

*Forthcoming in the Berkeley Journal of International Law – Fall 2013*

## **Same-Sex Marriage - Building an Argument before the European Court of Human Rights in Light of the U.S. Experience<sup>1</sup>**

*Emmanuelle Bribosia,<sup>2</sup> Isabelle Rorive<sup>3</sup> & Laura Van den Eynde<sup>4</sup>*

### **Introduction**

In 2013, the question whether same-sex couples should be able to enter into a legal marriage is still a well-disputed societal issue which is at the forefront of legal discourse in many democratic countries belonging to the Council of Europe as well as in numerous States in the United States.<sup>5</sup> If this may come as a surprise in times of liberalization of mores and of desacralization of marriage, which have seen the number of *de facto* unions and of divorces increase dramatically (although the situation varies from country to country), it is essential to recall that criminalization of homosexual relations between consenting adults were formally outlawed only in 1981 at Council of Europe level<sup>6</sup> and in 2003 for the entire United States.<sup>7</sup>

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<sup>1</sup> This research has been funded by the Interuniversity Attraction Poles Programme (IUAP) initiated by the Belgian Science Policy Office (BELSPO). More particularly, this paper has been written in the framework of the IUAP project *The Global Challenge of Human Rights Integration: Towards a Users' Perspective* (2012-2017): [www.hrintegration.be/](http://www.hrintegration.be/) and presented at the Berkeley Comparative Law Study Group on April 4, 2013. The authors are grateful for all the received comments and especially indebted to Françoise Tulkens, Julie Ringelheim, Ulad Belavusau, and Thomas Bombois. The authors thank Julian McLachlan for the precious editing work. The authors take responsibility for any error.

<sup>2</sup> Professor at the Law Faculty of the *Université libre de Bruxelles* (ULB), Belgium and Director of the Legal Department of the Institute for European Studies (ULB).

<sup>3</sup> Professor at the Law Faculty of the *Université libre de Bruxelles* (ULB) and Director of the Centre Perelman for Legal Philosophy (ULB).

<sup>4</sup> Doctoral Researcher at the *Université libre de Bruxelles* (ULB).

<sup>5</sup> In the United States the question remains of high priority in the political and judicial agendas of the States and of the federal government. As of today, thirteen States have legalized same-sex marriages (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington), as well as the District of Columbia and five Native American tribes. Within the Council of Europe, the Netherlands opened civil marriage for same-sex couples in 2001, which made it the first country in the world to do so. Nine other European States have followed so far: Belgium in 2003, Spain in 2005, Norway and Sweden in 2009, Portugal and Iceland in 2010, Denmark in 2012, France, England and Wales in 2013. In addition, a fair number of States have put in place some kind of registered partnerships: Denmark in 1989, Norway in 1993, Sweden in 1995, Iceland in 1996, the Netherlands and Spain in 1998, France in 1999, Belgium in 2000, Germany and Spain in 2001, Finland in 2002, Luxembourg in 2004, Andorra and the United Kingdom in 2005, the Czech Republic and Slovenia in 2006, Switzerland in 2007, Hungary in 2009, Austria in 2010, Lichtenstein and Ireland in 2011. Croatia put in place unregistered cohabitation in 2003. For more details, see the summary country by country on the ILGA-Europe website ([www.ilga-europe.org](http://www.ilga-europe.org)). See also, Council of Europe Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe*, 91 *et seq.* (Council of Europe Publishing, June 2011).

<sup>6</sup> Eur. Ct. H.R., *Dudgeon v. United Kingdom*, Appl. No. 7525/76, 21 October 1981 and Parliamentary Assembly of the Council of Europe, Recommendation 924 (1981) on discrimination against homosexuals, 33<sup>rd</sup> ordinary session.

<sup>7</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

Moreover, the report published by the Agency for Fundamental Rights in 2011<sup>8</sup> expresses concerns about the increase of criminal offenses motivated by a homophobic motive and reminds us that the achievements of the last decades to suppress the discrimination based on sexual orientation remain fragile.

The violent actions that were undertaken against same-sex couples in certain European countries are clear evidence of how the recognition of non-mainstream ways of life is far from being achieved. The opposition does not stem exclusively from the streets. It also takes on legislative forms. In January 2013, the lower house of the Polish Parliament refused to legalize civil unions between same-sex partners.<sup>9</sup> In June of the same year, the Russian President signed into law various homophobic bills.<sup>10</sup> The virulence of certain statements made at the French National Assembly in the context of the debates concerning “marriage for everyone” show to what degree the debate is also sensitive in a European State like France, which purports to be the cradle of fundamental freedoms and claims over and over again the separation of political and religious affairs. Forty five years after May 1968 and its struggle for emancipation and sexual liberation, the right to individual autonomy, as part of the right to private life, is still in the process of being materialized. The arguments to refuse the ability to contract marriage to same-sex couples sometimes involve hints of homophobia which invite us to deconstruct this narrative in the light of the right to non-discrimination.

