A COMPARATIVE ANALYSIS OF LAWS PERTAINING TO SAME-SEX UNIONS

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While it is true that a number of jurisdictions in recent years have accepted same-sex marriage,[2] the overwhelming weight of international authority—including a majority of liberal western democracies with established traditions of concern for the rights of gays and lesbians—continue to reserve the formal institution of "marriage" to opposite-sex couples. Even in recent years, many of these jurisdictions have concluded that there are sound public policy reasons for supporting same-sex couples through legal mechanisms other than same-sex marriage. The weight of authority also confirms that differences among various national, state and federal jurisdictions are fully compatible with international norms. One legal solution need not fit all.

The accumulated wisdom reflected in these widespread legislative, judicial and administrative judgments is based not on irrationality, ignorance, or animus toward gays and lesbians but on considered reasoning about the nature of the institution of marriage and the fundamental role it plays in societies around the world. This is not to say that foreign law and practice can or should determine the meaning of U.S. Constitutional guarantees. But even in a world where opinions are changing, the vast experience in other countries,[3] as in most of our own states,[4] confirms that there is much more than irrationality, ignorance, or rank prejudice behind traditional marriage definitions. International experience confirms this suggestion, and counsels respect for the reasons that have undergirded marriage institutions for centuries. Further, even if change is accepted, international practice confirms the wisdom of allowing legislative flexibility in the pace and structure of legal reform.

Accordingly, most foreign jurisdictions have concluded that decisions on the culturally sensitive issues of marriage and marriage-like rights for same-sex couples should be reached through democratic processes based on careful policy

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[2] The actual number of these jurisdictions, while growing, remains surprisingly small. Only three jurisdictions have mandated same sex marriage by judicial decision, and in two of those cases, the ultimate legal resolution was left to the legislative branch. See *infra* note 7. The admittedly larger number of countries that have accepted same sex marriage by legislation (13) amounts to less than 1/12 of the countries on earth. See *infra* note 7.

[3] See *infra* note 7.

[4] See *infra* note 16.

making and compromise rather than through judicial mandates. National and international courts have overwhelmingly refused to short circuit the democratic process when adjudicating claims for same-sex marriage.

I. International Practice on Legal Treatment of Same-Sex Unions

While international legal opinion is not determinative of whether a particular U.S. practice is constitutional, the U.S. Supreme Court has, in another context, "acknowledge[d] the overwhelming weight of international opinion," not to determine the meaning of the U.S. Constitution's guarantees, but to "provide respected and significant confirmation" of the Court's conclusions about those guarantees.[5] Further, and more broadly, when making the judicial determination of whether there is a rational basis for legislative definitions of marriage—the legal standard under most U.S. state constitutions[6]--the weight of world reasoning and practice can hardly be ignored.

At the outset, it is important to recognize that the vast majority of nations define marriage as solely the union of man and woman. Only sixteen non-U.S. jurisdictions recognize same-sex unions as marriages.[7] *All* of the rest retain the

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[5] *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

[6] The standard of review for sexual orientation is mere rationality. *See, e.g.* Romer v. Evans, 517 U.S. 620, 631 ("the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons") (applying a form of rational basis review) *but see* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014) (Reinhardt, J.); Griego v. Oliver, 201, 316 P.3d 865, 884 (N.M. 2013) (applying heightened scrutiny as a matter of state law); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 475-76 (2008) (same); Varnum v. Brien, 763 N.W.2d 862, 887 (Iowa 2009) (same).

[7] Same-sex unions are permitted to have the designation of marriage in sixteen foreign states. Argentina (Ley No. 26.618, 22 July 2010 (CXVIII) B.O. 31.949); Belgium (Civil Code Article 143), Brazil (Superior Tribunal of Justice – R.E. 1.183.378 - RS (2010/0036663-8) (1 February 2012)), Canada (Bill C-38 (2005)) Denmark (Lov nr. 532 af 12 June 2012 Gældende), France LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.) (18 May 2013), Iceland (Iceland Doc. 836 - 485th matter (2010)), The Netherlands (Law of 21 December 2000 in *Staatsblad* 2001 no. 9), New Zealand (Marriage (Definition of Marriage) Amendment Act 2013 (13/20)), Norway (Besler. O. nr. 91 (2007-2008)), Portugal (Lei No. 9/2010), South Africa (Civil Union Act 17 of 2006), Spain (Ley 13 of 1 July 2005), Sweden (Svensk författningssamling 2011:891), United Kingdom (Marriage (Same Sex Couples) Act 2013 (c.30) (Royal Assent on 17 July 2013)) and Uruguay (Se Dictan normas relativas al matrimonio igualitario Ley No. 19.075) (May 3, 2013)) have all legalized same-sex marriage. Canada and South Africa—only two of the sixteen—have both enacted laws giving marriage status to same-sex couples following court order. *See Halpern v. Canada* (Att'y Gen.), [2003] 65 O.R. 3d 161 (Can. Ont. C.A.); *Hendricks v. Quebec*, [2002] R.J.Q. 2506 (Can. Que.); *Barbeau v. British Columbia* (Att'y Gen.), [2003] 12. B.C.L.R. 4th 1 (Can. B.C.); *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC). Of the sixteen, Brazil is the only country to have instituted same-sex marriage directly by court mandate. Superior Tribunal of Justice – R.E. 1.183.378 - RS (2010/0036663-8) (1 February 2012). See also, ADI n.4.777/DF and ADPF/RJ NO.132. According to communications received by the authors from Professor Augusto Zimmerman, March 11 & 12, 2014, this decision was disputed because it ignored an explicit provision of the Brazilian constitution defining marriage as the union of a man and a woman. Following the decision of the

