seen as a premarital arrangement or as an alternative to marriage.²⁸² Both possibilities, however, have far reaching consequences for the relationship between marriage and family formation. They show that marriage has lost its relevance as the primary gateway for starting a family. Men and women have children and engage in committed relationships without linking those decisions to marriage. This demographic reality coincides with a more open attitude towards cohabitation in general.²⁸³

3. Same-sex couples

Until the mid-twentieth century, legal and political struggles in favor of gay and lesbian rights focused primarily on protecting individuals from homophobia and repealing sodomy laws.²⁸⁴ In the United States in 1960, every state had statutes criminalizing various types of consensual sexual relations between individuals of the same sex.²⁸⁵ Although there are cases

277. D'VERA COHN ET AL., PEW RESEARCH CENTER, SOCIAL & DEMOGRAPHIC TRENDS 1 (2011), available at <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/>.

278. K. Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 INT'L J. L., POL'Y. & THE FAM. 1, 1 (2001); see also A.H. GAUTHIER, THE STATE AND THE FAMILY: COMPARATIVE ANALYSIS OF FAMILY POLICIES IN INDUSTRIALIZED COUNTRIES 111-112 (1998).

279. *Partnership and Reproductive Behaviour*, supra note 257, at 23.

280. Jorge Rodriguez Vignoli, *Tendencias recientes de las Uniones Consensuales en América Latina: Un Examen con Distinciones Socioeconómicas en Países Seleccionados*, CEPAL MEETING OF EXPERTS, 6 (Oct. 28–29 2004), available at <http://www.eclac.org/dds/noticias/paginas/9/19679/JRodriguez.pdf>.

281. *Id.* at 5.

282. *Id.* at 7.

283. In response to a recent study, 39% of American answered that they believed marriage is an obsolete institution. PEW RESEARCH CENTER, THE DECLINE OF MARRIAGE AND THE RISE OF NEW FAMILIES: A SOCIAL & DEMOGRAPHIC TRENDS REPORT (Nov. 18, 2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

284. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1558 (1993).

285. Mary Bernstein, *Liberalism and Social Movement success: the case of United States Sodomy Statutes*, in REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 3, 3 (Elizabeth Bernstein &

of legal battles for the recognition of same-sex marriage prior to the 1990s,²⁸⁶ the rise in the visibility of gay and lesbian couples is mainly a phenomenon of the 1990s.²⁸⁷ In 2001, The Netherlands was the first country to legalize same-sex marriage.²⁸⁸ However, the movement towards recognition of same-sex couples as legitimate associations began much earlier.²⁸⁹ Most regulations aimed at providing comprehensive legal frameworks for same-sex couples in Europe emerged in the 1980s and 1990s.²⁹⁰ Denmark was the first country to pass a registered partnership regime for same-sex couples.²⁹¹ The statute resembled marriage regulation in all aspects related to the relationship between the couple, but left out all parental regulations.²⁹² Other countries that legally recognized same-sex couples followed this pattern.²⁹³ Since 1989, an increasing number of countries have created some type of regulation that recognizes the

Laurie Schaffner eds., 2005).

286. CAROL SANGER, *FAMILY LAW STORIES*, 28–30 (2007).

287. This is apparent by the rise in the number of publications discussing same-sex marriage or same-sex unions in general. A limited search in the Library of Congress catalog shows thirteen books with the word “same-sex marriage” in the title between 1900 and 1989, forty-two between 1990 and 1999, and 450 since the year 2000. An advanced search of the Worldcat database (<http://www.worldcat.org/>) showed five entries between 1900 and 1989 that contain “same-sex” in the title, and the word “marriage” as a subject when searching for books in English, excluding juvenile and fiction categories. The same search showed 160 hits from 1990 to 2000, and 974 from 2001 to 2013. When narrowing the search by limiting results by subject heading and marking only “same-sex marriage,” Worldcat shows 96 entries from 1990 to 2000, and 521 from 2001 to 2013. It does not show “same-sex marriage” as a search-limiting option when looking between 1900 and 1989.

288. Ian Curry-Sumner, *A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe*, in *LEGAL RECOGNITIONS OF SAME-SEX RELATIONSHIPS IN EUROPE, NATIONAL CROSS-BORDER AND EUROPEAN PERSPECTIVES*, EUROPEAN FAMILY Law Series No. 32 71 (Katharina Boele-Woelki & Angelika Fuchs eds., 2012); *see also* *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W. 2d 335, 351 (Iowa 2013) (stating that with the legalization of same-sex marriage in Iowa, the presumption of legitimacy applies regardless of the gender of the spouses).

289. Katharina Boele-Woelki, Colloquy, *Le Partenariat Enregistre: Legislation Des Pays-Bas* 44 (1999), available at <http://ciec1.org/CadrEtudeColloque.htm>.

290. *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 2* (Robert Wintemute & Mads Andenæs eds., 2001)

291. Macarena Sáez, *Same Sex Marriage, Same Sex Cohabitation and Same Sex Families Around The World: Why “Same” Is So Different*. 19 AM. U. J. GENDER SOC. POL’Y & L. 1, 16 (2011).

292. Linda Nielsen, *Family Rights and the “Registered Partnership” in Denmark*, 4(3) INT’L J. L. POL’Y FAM. 297, 298 (1990).

293. In 2003, Belgium first passed a same-sex marriage law with restrictions on adoption. Only in 2005 did the legislature open adoption to same-sex couples. Frederik Swennen & Yves-Henri Leleu, *Belgium*, 19 AM. U. J. GENDER SOC. POL’Y & L. 57, 65 (2011). Portugal did the same in 2010 by expanding marriage to same-sex couple but keeping adoption open only to heterosexual couples. Sáez, *supra* note 291 at 9–10. In May 2013, Portugal granted same-sex married couples access to second parent adoption. Andrei Khalip, *Gay Couples in Portugal win limited adoption rights*, REUTERS (May 17, 2013), available at <http://www.reuters.com/article/2013/05/17/us-portugal-gayadoption-idUSBRE94G0KV20130517>.

legitimacy of same-sex couples.²⁹⁴

These new legal landscapes have triggered developments in international law, immigration law, family law, and tax law, among other areas. Countries face new legal issues related to the recognition of civil unions and same-sex marriage. For example, old principles, such as the presumption of the legitimacy of children within marriage, have to be reinterpreted in light of same-sex marriage.²⁹⁵ Civil unions and registered partnerships create a set of legal family associations that did not exist before the 1980s. New associations are accompanied by new legal issues, and countries have been adapting ever since to a more complex set of familial alternatives.

Today, the traditional legal concept of marriage is contrasted with a reality that is more diverse, and includes families that are formed by adults and children who often are not tied to each other by blood or marriage. Individuals no longer see marriage as a mandatory step before forming a family, and look at marriage as one of several private alternatives. Since the inception of no-fault divorce in many countries, marriage looks more like a private contract and has less of a public institutional character.²⁹⁶ Countries have also detached the concept of parenthood from marriage, recognizing parenthood as a direct link between child and parent, regardless of the marital status of the parents.²⁹⁷ The struggle for the recognition of same-sex couples has brought into view the longstanding issue of the lack of recognition of complex family structures outside marriage.

294. According to the organization Hiddush-Freedom of Religion for Israel, at least thirty-four states have provided foundational approval to same-sex couples. See *Freedom of Marriage World Map*, HIDDUSH FOR RELIGIOUS FREEDOM AND EQUALITY (Feb. 5, 2015), <http://marriage.hiddush.org/about/same-sex-marriage-and-civil-unions>. According to the Pew Research Center, by the end of 2014, twenty countries allowed same-sex marriage either fully or partially. *Gay Marriage Around the World*, PEW RESEARCH CENTER (Dec. 19, 2013), <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/>.