Although legislative avenues are still relevant,<sup>11</sup> as is recently illustrated by the votes at the French National Assembly in favor of “marriage for everyone”<sup>12</sup> during Spring 2013 or those cast in the House of Commons with respect to Britain,<sup>13</sup> courtrooms remain of interest to many activists<sup>14</sup>. Indeed, many of the LGBT victories have been achieved through judicial

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<sup>8</sup> European Union Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States*, Publications Office of the European Union (2011).

<sup>9</sup> Political and legal developments are not necessarily linear: In 1932, Poland became the first country in 20<sup>th</sup> century Europe to decriminalise homosexual activity.

<sup>10</sup> Amnesty International, *Urgent Action: Discriminatory Law Backed in Russia*, published on 29 January 2013 on [www.amnesty.international.org](http://www.amnesty.international.org); Human Rights Watch, *Russia: Drop Homophobic Law*, <http://www.hrw.org/news/2013/06/10/russia-drop-homophobic-law> (last accessed on 13 August 2013).

<sup>11</sup> Kees Waaldijk, *Civil developments: patterns of reform in the legal position of same-sex partners in Europe*, 17 CAN. J. FAM. L. 62 (2000); Susan Gluck Mezey and David Paternotte, *Pursuing Marriage Equality in Four Democracies: Canada, the United States, Belgium, and Spain*, 13 GLOBAL JOURNAL OF HUMAN-SOCIAL SCIENCE RESEARCH (9 July 2013). In Finland, after being turned down by the Parliament’s Legal Affairs Committee, committee, a bill legalizing same-sex marriage is currently (summer 2013) being brought back to the Parliament as a citizens’ initiative. See for more detail on the campaign: <http://www.tahdon2013.fi/in-english/why-a-citizens-initiative/> (last accessed August 24, 2013).

<sup>12</sup> On 23 April 2013, the National Assembly approved a Bill allowing the recognition of same-sex marriage (331 voted in favor, 225 against and 10 abstained). The French Constitutional Council was seized of the law and held that it was constitutional. An English version of the decision is available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2013-669-dc-of-17-may-2013.137411.html> (last accessed September 5, 2013).

<sup>13</sup> The British House of Commons has voted 400-175 on the Marriage Equality Bill on February 5, 2013. The bill passed its third reading in the House of Lords on 15 July 2013 and received Royal Assent. It will enter into force in 2014.

<sup>14</sup> Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, in INTERNATIONAL ORGANIZATION, (forthcoming 2013), currently available on SSRN at <http://ssrn.com/abstract=1850526>; Elizabeth Burleson, *International Human Rights Law, Co-parent Adoption, and the Recognition of Gay and Lesbian Families*, 55 LOY. L. REV. 791 (2009).

decision.<sup>15</sup> The review of laws prohibiting marriage or any form of legal recognition of same-sex couples can prevent the popular vote from becoming a “dictatorship of the majority”.<sup>16</sup> Everywhere, as news headlines show, the highest courts are confronted with these questions.

This article aims to adopt a critical but constructive look at the case law of the European Court of Human Rights (hereinafter “ECtHR”) regarding same-sex marriage.<sup>17</sup> The case law of the ECtHR is closely followed to observe the changes in matters involving LGBT issues and the Court “has been considering whether same-sex couples should (...) be recognized as a family under the European Convention of Human Rights (ECHR) for over thirty years”.<sup>18</sup> In 2010, the Court issued its first judgment on the specific question of the right to marry in the *Schalk and Kopf* case.<sup>19</sup> The Court ruled that Contracting States are not obliged to grant same-sex couples access to marriage. However, incremental changes in the Court’s case law are patent and the Court went as far as holding that the right to marry is not necessarily limited to marriage between persons of opposite sex.<sup>20</sup> The 2013 case *X v. Austria*<sup>21</sup> concerning the adoption of a child by the female partner of his biological mother, confirms the fact that the Court seems open to acknowledge evolution. Particularly in non-discrimination law, one can observe that the Court tends to give concrete form to its advances in case law by moving smoothly. Sometimes, it gives an alarm signal by speaking of an emerging European consensus although it dismisses the claimant *in casu*,<sup>22</sup> sometimes it paves the way for a coming evolution while it will activate its potential in a future case.<sup>23</sup>

The standpoint of this article is that, three years after the *Schalk and Kopf* case, and among others with the inputs of other courts’ decisions and of the current debates in the US,<sup>24</sup> the

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<sup>15</sup> This does not deny that litigation has sometimes ignored grassroots efforts, proven counter-productive or created backlash see Michael J. Klarman., *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (Oxford University Press, USA, 2012).