understanding of marriage as the union of a man and a woman. That is, taking the 193 member states of the United Nations as the reference point, twelve times more countries disallow same-sex marriage than allow it. Additionally, many nations have adopted constitutional provisions defining marriage, explicitly or implicitly, [8] as the union of a husband and wife—more nations than have recognized any form of same-sex union. A 2010 article lists thirty-five such nations.[9] Since then, Hungary has adopted a constitution that expressly limits marriage to opposite-sex couples.[10] The German Constitutional Court has long interpreted its constitution to the same effect.[11] In 2011, a new Civil Code went into effect in Romania including a definition of marriage that provides a statutory interpretation of the relevant constitutional provision: "Marriage is the freely consented to union between a man and a woman, established as provided by law."[12]

Supreme Tribunal of Justice, some homosexual couples sought to register their relationships as marriage before notaries public. Some notaries complied with these requests, but others refused. At this point, state "corregedorias de justice" (i.e., justice administrative offices) determined that all notary public offices had to register such homosexual relationships as 'homosexual marriage'. The matter was then brought to the attention of the second highest court below the Supreme Tribunal, which ruled in favor of homosexual couples in Recurso Especial No 1.183.378/RS on grounds that the Federal Constitution had determined that "the law shall facilitate the conversion of civil unions into marriages" (Federal Constitution, Art. 226, para. 3). Finally, the National Judicial Council, a non-law-making body which serves as a watchdog agency supervising judicial bodies and notaries, passed Resolution No. 175 (2013) requiring every public notary to register the 'marriage' of same-sex people, either directly or be means of conversion from civil union into 'homosexual marriage'. The National Judicial Council is always presided over by the Supreme Court's president, who approved of the extension of the scope of the Supreme Court rule. As a result, it is practically assumed that same-sex marriage has been finally legalized in Brazil. *But see Gay Marriage Around the World* PEW FORUM (February 5, 2014) at http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/ (stating that "[t]he conservative Social Christian Party has appealed the Council of Justice's decision to the Supreme Court, and Brazil's legislature may still weigh in on the issue, leaving some uncertainty surrounding the future of same-sex marriage in the world's fifth-largest country.").

[8] By "implicitly" we mean here that gendered terms are used in referring to marriage.

[9] Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition* 4 CAL. WEST. INT'L. L. J. 143, 186-187 note 251 (2010).

[10] "Hungary protects the institution of marriage between man and woman, a matrimonial relationship voluntarily established, as well as the family as the basis for the survival of the nation." L cikk, A Magyar Köztársaság Alkotmánya (Hungary).

[11] Article 6 of the German Constitution also protects marriage. The Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman." Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court of Germany] 28 February 1980, 53, 245; Civil Partnership Case, 105 BVerfGE 313 (2002) [Germany], English translation in Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3d ed. 2012), 608.Similarly, the Romanian Constitution contains a general protection of marriage. Constitution of Romania art. 48.

[12] Codul Civil (2009) (Romania), art. 259(a), implementing Romania Const., art. 44, which provides "(1) The Family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education, and instruction of their children," and (2) The terms for entering into marriage, dissolution, and nullity of marriage shall be established by law." *See* Daniel Buda, *The Administrative Reform in Romania: The New Civil Code and the Institution of Marriage* 36 TRANSYLVANIAN REV. OF ADMIN. SCIENCES 27, 33 (2012).

A smaller number of jurisdictions have sought to give recognition to same-sex relationships and provide them with legal incidents associated with marriage.[13] In doing so, a few have redefined marriage to include same-sex couples.[14] But most have instead crafted compromises that stop short of changing the definition of marriage or even providing all marriage incidents to same-sex couples.[15]

Similarly in the United States, the various states have followed different paths. A minority of seventeen U.S. states[16] have joined with the sixteen foreign nations already mentioned in instituting same-sex marriage. Two-thirds of U.S. states have enacted constitutional amendments or statutes or adhere to cultural norms consistent with the legal norms of the other 177 sovereign states recognized by the United Nations that define marriage as a relation between man and woman.