295. 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, 575–76 (2004). Originally, the Dutch legislature did not want to apply the presumption of legitimacy to same-sex marriage. It stated that “[i]t would be pushing things too far to assume that a child born in a marriage of two women would legally descend from both women. That would be stretching reality.” Kees Waaldijk, *Explanatory memorandum on the text of the Dutch law on the opening up of marriage for same-sex partners* (May 2, 2001), available at <http://media.leidenuniv.nl/legacy/Translation%20of%20Dutch%20law%20on%20same-sex%20marriage.pdf>.

296. JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 72 (2002).

297. JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW xiii (2000).

B. An old legal framework

While the social concept of marriage has changed, most countries employ marriage as the fundamental paradigm of family law. In many systems, marriage and the family are still constitutionally equated with one another. For example, the Basic Law for the Federal Republic of Germany states in its first chapter, entitled “Basic Rights,” that “[m]arriage and the family shall enjoy the special protection of the state.”²⁹⁸ Australia does not enumerate a list of rights in its Constitution. Nevertheless, its Constitution states that Parliament shall have the power to “make laws for the peace, order, and good government of the Commonwealth with respect to: . . . (xxi) marriage; (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.”²⁹⁹

In Hungary, the Constitution includes within its General Provisions of Chapter I the protection of the “institution of marriage and the family.”³⁰⁰ Colombia connects both institutions by stating that “[t]he family is the basic nucleus of society. It is formed on the basis of natural or legal ties, by the free decision of a man and woman to contract matrimony or by their responsible will to conform one.”³⁰¹ Furthermore, Article 42 of the Colombian Constitution has ten paragraphs dedicated to the regulation of marriage and family.³⁰²

Meanwhile, in Peru, the Constitution states that it protects the family and “promotes marriage” as recognition that marriage and family are “natural and fundamental institutions of society.”³⁰³ Similarly, El Salvador’s Constitution states that “[m]arriage is the legal foundation of the family,” and goes on to say that “[t]he State will encourage marriage.”³⁰⁴ It does, nonetheless, add that “[t]he lack of [marriage] will not affect the enjoyment of rights that may be established in favor of the family.”³⁰⁵ A similar connection is found in the Constitutions of other Latin American countries such as Brazil,³⁰⁶ Costa Rica,³⁰⁷ Cuba,³⁰⁸ Guatemala,³⁰⁹

298. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. VI (Ger.).

299. AUSTRALIAN CONSTITUTION S 51.

300. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 15.

301. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art.42.

302. *Id.*

303. CONSTITUCIÓN POLÍTICA DEL PERÚ [C.P.] [CONSTITUTION OF PERU] art. 4.

304. CONSTITUCIÓN POLÍTICA DEL SALVADOR [C.P.] [CONSTITUTION OF EL SALVADOR] art. 32.

305. *Id.*

306. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 226 (Braz.)

307. CONSTITUCIÓN POLÍTICA DE COSTA RICA [C.P.] [POLITICAL CONSTITUTION OF COSTA RICA] art. 51.

Honduras,³¹⁰ Panama,³¹¹ and the Dominican Republic.³¹² All these protections, however, look small when compared to Ireland's constitution. In Article 41.3.1, Ireland pledges "to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack."³¹³ It goes on to constitutionalize the role of women in the family by considering their role at home as instrumental to the common good and ensuring that mothers do not have to work for economic reasons "to the neglect of their duties in the home."³¹⁴

In the same vein, international human rights instruments refer to marriage and family as naturally connected. Article 16 of the Universal Declaration of Human Rights refers to the right to marry, and immediately after states, "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."³¹⁵ The European Convention on Human Rights also makes the connection between family and marriage by stating, "[m]en 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."³¹⁶ The American Convention on Human Rights follows the same trend by recognizing under the "Rights of the Family" that "[t]he family is the natural and fundamental group unit of society" and "[t]he right of men and women of marriageable age to marry and to raise a family."³¹⁷

There is, therefore, a disconnection between the strict regulation of marriage, that is, the legal meaning of marriage, and the reality of family formation. On the one hand, family law is based on a rigid structure of formal ties where marriage occupies the privileged position of the most complete relationship. A man and a woman linked by marriage enjoy protections and rights that couples linked by ties other than marriage do not have access to. More importantly, marriage changes the nature of a relationship from an association of two individuals to a complex web of

308. CONSTITUCIÓN POLÍTICA DE CUBA [C.P.] [CONSTITUTION OF CUBA] art. 35.

309. CONSTITUCIÓN POLÍTICA DE GUATEMALA [C.P.] [CONSTITUTION OF GUATEMALA] art. 47.

310. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [C.P.] [CONSTITUTION OF HONDURAS] art. 111.

311. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ [C.P.] [CONSTITUTION OF PANAMA] art. 52.

312. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA [C.P.] [CONSTITUTION OF THE DOMINICAN REPUBLIC] art. 55.

313. Ir. CONST., 1937, art. 41(3)(1).

314. *Id.* art. 41(2)(1)–(2).

315. Universal Declaration of Human Rights, *supra* note 250, art. 16(3).

316. European Human Rights Convention, *supra* note 250, art. 12.

317. American Convention on Human Rights, *supra* note 250, art. 17(1)–(2).

family relationships. It creates diversity of kinship as no other association does. On the other hand, real families do not necessarily fit the options provided by family law. Real families are formed by dynamic movements of individuals coming and going, creating support networks that do not correspond to ties by blood or sex. Real families are linked by dependency and support, and legal families are linked by law, regardless of whether there is real dependency or real support. There is a divide between the families that societies aspire to have, and the families that actually form within those societies.³¹⁸

This distinction refers to the dichotomy between the legal creation of an ideal family that reflects a specific society, and the families that actually exist in our communities.³¹⁹ The legal family is a hierarchical, heterosexual, patriarchal, and formalistic unit that starts with marriage. Family law based on this paradigm regulates how to start a family, what to do within the family, and how to exit the family. Instead, reality shows the complexities of relationships aimed at caring for and supporting individuals, which sometimes coincides with marital relations, and at many other times develops outside of the realm of marriage or even sex. Legal systems, however, are still focused on constructing families through marriage and offering these families a beneficial legal framework. Thus, real families outside marriage are treated as anomalies that ought to be regulated only to the extent necessary to avoid unfairness. A good example of a regulation based on fairness is found in the decision on *de facto* unions issued by the Family Court of Costa Rica in 2004.³²⁰ In its opinion, the court states “[i]t is interesting to note that the topic of *de facto* unions has been a whole process [sic] in which statistics that reflect reality within our social fabric demonstrate a disconnect with our legal regulations, and in order to avoid injustices, some situations have been, little by little, recognized and protected.”³²¹

Marriage, instead, is regulated as an aspirational social institution; a valuable institution that brings something that nothing else brings to society. Marriage is treated as an essential component in the construction of the *polis*. From this perspective, marriage is not only a family law institution, but also a civic institution. A citizen fulfills his civic duties not only by participating in public life, but by marrying another person and having children who will also become good citizens, and who in turn

318. See ALISON DIDUCK, *LAW'S FAMILIES*, 21–30 (2003).

319. See *id.*

320. T. Familia, junio 24, 2004, Sentencia 1040/04 (Costa Rica).

321. *Id.* ¶ III.

should marry. Marriage, thus, is viewed as a good in itself, regardless of any material benefits it may bring. The argument for marriage as an essentially “good” institution has permeated most of the struggle to keep marriage a heterosexual privileged institution.³²²

Cohabitation outside marriage has been to the family what illegal immigration has been to the state. In different periods, countries have been forced to redefine citizenship or to include as citizens individuals who were originally not welcomed as such.³²³ The same has happened with families. Countries have been forced by reality to recognize individuals who were once unwelcome in the legal family structure as family members. With the rise of cohabitation, the stigma of illegitimacy faded away and claims for equality between children born in and out of wedlock became more common.³²⁴ By abolishing the distinction between children born in marriage and out of wedlock, states recognized direct family ties between parent and child without marriage as the intermediary.³²⁵

Every time a court has granted rights to unmarried couples based on performing the same functions as married couples, they have recognized that family ties are possible beyond what formal statutes have intended. Courts approach this recognition as based on a need for fairness. For example, in cases for infliction of emotional distress, some courts have refused to use marriage as a bright line to reject complaints for negligence.³²⁶

322. *See id.* ¶ II.A.