<sup>16</sup> See for example the opinion of Justice Black in *Chambers v. Florida*: “Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement”; 309 U.S. 227 (1940).

<sup>17</sup> Although evidently linked, we do not touch upon the issue of filiation.

<sup>18</sup> Sarah L. Cooper, *Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights’ Jurisprudence on LGBT Rights*, GERMAN LAW JOURNAL, 1746 (2011).

<sup>19</sup> Eur. Ct. H.R., *Schalk and Kopf v. Austria*, Appl. No. 30141/04, 24 June 2010. For an extensive comment see Loveday Hodson, *A Marriage by Any Other Name? Schalk and Kopf v Austria*, 11 HUMAN RIGHTS LAW REVIEW 1 (3 January 2011).

<sup>20</sup> *Ibidem*, § 61.

<sup>21</sup> Eur. Ct. H.R. (GC), *X v. Austria*, Appl. No. 19010/07, 19 February 2013.

<sup>22</sup> See, for instance, as to transsexualism and civil status change: Eur. Ct. H.R., *Rees v. The United Kingdom*, Appl. No. 9532/81, 17 October 1986; Eur. Ct. H.R., *Cossey v. The United Kingdom*, Appl. No. 10843/84, 27 September 1990; Eur. Ct. H.R., *Sheffield and Horsham v. The United Kingdom*, Appl. No. 22885/93 & 23390/64, 30 July 1998; Eur. Ct. H.R. (GC), *Christine Goodwin v. The United Kingdom*, App. No. 28957/95, 11 July 2002; as to adoption by a single parent and sexual orientation: Eur. Ct. H.R., *Fretté v. France*, Appl. No. 36515/97, 26 February 2002 ; Eur. Ct. H.R., *E.B. v. France*, Appl. No. 43546/02, 22 January 2008.

<sup>23</sup> In this line with respect to Eur. Ct. H.R. (GC), *X v. Austria*, Appl. No. 19010/07, 19 February 2013, see Nicolas Hervieu, *Un long chemin européen vers la reconnaissance des familles homoparentales*, in LETTRE “ACTUALITÉS DROITS-LIBERTÉS” DU CREDOF, 26 February 2013.

<sup>24</sup> The limits of a comparative approach are well documented: see Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights*, 40 COLUM. HUM. RTS. L. REV., No. 2, 425 (2009). We are aware that, if anything, legal claims exacerbate the political character of the dispute and that activist

European Court of Human Rights should go one step further and recognize the right of same-sex partners to marry.<sup>25</sup> We argue that this is an unavoidable step to achieve legal consistency in accordance with “the doctrine of the Convention as a living instrument and the principle of dynamic and evolutive interpretation”.<sup>26</sup> Our argument is built so as to help the Court decide the next cases, but it should also feed the efforts of civil society organizations striving for equality, whose goals and strategies experience a growing transnationalization<sup>27</sup>.

Two cases involving this question are currently pending before the European Court of Human Rights: *Chapin and Charpentier v. France*<sup>28</sup> and *Ferguson and others v. the United Kingdom*.<sup>29</sup> The first is known as the Bègles gay couple case. The name comes from a municipality of the French department Gironde, where the mayor, in the spirit of civil disobedience, had performed the marriage ceremony of M. Chapin and M. Charpentier. This marriage was then annulled in court on the basis that “according to French law, marriage is the union of a man and a woman”.<sup>30</sup> The second case, highly publicized in the Equal Love campaign, was filed by sixteen people (eight were in a heterosexual couple and eight in a homosexual couples) in an affair built in the UK with the help of Robert Wintemute, professor of Human Rights Law at King’s College London, a well-known defendant of the right to equality of LGBTs. This case, which was directly referred to the European Court of Human Rights, is slightly different. As Prof. Wintemute puts it: “Our case is that the combination of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 creates a system that segregates couples into two separate legal institutions, with different names but identical rights and responsibilities”.<sup>31</sup> The argument of segregation is put in very strong words by referring to law as a social and discriminatory marker: “Same-sex couples are excluded from marriage, which is the universal system for legally recognizing a loving, committed, sexual

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strategies in practice move between cosmopolitan and communitarian discourses; see Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L. J. 951 (2004).

<sup>25</sup> Without entering the debate, we do recognise that many scholars and activists, for various reasons, do not advocate or prioritize the goal of same-sex marriage. For a short overview of the critiques from the LGBT movement itself see Erez Ben Zion Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL’Y 105 (2010); CRAIG RIMMERMAN, *LESBIAN AND GAY MOVEMENTS: ASSIMILATIONIST OR LIBERATIONIST STRATEGIES FOR CHANGE?* (Westview Press, 2009) and for a response see Darren Rosenblum, *Queer Legal Victories*, in *QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW*, 38, 47-48 (NYU Press 2009). See also Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (January 2012).