It is also instructive that nearly half of countries that recognize some form of same-sex union have reserved the designation of marriage solely for opposite-sex couples.[17] Additionally, precedent from countries and regional jurisdictions, such as

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[13] See *infra* notes 7 & 17.

[14] See *infra* note 7.

[15] See *infra* note 17.

[16] Marriages between same-sex couples are licensed by California, Connecticut, Delaware, Hawaii, Illinois (currently in Cook County and state-wide beginning June 1, 2014), Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), *appeal dismissed sub. nom.* Perry v. Brown, 725 F.3d 1140 (9th Cir. 2013); Strauss v. Horton, 207 P.3d 48, 68, 119 (Cal. 2009); CAL. FAM. CODE § 308(b); CONN. GEN. STAT. § 46b-20; DEL. CODE tit. 13, § 101; HAW. REV. ST. §§ 572-A et. seq.; 750 ILL. COMP. STAT. 5/201, 209, 212, 213.1, 220 & 75/60, 65; Edwards, et al. v. Orr, Case No. 13-cv-8718, Dkt. No. 46, Memorandum Opinion & Order (N.D. Ill., Feb. 21, 2014); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); ME. REV. STAT. tit. 19-A, § 650A; MD. CODE ANN., FAM. LAW § 2-201; Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003); MINN. STAT. § 517.01 et seq.; N.H. REV. STAT. ANN. § 457:1-a; Garden State Equality v. Dow, 82 A.3d 336 (N.J. Super. 2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013); N.Y. DOM. REL. LAW § 10-A; R.I. GEN. LAWS § 15-1-1 et seq.; VT. STAT. ANN. tit. 15, § 8; WASH. REV. CODE § 26.04.010.

[17] Eleven foreign states recognize same-sex unions without the designation of marriage. Andorra (Qualificada de les unions estables de parella [Termed Stable Unions of Partners] 17 BOPA No. 25 (Law 4/2005)), Australia (Family Law Act 1975 sec. 60EA), Austria (Eingetragene Partnerschaft-Gesetz (EPG) Act of 30 December 2009), Ecuador (Constitucion de 2008 art. 68), Finland (Lag 950 of 28 Sept. 2001 Amended by Lag 59 of 4 Feb 2005), Germany (Gesetz zur Beendigung der Diskriminierung Gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Act to End Discrimination Against Same-Sex Unions: Civil Partnerships], 2001 BGBl. No. 9 S. 266 (2001), as amended by Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Law on the Revision of Civil Partnership Law], 2004 BGBl. No. 29 S. 3996 (2004)), Ireland (Civil Partnership and Certain Rights and Obligations of Cohabitants Act (2010)), Liechtenstein (Lebenspartnerschaftsgesetz (2011)), Luxembourg (Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats), Slovenia (Zakon o registraciji istospolne partnerske skupnosti [Act on Registered Partnerships] (2009)), Switzerland (Loi fédérale sur le partenariat enregistré entre personnes du même sexe [LSP] [Federal Law on registered partnerships between persons of the same sex] June 29, 2004, Nbr. 210, art. 95). Sixteen states now recognize same-sex marriage. See *supra* note 7.

the European Court of Human Rights, have recognized the reasonableness and legitimacy of legal approaches that seek to protect the rights of gay and lesbian couples while retaining the definition of marriage as a heterosexual union.[18]

A. European Jurisdictions

A number of nations have extended legal recognition to same-sex unions while retaining the virtually universal understanding of marriage as the union of a husband and wife. In Europe, the combination of a law defining marriage as the union of a man and a woman and a legal status extending incidents traditionally associated with marriage to same-sex couples is common.

For example, since 2003, Austria has granted same-sex cohabiting couples the same legal incidents accorded to opposite-sex cohabiting couples.[19] In 2009, the Austrian Parliament approved a bill creating a registered partnership status through which same-sex couples can access many of the incidents of marriage, though others related to children such as adoption and access to in vitro fertilization are not available.[20]

The Czech Republic enacted registered partnership legislation for same-sex couples in 2006, providing registered couples with some limited incidents of marriage related chiefly to decision-making on behalf of the other party.[21]

In 2002, Finland created a registered partnership status with significant marriage incidents extended to same-sex couples.[22]

Ireland approved a Civil Registration Act in 2004 which specifically provides that "there is an impediment to marriage if . . . both parties are of the same-sex."[23] In 2010, however, the Irish government created a civil partnership status for same-sex couples allowing registrants to access some marriage incidents.[24]

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[18] *See, e.g.*, *Schalk and Kopf v. Austria*, App. No. 30141/04 (ECtHR, 24 June 2010) (holding that Austria's refusal to allow judicial recognition of same-sex marriage was within Austria's "margin of appreciation," but noting with approval the passage of civil partnership legislation).
[19] *Karner v. Austria*, App. No. 40016/98 (ECtHR, 24 July 2003).
[20] Eingetragene Partnerschaft-Gesetz [EPG] Bundesgesetzblatt [BGBl] no. 135/2009 (Austria).
[21] Act no. 115/2006 Coll. on Registered Partnership (Czech Republic); *see* Macarena Saez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different*, 19 J. GENDER, SOC. POL'Y. & L. 1, 30 (2011).
[22] Laki rekisteröidystä parisuhteesta 950/2001 of 9 November 2001 (Finland).
[23] Civil Registration Act 2004 (Act No. 3/2004) (Ireland).
[24] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) (Ireland).