323. This is apparent in the United States with the discussion on immigration reform. It is no coincidence that the Republican Party was suddenly interested in finding a solution to Latino illegal immigrants right after they failed to attract the Latino vote in the 2012 presidential election. *See* Pramila Jayapal, *Why Don't Republicans Want to Win?*, POLITICO (Aug. 6, 2013), <http://www.politico.com/story/2013/08/why-dont-republicans-want-to-win-95247.html>.

324. As Friedman states, “in an age of cohabitation, there is no place in the legal order for the concept of bastardy.” FRIEDMAN, *supra* note 255, at 127.

325. The U.S. Supreme Court made this direct relationship clear when it struck down the difference between legitimate and illegitimate children. *See Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968) (“The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child’s claim of damage for loss of his mother is in issue, why, in terms of “equal protection,” should the tortfeasors go free merely because the child is illegitimate? . . . Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.”).

326. This has been the approach of several courts in the United States. In order to determine if a relationship meets the required standards for one of the parties to make a claim of emotional harm when the other party has been injured, the New Hampshire Supreme Court stated that a court should “take into account the duration of the relationship, the degree of mutual dependence, the extent of common contribution to a life together . . . and the manner in which they related to each other in attending to life’s mundane requirements.” *Graves v. Estabrook*, 818 A.2d 1255 (N.H. 2003). The *Graves* court also

In 1990, Colombia created a legal regime for unmarried heterosexual couples.³²⁷ This recognition was the basis upon which LGBT activists in Colombia sought recognition of same-sex couples. In a line of decisions, the Constitutional Court of Colombia granted same-sex couples the same rights originally established by law for heterosexual *de facto* marital unions. The Court also expanded the rights associated with *de facto* unions, further reducing the difference between married and unmarried couples.³²⁸ In each decision, the Court adopted a functionalist approach to families by comparing what married and unmarried couples do, and concluding that if these couples fulfill similar objectives and behave similarly, statutes granting specific benefits should not distinguish between these families.³²⁹ This approach is derived from the Court's strong protection of autonomy:

It is thus clear that the current legal system, founded on respect for human dignity, tolerance, solidarity and personal autonomy does not allow the State to create legal tools to stigmatize some sexual behaviors and, to a certain extent, hinder the free exercise of sexuality. Such conduct would not only annul the right to the free development of personality and intimacy, but also the pluralism that our own constitutional system accepts and mandates to protect.³³⁰

Although the regulation of cohabitation outside marriage has emerged out of demands for fairness, the increase in the number of regulations that recognize unmarried couples as family associations has also had an impact on the perception of marriage as the normative ideal. States or countries

cites cases in Hawaii, Nebraska, Ohio, Pennsylvania, Tennessee, and West Virginia to support its position. *Id.*

327. In 1990, the Colombian Congress passed Law 54. Article 1 of the law defines the "marital *de facto* union" as one "formed by one man and one woman who, without being married, have an exclusive and permanent life-partnership." L. 54/90, diciembre 28, 1990, DIARIO OFICIAL [D.O.] (Colom.).

328. Colombia has gone as far as recognizing pension benefits for the cohabitant of a deceased, even when there is a legal spouse as well. Corte Constitucional [C.C.] [Constitutional Court], octubre 22, 2008, Sentencia C-1035/08 (Colom.). The Court recognized pension benefits for cohabitants and pension-sharing when the deceased cohabited with a legal spouse. Following the tradition of the Napoleonic Code, the Colombian Civil Code includes the legal spouse of the deceased as mandatory intestate heir. CODIGO CIVIL [Civil Code] [C.C.] art. 1040 (Colom.). In 2012, however, the Constitutional Court stated that the statute was conditionally constitutional "as long as it is understood that it encompasses the permanent partner of different or same sex who formed with the deceased, to whom [he or she] survives, a *de facto* union." Corte Constitucional [C.C.] [Constitutional Court], marzo 22, 2012, Sentencia C-238/12 (Colom.); *see also* Corte Constitucional [C.C.] [Constitutional Court], abril 13, 2011, Sentencia C-283/11 (Colom.).

329. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11, Gaceta Judicial [G.J.] (No. 30) (Colom.).

330. Corte Constitucional [C.C.] [Constitutional Court], julio 14, 1999, Sentencia C-507/99, ¶ 5.3 (Colom.).

that have afforded same-sex couples some formal recognition and rights also tend to accept same-sex marriage in later decisions as a logical next step.³³¹ Keeping marriage as the paradigm of family formation is increasingly less justifiable. It is also increasingly unfair.

Two examples illustrate the unfairness of constructing the legal family around marriage, to the detriment of the recognition of unmarried families.

1. The husband as the father and the father as a stranger.

In *Michael H. v. Gerald D.*, the U.S. Supreme Court was confronted with the task of determining if the relationship between a daughter and her biological father was worth the protection of the law or if, on the contrary, legal marriage outweighed biology to the point of denying the daughter's biological father paternity in favor of the mother's legal husband.³³² The Court chose the latter.³³³ Michael had an affair with Carole while she was married to Gerald.³³⁴ From this affair, Victoria was born.³³⁵ Gerald and Carole separated and Michael and Carole lived together for a few months.³³⁶ Michael developed a relationship with Victoria during this time.³³⁷ When Gerald and Carole reunited, Michael filed a filiation action to establish paternity and visitation rights.³³⁸ The Superior Court granted Gerald's summary judgment motion because under California law, he was presumed to be Victoria's father, and because he was living with Victoria's mother at the time Victoria was born. Michael and Victoria appealed, but the California Court of Appeals affirmed.³³⁹ Under California law, a child born to a married woman living with her husband, who is neither impotent nor sterile, was presumed to be a child of the marriage. This presumption could be rebutted in limited circumstances by the husband or wife only.³⁴⁰ The Supreme Court had to determine if the statute violated the biological father's procedural and substantive due process rights, and the child's equal protection and due process rights.³⁴¹

331. All of the countries and states reviewed in this Article have provided some formal recognition to unmarried same-sex couples before granting same-sex marriage.

332. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

333. *Id.* at 130–31.

334. *Id.* at 113.

335. *Id.* at 114.

336. *Id.*

337. *Id.* at 113–14.

338. *Id.* at 114.

339. *Id.* at 116.

340. *Id.* at 113 (citing CAL. EVID. CODE § 621 (West 2014) (repealed 1992)). CAL. FAM. CODE § 7611 (West 2014), has replaced that provision with a similar regulation.