Slovenia enacted a registered partnership law in 2005 to provide gay and lesbian couples incidents of marriage related to property, support obligations and inheritance.[25]

In 2005, a popular referendum in Switzerland approved a registered partnership status for same-sex couples, creating property rights, support obligations and inheritance rules for registrants.[26]

Australia and New Zealand also have laws providing some marriage incidents to same-sex couples while retaining the husband-wife definition of marriage. The Parliament of Australia enacted specific legislation in 2004 defining marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" and prohibiting recognition of same-sex marriages contracted in other jurisdictions.[27] Separately, Parliament has amended various laws to ensure same-sex cohabiting couples and opposite-sex cohabiting couples are treated alike.[28]

In New Zealand, the Court of Appeal interpreted its marriage act to refer to male-female unions.[29] Many of the incidents of marriage in New Zealand have been extended to same-sex couples in civil unions, although not the presumption of paternity or ability to jointly adopt children.[30]

Germany and Hungary grant constitutional protection to marriage as the union of a husband and wife while providing marriage-related benefits to same-sex couples. Germany's Constitution specifies that marriage shall enjoy the special protection of the state.[31] As noted above, the Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman."[32] In 2001, Germany's legislature created a legal status for "life partnerships" that offered many marriage incidents to same-sex couples (though not joint adoption).[33] In 2004, parliament amended the law to allow for stepparent-like adoptions of one partner's

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[25] Zakon o registraciji istospolne partnerske skupnosti (Slovenia).
[26] Loi fédérale sur le partenariat enregistré entre personnes du même sexe du 18 juin 2004 (Switzerland).
[27] Marriage Amendment Act 2004 (Cth) §§ 1, 3 (Australia).
[28] Australia Government Attorney-General's Department, *Same Sex Reforms: Overview of the Australian Government's same-sex law reforms*, at http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Samesexreforms.aspx. A brief discussion of the unsuccessful effort to redefine marriage to include persons of the same gender is described at http://newsweekly.com.au/article.php?id=5351.
[29] *Quilter v. Attorney General* (1998) 1 NZLR 523 (New Zealand Court of Appeal).
[30] Civil Union Act 2004 (New Zealand).
[31] Grundgesetz für die Bundesrepublik Deutschland [GG], 23 May 1949, Bundesgesetzblatt [BGBl.] VI (Germany).
[32] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 28 February 1980, 53, 245 (Germany).
[33] Gesetz über die Eingetragene Lebenspartnerschaft [LpartG] [Life Partnership Act] 16 February 2001, Bundesgesetzblatt [BGBl] I, 266 (Germany).

biological child by the other partner.[34] Hungary's marriage amendment is more explicit and was adopted since Proposition 8 in California. In a legal status separate from marriage, Hungary provides most marriage incidents to registered partners, though not joint adoption or access to artificial insemination.[35]

To summarize, eleven countries[36] define marriage as the union of a husband and wife while extending marriage incidents to same-sex couples.

B. The Rationales for Man-Woman Marriage Laws

Courts and legislative bodies in a number of nations and regional organizations such as the Council of Europe have had to address claims for same-sex marriage. These nations' constitutions and decisions make clear that retaining the understanding of marriage as the union of husband and wife can be motivated and justified by important social considerations unrelated to invidious discrimination against gay men and lesbians.

The most significant and widespread reasoning in support of retaining the male-female definition of marriage focuses on the importance of protecting the institution of marriage because of its significance for procreation and nurturing children.

In numerous countries—including those whose constitutions implicitly or explicitly define marriage as a relationship between one man and one woman—family, children and parenting are all linked in the constitutional text. Examples include Azerbaijan, Belarus, Bolivia, Hungary, Germany, Latvia, Lithuania, Moldova, Paraguay, Poland, Suriname, Turkmenistan, and Ukraine.[37] For example,

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[34] *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, 20 December 2004, Bundesgesetzblatt [BGBl] I, 69 (Germany).

[35] Zsolt Körtvélyesi & András L. Pap, *National Report: Hungary*, 19 AM. U. J. GENDER SOC. POL'Y & L. 211, 212 (2011).

[36] See *supra* note 17.

[37] Constitution of the Republic of Belarus [Канстытуцыя Рэспублікі Беларусь] art. 32 ("Marriage, the family, motherhood, fatherhood, and childhood shall be under the protection of the State"); Constitution of the Republic of Latvia [Satversme] art. 110 ("The state protects and supports a marriage, the family, the rights of parents and children."); Constitution of the Republic of Lithuania [Lietuvos Respublikos Konstitucija] art. 38 ("The family shall be under the protection and care of the state. … Marriage shall be concluded upon the free mutual consent of man and woman."; República de Paraguay Constitución Política art. 52 ("The union in marriage by a man and woman is one of the fundamental factors in the formation of a family."); Constitution of the Republic of Poland [Konstytucja Rzeczypospolitej Polskiej] art. 18 ("Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."); Constitution of Suriname [Grondwet van Suriname] art. 35 (enumerating six fundamental rights associated with marriage, three of which relate to the value of procreation and children in marriage: that "[e]very child shall have the right to protection[,]" that "[p]arents shall have the same responsibilities towards legal or natural children[,]" and that "[t]he State recognizes the extraordinary value of motherhood"); Constitution of Ukraine

the German constitution states that "[m]arriage and family shall enjoy the special protection of the state," that "the care and upbringing of children is the natural right of parents," and that "[e]very mother shall be entitled to the protection and care of the community."[38]

The German Constitutional Court has held that these provisions "guarantee the essential structure of marriage."[39] Even while upholding the right of the legislature to create same-sex civil partnerships, the German Constitution Court has ruled that that "part of the content of marriage, as it has stood the test of time . . . is that it is the union of one man with one woman to form a permanent partnership . . ."[40] The constitutional protection of marriage means that "marriage alone, like the family, enjoy constitutional protection as an institution. No other way of life . . . merits this protection. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment to the constitution."[41] The Court emphasized that marriage is not only a "sphere of freedom" but also a "social institution" and that the "structural principles that characterize marriage give it the form and exclusivity in which it enjoys constitutional protection as an institution."[42]

Other countries' parliaments or constitutional courts have specifically identified the realities of procreation and children as important state interests in retaining marriage as a heterosexual union. Examples include the parliaments of UK, Ireland, and Australia and constitutional courts of France, Italy, and Ireland.[43]

The example of France is instructive. In 2011, the Constitutional Council of France held "that the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rule of family law."[44] It understood this difference in situation between same-sex and opposite-sex couples as being in "direct relation to the purpose of the [French marriage] law,"[45] permitting the tribunal to reject the equality claims of two women who sought a marriage license. When France did enact same-sex marriage legislation in 2013, the public debate surrounding passage

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[Konstytutsiia Ukrainy] art. 51 ("Marriage shall be based on free consent between a woman and a man. Each of the spouses shall have equal rights and duties in the marriage and family. ... The family, childhood, motherhood, and fatherhood shall be under the protection of the State.")

[38] Grundgesetz für die Bundesrepublik Deutschland [GG], 23 May 1949, BGBl. VI (Germany).

[39] Civil Partnership Case, 105 BVerfGE 313 (2002) [Germany], English translation in Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3d ed. 2012), 608.

[40] *Id*.

[41] *Id*. at 609.

[42] *Id.* at 609-10.

[43] See *infra* notes 53-62 and accompanying text.

[44] *Mrs. Corinne C. et al.*, Decision No. 2010-92 QPC, French Constitutional Council, 28 January 2011, ¶10 as quoted in William C. Duncan, *Why French Law Rejects a Right to Gay Marriage: An Analysis of Authorities*, 2 INT'L. J. JURISPRUDENCE FAM. 215, 223 (2011)

[45] *Id.*

and subsequent demonstrations have focused on the assertion that the legislation undercuts children's entitlement to a mother and father.[46]

Earlier, in a 2005 case assessing the validity of a marriage license issued to a same-sex couple, the court of appeal in Bordeaux rejected the notion that failure to issue licenses to same-sex couples is discrimination.[47] It reasoned that the existing marriage law merely recognizes "the fact that nature has made potentially fertile only opposite-sex couples" and the law "take[s] this biological reality into account" in determining the forms of marriage "encompassing the couple and the predictable consequences which are commonly children, in a specific institution called marriage."[48] Thus, for French law, marriage is "a social platform for a family" and same-sex couples "that nature did not create potentially fruitful are therefore not implicated in this institution" so "their legal treatment is different because their situation is not analogous."[49]

In a 2006 report of the Mission of Inquiry on the Family and the Rights of Children, a French parliamentary commission also relied on the significance of procreation to marriage. It rejected the idea of marriage as no more than a "contractual recognition of a couple's love. It is a demanding framework with rights and obligations designed to welcome the child and provide for his or her harmonious development."[50] The Mission of Inquiry concluded that it "is not possible to consider marriage and filiation separately, since the two entities are closely related, marriage being built around children."[51] The fact that same-sex couples sometimes raise children was not dispositive for the commission because "since children conceived in that way require a third party donor, if not a surrogate . . . same-sex couples are objectively not in the same situation as heterosexual couples."[52]