341. *Michael H.*, 491 U.S. at 113, 116.

Justice Scalia, writing for the majority, quickly dismissed any possibility of allowing dual fatherhood. “At the outset,” Justice Scalia stated, “it is necessary to clarify what he [Michael] sought and what he was denied. California law, *like nature itself*, makes no provision for dual fatherhood.”³⁴² After that, it was clear that only one of the two men seeking recognition of his paternity could win. Michael had biology on his side and Gerald had marriage. Both had bonded with the child. Justice Scalia considered the statute constitutional because California has an interest in family stability.³⁴³ He quoted the court of appeals’ decision stating, “[t]he conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.”³⁴⁴

According to this interpretation, a natural father and his daughter are not a family if marriage interferes. That link cannot be destroyed because it doesn’t exist legally. There is, however, a family between Carole and Gerald that must not be disturbed. The Court refused to find a liberty interest in Michael’s relationship with Victoria because Michael’s interest was not “traditionally protected by our society.”³⁴⁵ Justice Scalia’s opinion reinforced the communion between the legal and marital family, and the divide between legal and socially constructed families. In the eyes of the majority, the relationship between Michael and Victoria had not been historically treated as a protected unit or granted a special protection.³⁴⁶ On the contrary, the marital unit has been historically awarded a special protection against claims such as Michael’s.³⁴⁷ The U.S. Supreme Court did not see the possibility of accepting familial ties that simultaneously recognize the actual relationship between Victoria and Gerald, and a separate but equally valid relationship between Victoria and her natural father, Michael.

342. *Id.* at 118 (emphasis added).

343. *See id.* at 131 (“When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child—or, more accurately, by a court-appointed guardian ad litem—may well disrupt an otherwise peaceful union.”).

344. *Id.* at 119–20.

345. *Id.* at 122.

346. *See id.* at 124 (stating it is “impossible” to find that Michael and Victoria’s “situation” has been historically treated as a protected family unit, and that it had not “been accorded special protection” on any other basis).

347. *See id.* at 125 (“[T]he evidence shows that even in modern times . . . the ability of a person in Michael’s position to claim paternity has not been generally acknowledged.”).

2. The estranged wife as the family and the long-term companion as a stranger

Eliana Perez Carreño and Manuel Alvarez Jimenez married in Chile in 1950 and separated before 1962.³⁴⁸ Gladys Grez Jahnsen started a relationship with Manuel Alvarez Jimenez in 1962 and they lived together until 1988, when Manuel died.³⁴⁹ During their life together, Gladys and Manuel acquired real estate.³⁵⁰ According to the Chilean Civil Code, the wife and children of the deceased are his legal heirs.³⁵¹ The unmarried partner is not.³⁵² Gladys requested that the Court recognize a shared property interest between herself and Manuel over assets that they had acquired together.³⁵³ The lower court granted Gladys' request and recognized fifty percent of Manuel's estate as hers.³⁵⁴ The court of appeals affirmed.³⁵⁵ The Supreme Court of Chile reversed, holding that the lower courts erred by dismissing the Civil Code's estate rules.³⁵⁶ Gladys lived with Manuel for thirty-four years but her relationship was completely invisible to the court. No mutual support, no shared effort counted during this time. Manuel's relationship with his legal wife was the only relationship that the Court was willing to see.

Although these examples may be met by different responses from today's courts, they illustrate the shortsightedness of the married family protection. There are millions of stories like this around the world: women and men who have raised the children of their partners but do not count as families at the moment of their partners' death; same-sex couples who are not protected under domestic violence statutes because they are not considered family;³⁵⁷ gay men and lesbian women who cannot adopt their

348. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 12 mayo 2005, "Grez Jahnsen Gladys del Carmen c. Alvarez Pérez Manuel Miguel y otros" Rol de la causa: 5508-1998, REVISTA DE DERECHO Y JURISPRUDENCIA [R.D.J.] No. 2, p.233-44 (Chile), available at http://www.scielo.cl/scielo.php?pid=S071809502005000200012&script=sci_arttext. The decision is divided in two parts, following the Chilean system of structuring legal decisions. Part I is titled "Vistos," and describes the hearing and decision being challenged. In this case, the appellants challenged the decision of the Thirteenth Civil Court of Santiago declaring that assets between Gladys Grez Jahnsen and Manuel Alvarez Jimenez were communal. Part II provides the Court's reasoning and decision reversing the lower court.

349. *Id.* at Part I, ¶ 2.

350. *Id.*

351. *Id.* at Part II, ¶ 5.

352. *Id.*

353. *Id.* at Part I, ¶ 2.

354. *Id.* at Part I, ¶ 5.

355. *Id.* at Part I, ¶ 6.

356. *Id.* at Part II, ¶ 11.

357. See *Pueblo v. Ruiz*, 159 D.P.R. 194, 202 (P.R. 2003) ("[E]l propósito cardinal de la política

partners' children because of their sexual orientation;³⁵⁸ adults raising the children of friends or former partners who died or are too ill to care for those children.

Undeniably, same-sex marriage benefits many families. Along the path toward recognition, it is important not to close the door for the recognition of other types of associations that are even more invisible to the law. Many people do not get married or marry after periods of cohabitation.³⁵⁹ This is not always because they are of the same sex, but because their lives are too complex, and their most stable support networks are not tied to emotional relationships based on sexual attraction and romantic love. These relationships are built on extended support by traditional kinship, such as grandparents, aunts, cousins, or other groups of people such as community members, godparents, and friends. The question of what families do, and whether we will recognize them without making them take their case to court (where they will most likely lose), is more important than who should be treated as family *ex ante*. People rely on different family members for different issues. Family law needs to acknowledge and understand a complex web of relationships. It is not the aim of this Article to elaborate on how exactly to recognize functional families. However, any reflections on what families are and how family law should protect them requires acknowledging the flaws of a marriage-centric system.

pública enunciada es fortalecer la institución de la familia, que se visualiza como una política que surge y se ampara en la unión sentimental y legal entre un hombre y una mujer.” “[T]he main purpose of the public policy [advanced in the domestic violence statute] is to strengthen the institution of the family, which is seen as one that emerges from and is protected by the emotional and legal union between a man and a woman.”).

358. See *X and Others v. Austria*, App. No. 19010/07, Eur. Ct. H.R. (2013) (finding Austria in violation of the European Convention of Human Rights for not allowing second parent adoption for same-sex couples while allowing it for unmarried heterosexual couples). The same court, however, did not find it discriminatory that a same-sex couple could not access second parent adoption because heterosexual unmarried couples did not have access to it as well. *Gas and Dubois v. France*, App. No. 25951/07, Eur. Ct. H.R. (2012) (“[M]arriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences.”).

359. For the United States, see CASEY E. COPEN ET AL, NAT’L CTR. FOR HEALTH STATISTICS, FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH 2 (2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf>. In Europe, there are striking variations between Northern European countries where cohabitation is very prominent and Southern European countries where it is less prevalent. Throughout Europe, however, there is an increase in cohabitation patterns. See Kathleen Kiernan, *Redrawing the Boundaries of Marriage*, 66 J. MARRIAGE & FAM. 980, 985 (2004). For a rise in cohabitation trends in Latin America, see generally Albert Esteve, Ron Lesthaeghe & Antonio Lopez-Gay, *The Latin American Cohabitation Boom, 1970–2007*, 38 POPULATION & DEV. REV. 55 (2012).