Similarly, the Constitutional Court of Italy upheld the constitutionality of that nation's marriage laws in a 2010 decision that also relied on an understanding of the potential procreative nature of marriage.[53] The court noted that Article 29 of the Italian Constitution provides recognition to marriage and the family, and then Article 30 makes provision for the protection of children. The court explained the significance of this fact: "it is not by chance that, after addressing marriage, the

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[46] *See*, *e.g.*, Tens of Thousands Protest in France Defending Traditional Family Values, RT.COM (February 3, 2014) at http://rt.com/news/france-protest-gay-marriage-543/.
[47] *Arrêt de la cour d'appel de Bordeaux*, 6e ch., 19 April 2005, 04/04683, *appeal dismissed*, Cass. 1e civ., ar. 3, 2007, 05-16.627, Decision No. 511, as quoted in Duncan, 2 INT'L. J. JURISPRUDENCE FAM. at 220.
[48] *Id.*
[49] *Id.*
[50] Rapport fait au nom de la mission d'information sur la famille et les droits des enfants, No. 2832, l'Assemblée nationale le 25 janvier 2006 (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf 65).
[51] *Id.* at 68).
[52] *Id.* at 76).
[53] *Judgment No. 138 of 2010*, Corte costituzionale (Italy).

Constitution considered it necessary to deal with the protection of children." The court noted that Article 30 protects the rights of children "born outside marriage." It declared: "The necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions."[54] The court explained that the nation's marriage law "is grounded on Article 29 of the Constitution" and "the legislation itself does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogenous with marriage."[55]

In the United Kingdom, during the debate over Civil Partnerships in the House of Lords in 2004, government minister Baroness Scotland of Asthal explained that the legislation was intended to offer "a secular solution to the disadvantages which same-sex couples face in the way they are treated by our laws" but not to "undermine or weaken the importance of marriage." She said: "it is important for us to be clear that we continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children."[56] As noted above, subsequently the United Kingdom enacted legislation to redefine marriage.

When the Australian Parliament debated the 2004 law to enshrine the definition of marriage, the Attorney General introduced the measure noting that marriage "is vital to the stability of our society and provides the best environment for the raising of children." He referred to marriage as "a central and fundamental institution."[57] In the Senate, the major opposition Labor Party announced its support of the measure.[58] A Senate Committee report from 2009 recommending rejection of a bill to create same-sex marriage based its recommendation, in part, on submissions to the Committee that "argued in favour of preserving the narrower and common definition on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children."[59] In 2012, Parliament again considered a proposal to redefine marriage. The key speech in opposition in the Senate argued "marriage is . . . ultimately about the next generation and its socialisation, with the benefit of having, if at all possible, mother and father role models."[60] The proposal was rejected 98-42 in the House of Representatives and 41-26 in the Senate.[61]

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[54] *Id.* at 26-27.
[55] *Id.* at 27.
[56] Civil Partnership Bill [H.L.], House of Lords Debate, 22 April 2004, Hansard vol. 660 cc. 388-433, available at http://hansard.millbanksystems.com/lords/2004/apr/22/civil-partnership-bill-hl.
[57] Australia House of Representatives, Marriage Amendment Bill 2004, Second Reading Speech, June 24, 2004 (Philip Rudock, MP).
[58] Australia Senate, Marriage Amendment Bill 2004, Second Reading Speech, August 12, 2004 (Senator Joe Ludwig).
[59] Australia Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009* (November 2009).
[60] Australia Senate, Marriage Amendment Bill (No. 2) 2012, Speech, September 18, 2012 (Senator Eric Abetz).
[61] Peter Westmore, *Australian People Win on Marriage,* NEWS WEEKLY (13 October 2012).

In a High Court decision in Ireland involving a challenge to the government's failure to treat same-sex couples as married for tax purposes, the court heard extensive evidence on the potential effects of same-sex marriage for child well-being. In rejecting the claim for recognition of same-sex marriage, the court said: "Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry albeit there is no evidence of any adverse impact on welfare."[62]

Notably, even some of the nations that have redefined marriage to include same-sex couples recognize the salience of these procreation concerns. The first nation to give legal recognition to same-sex marriage, the Netherlands, still does not apply the presumption of parentage associated with marriage to male same-sex couples.[63] Belgium, which redefined marriage in 2003, and Spain, which did so in 2005, do not extend the presumption of parentage to same-sex married couples.[64] Thus, these nations have attempted to recognize biological realities that have long been linked to the legal regulation of marriage even as they have redefined it. This, of course, is best accomplished when the law is created by political bodies, which can make these kinds of distinctions, rather than courts charged with an up-or-down vote on constitutionality.[65]

II. Legal Opinion from Other Nations and Supranational Bodies

A. International Human Rights Norms

International tribunals consistently have been unwilling to impose same-sex marriage through judicial interpretation of international human rights norms. The European Court of Justice, European Court of Human Rights, United Nations Human Rights Committee, have all rejected the notion that same-sex marriage is a constitutional or human right. The same can be said of various foreign jurisdictions, notably the French Constitutional Court, the Italian Constitutional Court, the German Federal Constitutional Court, and New Zealand Court of Appeal. Particularly instructive is the opinion of the European Court of Human Rights, which examines the degree of consensus among member states in assessing whether countries deserve a "margin of appreciation" for legal differences. It is instructive that it has not found sufficient consensus in Europe on the same-sex marriage issue to withhold margin of appreciation treatment. It is also significant that the

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[62] *Zappone v. Revenue Commissioners*, [2006] IEHC 404 (Ireland High Court 2006), p. 130.

[63] Macarena Saez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different* 19 J. GENDER, SOC. POL'Y. & L. 1, 4 (2011).

[64] *Id*. at 5-6.

[65] *Cf.* Duncan, 2 INT'L. J. JURISPRUDENCE FAM. 222 (arguing that in framing same-sex marriage as an issue of rights and equality, some U.S. courts have ignored the interests of children recognized by French tribunals).

European Court of Human Rights has not required uniformity on marriage law among the 47 states it oversees.

Although the European Court of Human Rights, which has been supportive of sexual orientation claims in a large number of other settings,[66] has recently declined to recognize a right to same-sex marriage. In *Schalk and Kopf v. Austria*,[67] the Court rejected the claim that an Austrian law permitting same-sex couples to contract registered partnerships but not marriages violated the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court held the right to marry protected in Article 12 of the Convention "does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage."[68]

The *Schalk* decision explicitly rejected a claim that the failure to redefine marriage constituted sexual orientation discrimination. Even while holding that "differences based on sexual orientation require particularly serious reasons by way of justification," the European Court rejected the claim of discrimination because "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy."[69] The court also noted that while "there is an emerging European consensus towards legal recognition of same-sex couples … this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes."[70] The court also held that Austria could make its own determinations about the precise incidents of marriage extended to same-sex couples even if they did not create precise equality with those accorded married couples.[71]

In 2012, in a case involving France's adoption law, the European Court of Human Rights confirmed this holding, noting "Article 12 of the Convention does not

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[66] See, e.g., *Dudgeon v. the United Kingdom,* App. No. 7525/76 (ECtHR, 22 October 1981) (barring prohibition of homosexual activity by consenting adults); *Lustig-Prean and Beckett v. the United Kingdom,* App. Nos. 31417/96 and 32377/96 (ECtHR, 27 September 1999) (extensive investigation into lives of homosexual military officials violated privacy rights); *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 (ECtHR, 21 December 1999) (holding that sexual orientation discrimination falls under Article 14's general ban on discrimination); *A.D.T. v. the United Kingdom*, App. No. 35765/97 (ECtHR, 31 July 2000) (states may not ban private taping of homosexual acts); *E.B. v. France*, App. No. 43546/02 (ECtHR, 22 January 2008) (sexual orientation discrimination in application of adoption law violates Article 14's nondiscrimination ban).

[67] App. No. 30141/04 (ECtHR, 24 June 2010).

[68] *Id.* at ¶63.

[69] *Id.* at ¶97.

[70] *Id.* at ¶105.

[71] *Id.* at ¶108.

impose on the governments of member States the obligation to extend the right of marriage to a same-sex couple."[72]

Later in 2012, the European Court also had occasion to address the question of whether Finnish law could permissibly require that an individual undergoing a gender change transform her marriage into a civil partnership. In that case, the court explained: "While it is true that some Contracting States have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not flow from an interpretation of the fundamental rights as laid down by the Contracting States" in the European Convention.[73]

As discussed above, the Italian Constitutional Court, German Federal Constitutional Court and French Constitutional Council also rejected claims that national constitutions mandated recognition of same-sex marriage or similar statuses.[74]

Finally, the United Nations Human Rights Committee, the official treaty body charged with interpreting the International Covenant on Civil and Political Rights, has held that the Covenant created a treaty obligation "to recognize as marriage only the union between a man and a woman wishing to marry each other" and that a "mere refusal to provide for marriage between homosexual couples" did not breach the Covenant.[75]

B. Democratic Institutions Versus Courts

With the exception of Brazil, Canada, and South Africa, international judicial bodies have consistently declined to redefine marriage, considering this an issue to be determined in legislatures.

The European Court of Human Rights rejected a claim that the Convention for the Protection of Human Rights and Fundamental Freedoms required member nations to create same-sex marriage: "the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society."[76]

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[72] *Gas and Dubois v. France*, App. No. 25951/07 (ECtHR, 15 March 2012) ¶66.
[73] *H. v. Finland*, App. No. 37359/09 (ECtHR, 13 November 2012) ¶38.
[74] *Judgment No. 138*, *supra* note 53 at 25; Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] July 17, 2002, 1 BvF 1/01, ¶111; *Mrs. Corinne C. et al.*, *supra* note 44.
[75] *Joslin v. New Zealand*, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (U.N. Hum. Rts. Cmte. 2002).
[76] *See Schalk and Kopf, supra* note 18 at ¶62.