III. THE ROLE OF COMPARATIVE AND INTERNATIONAL LAW IN SAME-SEX MARRIAGE DECISION-MAKING

In prior sections, this Article focused on the role of marriage and family law, and whether court decisions on same-sex marriage have reinforced or reduced the importance of marriage as the gateway to family formation. It is clear that the same arguments are being used to reinforce marriage, to accept same-sex marriage, or to broaden the scope of family protection through constitutional norms. A comparative analysis of national court decisions on same-sex marriage also shows that courts read each other's work.

There is abundant literature to accept as a fact that courts often use arguments articulated in other proceedings to develop their own legal reasoning.³⁶⁰ Even U.S. courts, though more cautious than courts from other countries in using foreign law, have referred in several decisions to foreign rulings.³⁶¹ The means by which courts use foreign decisions varies greatly. Ann-Marie Slaughter refers to vertical and horizontal judicial globalization.³⁶² When national courts use arguments and decisions by supranational courts, those courts are engaging in a vertical type of judicial borrowing, even when they are not bound by these judgments. When courts look at what other countries are doing, they engage in a "cross-fertilization" of judicial decisions.³⁶³ It seems that areas where there is insufficient precedent, or areas that can be perceived by society as radical shifts in a legal system, are good places to use foreign legal decisions as supporting resources.³⁶⁴ Technology has also made it easier for judges to contemplate foreign solutions to the same issues. As Australian Justice Michael Kirby explains, "[h]onesty and transparency sometimes suggest an

360. For an account on how judges use foreign law, *see, e.g.*, David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011). For an analysis on legal transplants in the context of adjudication processes in Canada, *see, e.g.*, Michel Bastarache, *How Internationalization of the Law Has Materialized in Canada*, 59 U.N.B. L.J. 190 (2009). For Europe, *see, e.g.*, Sir Basil Markesinis and Jörg Fedtke, *The Judge As Comparatist*, 80 TUL. L. REV. 11 (2005). For Latin America, *see, e.g.*, Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129 (2008).

361. For an analysis of the use of foreign legal decisions by American courts, *see generally* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

362. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112 (2000)

363. *Id.*

364. *See* Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1, 4 (Sujit Choudhry ed., 2006) ("[F]oreign judgments are a source of practical wisdom to the tough business of deciding hard cases where the positive legal materials run out.").

acknowledgement of such source materials.”³⁶⁵

In the area of same-sex marriage, the use of foreign law is evident. The courts of South Africa, Mexico, Brazil, Portugal, Colombia, and Spain explicitly referred to foreign and international court judgments in their decisions, as well as foreign legislation and legal scholarship. They used these sources in two different ways. Sometimes, foreign sources were used to reinforce a particular argument advanced by the court.³⁶⁶ In other cases, foreign decisions were cited along with information on foreign legislation that includes same-sex marriage, and international law materials in favor of advancing gay and lesbian rights in general.³⁶⁷ With regards to how these arguments reach courts, in some cases decisions refer to arguments from foreign sources because the parties or third party interveners brought those sources to the court’s attention.³⁶⁸ Due to the different styles of writing decisions, however, it is not always possible to identify if foreign arguments are part of the parties’ litigation strategy, or if they were adopted by the court’s own initiative. The use of international law varies depending on each country’s legal mandate to use international law. All of the foreign decisions analyzed here refer to international instruments, especially those from Europe. In some cases, however, courts used international decisions for their argumentative power, rather than as authoritative sources of law.

A. Good arguments are good arguments everywhere

Most literature on “judicial borrowing” analyzes the use of foreign

365. Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT’L L. 171, 173 (2008).

366. See, e.g. *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) (S. Afr.) (quoting *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), to highlight the need for the legislature to seek a solution for same-sex couples that would include tangible and intangible benefits). In the case of Portugal, opponents to same-sex marriage argued that international law supported the position that marriage was protected as a union between a man and a woman. See S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2ª SÉRIE [D.R.] 28.4.2010, 22367 (Port.) (citing several decisions, and quoting, among others, the South African decision in *Fourie* to highlight that international law may protect the heterosexual marriage but it does not forbid expanding such protection); Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo en Revisión 581/2012, Décima Época, 5 de Diciembre de 2012, 41, 48–49 (Mex.) (citing *Loving v. Virginia*, 388 U.S. 1 (1967), *Brown*, 347 U.S. 483 (1954), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), to compare discrimination based on sexual orientation with racial discrimination).

367. See Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Acción de inconstitucionalidad 2/2010, Novena Época, 10 de Agosto de 2010, *slip op.* ¶ 267 (Mex.); S.T.C., Acórdão No. 121/2010, ¶ 14 (Port.); S.T.C., Nov. 6, 2012, (B.O.E. No. 286, p.168, 193–94) (Spain).

368. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11, Gaceta Judicial [G.J.] (No. 30) (Colom.). Additionally, all parties to the proceedings referred to foreign law to illustrate their own arguments. *Id.* at 17, 22–23; *Fourie*, SA 524 ¶ 99; SCJN, Acción de inconstitucionalidad 2/2010, ¶ 42.

legal sources by local courts from the perspective of their argumentative force.³⁶⁹ There is little disagreement about the lack of authoritative force of foreign sources.³⁷⁰ The substantive justifications given by others are what make a foreign case compelling or not. It is the weight of the argument, not the weight of the court that made the argument that matters. Sometimes, a good argument made by a prestigious court makes a given argument even more compelling. There is no way, however, to know what makes one court more prestigious than others to the court borrowing one of their arguments. Courts also refer to international decisions regardless of whether they are bound by them. Non-binding international and foreign decisions are used by courts to find compelling arguments.

The Colombia Constitutional Court explains the role of foreign decisions and foreign scholarship as additional argumentative sources, stating that “[f]oreign scholarship, before national scholarship, has dealt at length with this issue [of same-sex marriage].”³⁷¹ The Court goes on to add that, “constitutional courts and tribunals of other latitudes have dealt with similar petitions, as the broad reference to comparative law by Action D-8376 shows.”³⁷² The Portuguese Constitutional Court gave a similar explanation for its use of comparative law. The Court rejected the idea that the regulation of same-sex relationships was limited to a local discussion. On the contrary, it stated that when there are issues linked to “human problems as universal as those related to the legal protection of homosexual relations it may be interesting to know what happened in other legal experiences.”³⁷³ The Constitutional Tribunal of Portugal referred to the need to maintain its autonomy when deciding these issues, but stated that the use of comparative law could help it draw legal principles common to all of those legal experiences.³⁷⁴ With the exception of the American and Canadian decisions, the decisions on same-sex marriage presented here used both foreign and international decisions and scholarship to bolster their own ideas on the issue.

The South African Constitution expressly allows judges to consider foreign law when interpreting the Bill of Rights.³⁷⁵ In *Fourie*, the South African Constitutional Court cited Canadian case law to emphasize the idea that not all differentiations are discriminatory, and special measures are

369. Choudhry, *supra* note 364, at 3.

370. *Id.*

371. Corte Constitucional, Sentencia C-577/11, ¶ 2.2.

372. *Id.*

373. S.T.C., Acórdão No. 121/2010, ¶ 7 (Port.).

374. *Id.*

375. S. AFR. CONST., 1996, § 39(1)(c).

sometimes necessary.³⁷⁶ For its justification on why same-sex marriage did not interfere with freedom of religion, the Court again cited Canadian sources as well as American decisions.³⁷⁷ The Constitution of South Africa also provides that courts “must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”³⁷⁸ Consistent with the constitutional mandate, the *Fourie* decision included a section on international law.³⁷⁹ The Minister of Home Affairs argued that international law did not recognize a right to same-sex marriage.³⁸⁰ The Supreme Court of South Africa responded to the international case law against same-sex marriage by stating that “while it is true that international law expressly protects heterosexual marriage,” international law did not *exclude* the possibility of same-sex marriage.³⁸¹ The South African Court showed deference to international law arguments brought to its consideration but rejected them on substantive grounds.³⁸²

The Spanish Constitutional Court used comparative law in several parts of its 2012 decision on same-sex marriage. For example, to support its statement that institutions evolve, the Spanish Constitutional Court cited the Canadian Supreme Court’s concept of the constitution as a “living tree,” and explained that the evolving nature of Spain’s Constitution is precisely the reason why the Court must reject marriage as essentially heterosexual.³⁸³ The Constitutional Tribunal of Portugal also referred at length to foreign courts.³⁸⁴

As the South African case shows, many of the foreign decisions used

376. *Fourie*, SA 524 ¶ 152 (citing *Weatherall v. Canada*, [1993] 2 S.C.R. 872, 874 (Can.)).