The Italian Constitutional Court similarly concluded that "it is for Parliament to determine—exercising its full discretion—the form of guarantee and recognition for the aforementioned unions" referring to same-sex cohabiting relationships.[77] In rejecting a challenge to the country's civil partnership law, Germany's Federal Constitutional Court also stated that for the legislature "it is not forbidden in general to establish new opportunities for couples of opposite sex or for other relationships …. But there is no constitutional command to create such opportunities."[78]

The French Constitutional Council has held that it is not the prerogative of the court "to substitute its appreciation to that of the legislator in considering, in this manner, the difference in situation" between same and opposite-sex couples.[79]

Of the sixteen countries that have redefined marriage to include same-sex couples, thirteen have done so without the involvement of judicial bodies relying on constitutional or human rights provisions; Argentina, Belgium, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, the United Kingdom and Uruguay all redefined marriage by legislative action rather than court mandate.[80]

Even in Canada and South Africa, where courts were the initial impetus for the acceptance of same-sex marriage, adoption of same-sex marriage was ultimately referred to the legislative branch or involved significant legislative input. In Canada, where a provincial appellate court had ruled the Charter of Rights and Freedoms necessitated creation of same-sex marriage,[81] the final resolution of the issue was by an act of Parliament.[82]

So too, while South Africa's Constitutional Court gave Parliament a year to create same-sex marriage after interpreting that nation's constitution as requiring such a step,[83] the resolution was in Parliament.[84] In responding to the court's direction, however, Parliament declined to amend the existing marriage act. Instead, it created an additional, alternative status of civil unions which includes both civil partnership and marriage. Thus, opposite-sex couples can marry under the Marriage Act of 1961, under the Civil Union Act of 2006, or they can register a

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[77] *Judgment No. 138, supra* note 53 at 25.
[78] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] July 17, 2002, 1 BvF 1/01, ¶111.
[79] *Mrs. Corinne C. et al.*, *supra* note 44 at ¶10.
[80] See *supra* note 7.
[81] *Halpern v. Att'y Gen. of Can.*, 65 OR3d 161, 172 OAC 276, P 71 (2003).
[82] Canada Civil Marriage Act, R.S.C. ch. 33 (2005).
[83] *Fourie v. Minister of Home Affairs*, 2006 (3) BCLR 355 (CC) (S. Afr.).
[84] South Africa Civil Unions Bill, B 26B-2006.

civil partnership under the latter Act while same-sex couples can marry or register a civil partnership only under the 2006 law.[85]

Brazil stands alone as the only country outside the United States in which the judiciary has imposed same-sex marriage without any legislative involvement.[86]

In sum, only three courts in foreign jurisdictions (Brazil, Canada, and South Africa) have held that national or supranational charters require same-sex marriage. By contrast, the United Nations Human Rights Committee, European Court of Human Rights, European Court of Justice, French Constitutional Council, German Federal Constitutional Court, Italian Constitutional Court, and New Zealand Court of Appeal have all rejected such claims, and have held instead that the decision whether to adopt same-sex marriage should be left to democratic processes.

The vast majority of countries that now permit same-sex marriage did so not as a matter of court order but through legislative action. Further, most nations that do recognize some form of same-sex union do not give them the designation of marriage.

III. Conclusion

While the global trend toward redefining marriage to include same-sex couples is evident in a number of jurisdictions, the trend thus far has reached only a relatively small number of countries. The vast majority of states still do not permit same-sex marriage. Those states that do have done so by redefining their marriage law through a legislative process, with Brazil and a few U.S. states being the sole exceptions. These legislative processes have permitted a more nuanced approach to the redefinition of marriage and the array of legal and social changes that a major shift in family law systems necessarily entails. It is not unreasonable to allow the legislative institutions to deal with the complex issues involved in a way that minimizes the risks of precipitous change. This approach allows legislative institutions to address acknowledged injustices of the past without dismantling the traditional institution of marriage with a single judicial stroke. Judicial imposition of a constitutional result in this domain could lock in patterns of polarization that could get in the way of legislative compromises that may ultimately provide better long-term solutions for society as a whole. Care needs to be taken to avoid putting at risk fragile and sometimes unseen virtues of family institutions that have served humankind well down through the ages and across civilizations. The assumption that mere animus or bigotry is the only explanation behind the legal structures of

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[85] *See* Civil Unions Bill, B 26B-2006 (South Africa); Francois du Toit, *National Report: The Republic of South Africa* 19 J. GENDER, SOC. POL'Y. & L. 277, 280 (2011).

[86] Superior Tribunal of Justice – R.E. 1.183.378 - RS (2010/0036663-8). See *supra* note 7 for more information about the status of the order.

most nations of the earth is a charge aimed at blocking the quest for genuinely reasoned and good faith solutions that can be reached best in the political arena. Accordingly, with very few exceptions, national and supranational courts have held that such decisions must be left to democratic action by citizens or their legislative representatives.