377. *Id.* ¶ 9 (citing Canadian Chief Justice Beverley McLachlin, *Freedom of Religion and the Rule of Law: A Canadian Perspective*, in *RECOGNISING RELIGION IN A SECULAR SOCIETY: ESSAYS IN PLURALISM, RELIGION, AND PUBLIC POLICY 12* (Douglas Farrow ed., 2004); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301–02 (2000)).

378. S. AFR. CONST., 1996, § 233.

379. *Fourie*, SA 524 ¶¶ 99–105.

380. *Id.* ¶ 99.

381. *Id.* ¶ 100 (citing *Joslin v. New Zealand*, U.N. H.R.C. Communication No. 902/1999, U.N. Doc A/57/40 (July 17, 2002)).

382. In *Fourie*, the Counsel for the Minister of Justice argued that International Law protected marriage as a heterosexual institution. *Id.* ¶¶ 46, 100. The Court argued that the intention of international law was to “forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage.” *Id.* ¶ 100. The Court added that “[t]here is nothing in the international law instruments to suggest that the family which is the fundamental unit of society must be constituted according to any particular mode.” *Id.* ¶ 101.

383. S.T.C., Nov. 6, 2012, (B.O.E. No. 286, p. 180) (Spain).

384. S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2ª SÉRIE [D.R.] 28.4.2010, 22367 ¶ 12–15 (Port.).

by other courts for their argumentative force did not deal with same-sex marriage. South Africa and Mexico, for example, used three American landmark cases to support same-sex marriage on the basis of equality, not marriage: *Brown v. Board of Education*, the dissenting opinion from *Plessy v. Ferguson*, and *Loving v. Virginia*.³⁸⁵ These courts could have decided to use compelling arguments on the importance of marriage. If they were going to cite American jurisprudence, they had plenty to choose from opinions expounding on marriage as an essentially “good” institution. However, they decided to emphasize the discrimination inherent in a two-tiered system of same-sex civil unions and opposite-sex marriage.³⁸⁶ *Brown*, *Plessy*, and *Loving* are decisions that speak about equality not marriage, but their reasoning is appealing beyond any specific national constitution.

The Brazilian STF’s 2011 decision also did not refer to specific arguments used by foreign courts. No other decision, however, reads more like a text on jurisprudence than the combined opinions of the Brazilian decision. Even though it is not possible to point to a specific “migration of constitutional ideas,”³⁸⁷ the decision referred to legal philosophy through the writings of American, European, and Latin American scholars.³⁸⁸ It used a universal narrative on the rule of law, the role of courts, and the concepts of equality and autonomy.

By contrast, in its first decision on same-sex marriage, Mexico’s Supreme Court barely mentioned the Inter-American System of Human Rights.³⁸⁹ It did, however, cite the European Court of Human Rights

385. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ. of Topeka* 347 U.S. 483, 486 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (overruled by *Brown*, 347 U.S. 483 (1954)).

386. Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo en Revisión 581/2012, Décima Época, 5 de Diciembre de 2012, 41, 48 (Mex.); *Fourie*, SA 524 ¶ 150, 154.

387. Choudhry, *supra* note 364, at 2.

388. For example, Luiz Fux cites foreign scholars such as Robert Alexy, Ernst Benda, and Nancy Fraser. He also cites Ronald Dworkin’s explanation of American constitutional law and considers the application of Dworkin’s writings to Brazilian constitutional law as well. Fux also cites Spanish scholars discussing the same-sex marriage legislation in Spain. See S.T.F., No. 4.277, Relator: Min. Luiz Fux, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 659 (Braz.). Justice Ayres Britto cites, among others, Max Scheler, John Rawls, Hans Kelsen, Nietzsche, Hegel, and Sartre. See S.T.F., No. 4.277, Relator: Min. Ayres Britto, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 611 ¶ 9, 12, 14, 17 (Braz.). Justice Marco Aurelio refers to the opposing positions of H.L.A. Hart and Lord Patrick Devlin with regard to the decriminalization of sodomy laws. See S.T.F., No. 4.277, Relator: Min. Marco Aurelio, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 808 ¶ 5 (Braz.).

389. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Acción de inconstitucionalidad 2/2010, Novena Época, 10 de Agosto de 2010, *slip op.* ¶ 313 (Mex.).

(ECHR) and its case law on sexual orientation discrimination.³⁹⁰ Unlike the ECHR, by the beginning of 2014, the Inter-American System of Human Rights had decided only one case that involved discrimination on the basis of sexual orientation, and it was not a case on marriage.³⁹¹ In *Atala Riffo and daughters v. Chile*, the Inter-American Court of Human Rights made sexual orientation a protected category, and declared that the concept of family protected by the American Convention of Human Rights was not tied to marriage or to heterosexuality.³⁹² The *Atala* decision had not yet been issued when Mexico's Supreme Court issued its first decision on same-sex marriage. The SCJN, however, used *Atala* to support its second decision on same-sex marriage, affirming that a separate but equal treatment of same-sex couples was unconstitutional.³⁹³ This second decision extensively cited foreign courts to support its arguments in favor of marriage equality.³⁹⁴ It also cited U.S. decisions to explain its levels of scrutiny.³⁹⁵ When describing the requirements for its own system of strict scrutiny, the SCJN reinforced its explanation by referring to the same concept used by the U.S. Supreme Court for each element of the test.³⁹⁶ Brazil also referred to the Inter-American System of Human Rights, citing decisions that were not directly related to same-sex couples, but that spoke about the right to the protection of a person's life project.³⁹⁷

B. Foreign sources as descriptive tendencies

Colombia used comparative law at length to illustrate the state of same-sex couples' recognition around the world.³⁹⁸ The plaintiffs challenging the constitutionality of heterosexual marriage in the CCC included a thorough comparative law analysis to support their case.³⁹⁹ The court, however, "replied" to those comparative law arguments by giving a

390. *Id.* ¶ 248.

391. *Atala Riffo and daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

392. *Id.* at 35, 50.

393. Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo en Revisión 581/2012, Décima Época, 5 de Diciembre de 2012, 50 (Mex.).

394. *See, e.g., id.* at 25 fn. 9.

395. *Id.* at 34–36.

396. *Id.*

397. S.T.F., No. 4.277, Relator: Min. Marco Aurelio, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 808 ¶ 14 (Braz.) (referring to the Inter-American Court of Human Rights cases *Loayza Tamayo v. Peru*, *Cantoral Benavides v. Peru*, and *Gutierrez Soler v. Colombia*).

398. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, Sentencia C-577/11, Gaceta Judicial [G.J.] (No. 30) (Colom.).

399. *Id.* at 171.

full account of same-sex regulations around the world.⁴⁰⁰ Although the court focused on some arguments provided by foreign courts, it mostly focused on demonstrating that there was not one specific trend towards same-sex marriage as an equality imperative.⁴⁰¹

The Constitutional Courts of Portugal and Spain, as well as the Supreme Court of Mexico, also made references to comparative law.⁴⁰² In all of these cases, references to both legislation and court decisions were used to support the Court's own decisions. The Courts did not employ, however, a particular foreign argument in their decisions. Instead, they displayed the complete map of what was happening in other countries, in order to situate their own court within a worldwide trend. They could demonstrate to their own community that they were not outliers, but rather part of an almost inevitable global shift. The Constitutional Tribunal of Portugal referred to comparative and international law to support its statement that the realm of family and marriage was changing at a fast pace globally, and not just in Portugal.⁴⁰³

As mentioned before, Brazil's Supreme Federal Tribunal used foreign scholarship to support its own arguments. It also used references to foreign regulations as a measure of an evolving reality in the area of same-sex couples.⁴⁰⁴ With this intent, the decision cited regulations of the European Union to support its own decision to recognize same-sex couples as permanent unions.⁴⁰⁵ The decision not only referred to binding European law instruments, but also to foreign sources related to discrimination. Justice Marco Aurelio's opinion, for example, referenced the Wolfenden Report issued in Great Britain in 1957.⁴⁰⁶

400. *Id.* at 171–74.

401. *Id.* at 171.

402. S.T.C., Nov. 6, 2012, (B.O.E., No. 286, p. 180, 193) (Spain); S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2ª SÉRIE [D.R.] 28.4.2010, 22367 ¶ 12–15 (Port.); Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Amparo en Revisión 152/2013, Décima Época, 23 de Abril de 2014, *slip op.* 1, 26–27, 41, 48 (Mex.).

403. S.T.C., Acórdão No. 121/2010, at 22370 (citing the European Human Rights Convention, *supra* note 250); *id.* at 22372–74 (referring to different European countries).

404. S.T.F., No. 4.277, Relator: Min. Ayres Britto, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 611 ¶ 20 (Braz.) (citing the VIRGINIA DECLARATION OF RIGHTS (1776)).

405. *Id.* at 16.

406. S.T.F., No. 4.277, Relator: Min. Marco Aurelio, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 808 ¶ 4 (Braz.) (discussing the Wolfenden Report, a report issued by a Parliamentary Committee in the United Kingdom recommending a drastic withdrawal of government involvement in homosexuality and prostitution, recommending the decriminalization of sodomy and prostitution, and generating an influential debate on the relationship between law and morality); *see generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1959); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

The level of influence of foreign and international decisions in national courts' decisions is indeterminate. It is clear, however, that judges are reading each other's opinions. Perhaps those readings were compelling enough to convince them to consider their own constitutional frameworks as "living trees," or to bring their own constitutional interpretations of dignity closer to autonomy and equality.

IV. WHAT THE FUTURE HOLDS

A. Reinforcing the marriage paradigm: the conformist approach

Same-sex marriage can be viewed as the most important departure of legal marriage from its basic source, the Judeo-Christian marriage. This seems to reflect a new construction of the community ethos, based on the supremacy of individual autonomy rather than on restrictions of individual liberties for a supposedly collective benefit. But as revolutionary as this claim may seem, we can also argue that this is the alternative that best suits the status quo.⁴⁰⁷ Same-sex marriage does not challenge marriage as an institution and it does not challenge state intervention in intimacy. Same-sex marriage leaves all elements and effects of the traditional institution intact. It does not affect the claims of non-married heterosexual couples or the claims of individuals who have created their families around non-traditional structures, such as sisters living together, or single friends who age together.⁴⁰⁸ The inclusion of same-sex couples into the marriage institution does not represent a real change of paradigm in family law. It is, on the contrary, a sort of "escape valve" that maintains marriage's status as the gatekeeper of the legal family.

Countries that value marriage as a societal aspiration, and value autonomy and equality as core public values have two options. They can tip the scale towards marriage and maintain a caste-like system of families in which marital families receive more protection than non-marital ones. Or, they can shift the focus from marriage to functions of dependency and support. In the latter, family and citizenship are liberated from their dependency on marriage. In this scenario, family is tied to citizenship by assuming the role of forming individuals that understand values of equality, respect for diversity, and democracy. Instead, countries that decide to reinforce marriage as the family law paradigm are also reinforcing a traditional link between marriage and citizenship. By doing so, they are

407. ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 185 (1995) ("Gay marriage is not a radical step; it is a profoundly humanizing, traditionalizing step.")

408. POLIKOFF, *supra* note 13.

creating two types of citizens: the good citizen, and the “not so good” citizen. The good citizen gets married and by that act, simplifies the entrance to citizenship for her immediate family members. The good citizen gets benefits and her family is legally recognized as such. The “not so good” citizen, instead, does not behave in the way she should. What she may call a family is not recognized as such. Her citizenship is not good enough to provide citizenship to her immediate family members, and her contributions as a citizen are not good enough to take advantage of the rights and benefits granted to good citizens.

In cases where marriage has been made available to same-sex couples based on the inherent value of marriage, the decisions show that same-sex couples are worthy of the institution of marriage.⁴⁰⁹ In order to achieve access, assimilation of the different group to the majoritarian group is necessary. Images of loving same-sex couples that are stable, caring, educated and engaged in their communities cover the pages of magazines, newspapers, court decisions, and congressional debates.⁴¹⁰ Marriage is open to heterosexual couples no matter how badly they behave. Same-sex couples, however, must show that the group is worthy of marriage as an aspiration. They are good citizens that need to become better ones by accessing marriage.

The conformist approach to same-sex marriage closes the chapter on same-sex marriage. It also closes, or at least makes more difficult, the debate on family protection and the role of family law. After *Goodridge*, *Windsor*, and each new statute allowing same-sex marriage there is—rightly so—a celebration by same-sex marriage advocates. There is no celebration, however, for aunts, neighbors, and friends taking care of distant or unrelated children or dependent adults. There is no celebration for heterosexual or same-sex unmarried couples who do not wish to or cannot marry for reasons unrelated to its recognition by a legal system, but who nonetheless act as and consider themselves a family. The division between married families and unmarried families continues. As long as family law acts as a filter through which only some unions become visible to the law, decisions that reinforce marriage as the most important bond will keep depriving individuals of possible legal protections for their family ties.

Whether the United States maintains and reinforces the marriage paradigm will depend on the grounds that state courts may use to decide

409. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

410. Ariel Levy, *The Perfect Wife*, THE NEW YORKER (Sept. 30, 2011), <http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife>.

same-sex marriage cases after *Windsor*. There are already several courts that used *Windsor* as part of their reasoning to allow same-sex marriage.⁴¹¹ Not all state courts have taken a conformist approach to marriage or have picked up on the institutional concept of dignity used by the U.S. Supreme Court. For example, the New Mexico Supreme Court referred several times to *Windsor* in its 2014 decision on same-sex marriage.⁴¹² It used dignity as a justification for opening marriage to same-sex couples, but mainly used arguments based on equality. The court referred to the substantive benefits granted to married couples that unmarried same-sex couples do not have.⁴¹³ This decision is a cause for optimism.

B. Real families as legal families: the transformational power of the same-sex marriage debate

By embracing a flexible approach to families, we recognize in all human beings the equality of worth enshrined in the South African Constitution. We not only embrace the dignity that comes from choosing one's family unit, but more importantly, we recognize that all family associations that respect constitutional values and human rights are worth the same respect. Most people do not have the luxury of choosing their families, and with the exception of a small percentage of women, single mothers are not single mothers by choice. Dignity, therefore, must cover not only autonomy, but also equality of worth.

Triggered by the debate on same-sex marriage, the discussion on family diversity has the power to align the "real" families with the legally recognized ones. Some decisions have given us an opportunity to start using the law to protect and foster the best possible environment for family stability, instead of clinging to the historical myopic obsession with marriage.

The combination of several fundamental rights, such as autonomy and

411. In the year after *Windsor*, around sixteen decisions on same-sex marriage were issued, all referring to *Windsor*. See, e.g., *Garden State Equality v. Dow*, 82 A.3d 336, 339 (N.J. Super. Ct. Law Div. 2013); *Griego v. Oliver*, 316 P.3d 865, 877 (N.M. 2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013); *Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014). *Bourke v. Beshear*, 996 F. Supp. 2d 542, 549 (W.D. Ky. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 476 (E.D. Va. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 648 (W.D. Tex. 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014); *Kendall Wright v. Arkansas*, No. 60-CV-13-2662, 2014 WL 1998004 (Ark. Cir. May 15, 2014); *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho 2014); *Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 421 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1135 (D. Or. 2014).

412. *Griego*, 316 P.3d at 876.

413. *Id.* at 887–88.

equality, with a conception of human dignity, provides us with the grounds to make family law a set of rules aimed at protecting families as they evolve, rather than a set of rules that artificially construct a legal family to which families must conform. It is impossible to maintain a political system that treats privacy, freedom of association, and equality as fundamental individual rights, but that simultaneously restricts marriage to heterosexual couples or, more importantly, restricts family protection to the married family.

Discourses on dignity usually relate to different dimensions of humanity. The South African Constitutional Court speaks of dignity as equality, though it has sometimes used dignity as autonomy or liberty.⁴¹⁴ The emphasis, however, is particularly set in equality of worth that derives from our condition as human beings. Mexico's Supreme Court embraces an idea of dignity linked to autonomy.⁴¹⁵ It also refers to dignity as equality, but the emphasis in the case of marriage is on the right to freely choose family associations without a state-imposed ideal of the family.⁴¹⁶

These fundamental rights have been at the core of legislative acts and adjudication processes striking down sodomy statutes. The next logical step, if courts are consistent in their interpretation, requires the rejection of majoritarian efforts to restrict marriage to heterosexual couples and the opening up of marriage to same-sex couples. Consistency, however, requires more than just allowing same-sex marriage. It requires a revision of the reasons for protecting one institution over others. This has been the approach of some of the courts reviewed here.⁴¹⁷ These courts have at least recognized that families today are formed from different sources. They have applied equality and autonomy to conclude that non-married couples should enjoy the same status as married couples when it comes to legal benefits and obligations. They have all recognized the evolving nature of the family and the need, for the sake of equality, to protect families

414. See, e.g., *Minister of Home Affairs v. Fourie* 2005 (1) SA 524, 29 (CC) (S. Afr.); but see *id.* at 10.

415. Rogelio López Sánchez, *El Tardío Desarrollo de la Dignidad Humana y el Libre Desarrollo de la personalidad en el Estado Constitucional Mexicano*, REVISTA DERECHO EN LIBERTAD NO. 3, 146–47 (2009), available at <http://fdm.edu.mx/revista>.

416. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Acción de inconstitucionalidad 2/2010*, Novena Época, 10 de Agosto de 2010, *slip op.* 1, 98 (Mex.).

417. S.T.C., Acórdão No. 121/2010, 82, DIÁRIO DA REPÚBLICA, 2^a SÉRIE [D.R.] 28.4.2010, 22367 (Port.). In the Brazilian case, Justice Ayres Britto stated that the Brazilian Constitution protected “the family in its common or proverbial sense as a domestic unit, with little regard as if it was formally or informally created, or if its formed by heterosexual couples or individuals openly gay [homoafetivas]. Consequently, the family is a cultural and spiritual fact at the same time (although not necessarily a biological fact).” S.T.F., No. 4.277, Relator: Min. Ayres Britto, 05.05.2011, 198, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.] 14.10.2011, 611 ¶ 28 (Braz.).

regardless of how they are formed. Which families get to be legally recognized does not depend on the nature of the bond, but on how those associations respect the same values and rights of each individual family member. Family units that do not respect equality between men and women, or children's rights, do not have to be afforded the protection of the law.

Decisions that have the potential to transform family law may one day desexualize families. It is unrealistic to divide families according to the sexual orientation of their members. What should matter is not the sex of the two individuals that make up a family unit, but the role each person fulfills within the family. What Martha Fineman and Nancy Polikoff have argued for so many years now has practical equivalents in court decisions from countries with diverse cultural and legal backgrounds.⁴¹⁸ There is more in common between South Africa or Canada and the United States than between Mexico and South Africa. These countries, however, have chosen to see what reality has been showing us all along: families come in all forms and shapes. As long as these familial associations respect the rights of their members, legal systems should not prefer one type of association to another. Some international courts are also taking a transformational approach by including diverse families within the scope of human rights. In *Atala*, the Inter-American Court of Human Rights interpreted the right to family in Article 17 of the American Convention on Human Rights as encompassing different types of families:

The Court confirms that the American Convention does not define a limited concept of family, nor does it only protect a "traditional" model of the family. In this regard, the Court reiterates that the concept of family life is not limited only to marriage and must encompass other *de facto* family ties in which the parties live together outside of marriage.⁴¹⁹

Through human rights and constitutional rights, countries in the Western world have created the framework to give all real families legal recognition. *Windsor* gave the U.S. Supreme Court a new chance to define its stance on the role of marriage and its relationship to family protection.

418. See generally, FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES, *supra* note 13; MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2005); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999); Martha Albertson Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031 (2001); POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW, *supra* note 13; Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, *supra* note 13.

419. *Atala Rizzo and daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, 47-48 (Feb. 24, 2012).*

The Court in *Windsor* chose to speak about marriage rather than families. It chose to speak about institutional dignity instead of human dignity as equality and autonomy. Fortunately, it did not completely abandon the idea of human dignity as liberty. Future litigators and judges have the task of reinforcing that Kantian concept of dignity in U.S. courts, and following in the footsteps of South Africa, Mexico, Colombia, and Brazil by reclaiming the secular and liberal conception of dignity used in *Lawrence*.

V. CONCLUSION

This Article has shown that decisions from different countries allowing same-sex marriage are not all equal. While some courts focus on maintaining marriage as the paradigm of family formation, others center their analysis on individual rights. A comparative analysis of these decisions shows some promising trends for the future. First, there are more decisions grounding their acceptance of same-sex marriage on equality and autonomy than on marriage as an essentially good institution. Second, the use of dignity as a constitutional value is more often attached to the rights of equality and autonomy than to marriage as a status that provides dignity. Third, we see more decisions referring to the need for legal systems to adapt to social reality, which in turn will open a door to the legal recognition of unmarried families on equal grounds as married ones. Fourth, courts around the world are listening to each other, but not as a matter of authority or out of a sense of camaraderie. Instead, courts refer to each other's arguments as a way of ensuring that the most compelling arguments are being considered in their own decisions, and in order to show that their own communities are not alone when it comes to discussing new family associations. These narratives allow for a transformation of the role of family law from a policing framework, which reinforces an aspirational family based on marriage, to a protective framework for socially constructed families.