<sup>26</sup> Steering Committee for Human Rights and Committee of experts on the reform of the Court, *Joint preliminary comments on the drafting of Protocols 15 and 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Strasbourg, DH-GDR(2012)008, 2 (29 August 2012).

<sup>27</sup> Ronald L. Holzhaecker, *Transnationalization of Civil Society Organizations Striving for Equality: Goals and Strategies of Gay and Lesbian Groups in Italy and the Netherlands*, EUI working paper, RSCAS, 2007/36; Kelly Kollman, *Same-Sex Unions: The Globalization of an Idea*, 51 INTERNATIONAL STUDIES QUARTERLY, 329 (2007).

<sup>28</sup> Eur. Ct. H.R., *Chapin and Charpentier v. France*, Appl. No. 40183/07, Communicated case, introduced on 6 September 2007.

<sup>29</sup> Eur. Ct. H.R., *Ferguson and others v. the United Kingdom*, Appl. No. 8254/11, pending. See also Eur. Ct. H.R., *Vallianatos & Others v. Greece*, Appl. No. 29381/09 and *C.S. and Others v. Greece*, Appl. No 32684/09, relinquishment of jurisdiction to the Grand Chamber. These pending cases concern the access of same-sex couples to registered partnerships which is presently limited to heterosexual couples.

<sup>30</sup> “Selon la loi française, le mariage est l’union d’un homme et d’une femme”; On 13 March 2007, the French *Cour de cassation* dismissed the appeal against the decision taken by the *Cour d’appel*, on 19 April 2005, to validate the annulment ordered by the *Tribunal de Grande Instance* of Bordeaux, on 27 July 2004.

<sup>31</sup> A quote from the website of EQUAL+LOVE where Robert Wintemute explains the legal basis of the application to the European Court of Human Rights (<http://equallove.org.uk/the-legal-case/>).

relationship between two adults. This legal segregation is similar to having separate beaches and drinking fountains for white and black people, as existed in South Africa under apartheid. It is comparable to having a system of marriage for Christians and civil partnership for non-Christians”.<sup>32</sup> As the *Chapin and Charpentier* and the *Ferguson* cases concern countries which legalized same-sex marriage in 2013, the European Court could easily evade the issue and circumvent its rulings to the specific facts. However, in *Ferguson*, the Court will at least have to address whether barring heterosexuals to access civil partnership is discriminatory. Anyhow, in time to come, the Court will be pressed to tackle the question in principle.

On some points, we find it helpful to look at the US scholarly articles and judgments that are currently discussing the same issue, because they can provide suggestions of changes or highlight paths to avoid. Arguments discussed in the American context can fuel the ongoing reflection held in parliaments, among activists and also in courts. Indeed, more specifically, the reasoning deployed in recent cases could inspire the respective courts.<sup>33</sup> Even if US courts do not make use of external sources with the same ease as the European Court of Human Rights (ECtHR) when interpreting their Constitution,<sup>34</sup> there are some cross-references, and *Schalk and Kopf* has already impacted the debate in the US (in particular in the *Perry* case)<sup>35</sup>. A dialogue between American and European judges does indeed exist, a dialogue which is, what is more, formalized by meetings between judges of the US Supreme Court and those of the European Court of Human Rights.<sup>36</sup>

In addition, the time seems appropriate. As said above, cases are pending before the ECtHR and the United States Supreme Court recently decided two cases involving the right for same-sex couples to marry:<sup>37</sup> *Hollingsworth v. Perry*<sup>38</sup> and *United States v. Windsor*.<sup>39</sup> The first

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<sup>32</sup> *Ibidem*.

<sup>33</sup> Others have already mentioned that the two recent US Supreme Court rulings “have the potential to influence the jurisprudence of courts around the world”; Matthew Flinn, “US Supreme Court opens door to marriage equality, UK coming next”, *UK Human Rights Blog*, 29 juin 2013, <http://ukhumanrightsblog.com/2013/06/29/us-supreme-court-opens-door-to-marriage-equality-uk-coming-next/>.

<sup>34</sup> See, for instance, Jan M. Smits, *Comparative Law and Its Influence on National Legal Systems*, MATHIAS REIMANN & REINHARD ZIMMERMANN (ed.), *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 514 (Oxford University Press 2006).

<sup>35</sup> The European case of *Schalk and Kopf* was mentioned a few times during the *Perry* litigation at the Supreme Court level (see below): by the petitioners’ brief and three amicus briefs submitted in *Perry* in support of both the petitioners and the respondent. See also Sarah L. Cooper, *A Review of the Concurrent Debates about the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States*, 5 PHOENIX LAW REVIEW 39, 41 (2011-2012); Lawrence R. Helfer and Erik Voeten, *supra* note 14. The following articles undertake a similar exercise, but directed to U.S. courts and scholars: Robert Wintemute, *The Massachusetts Same-Sex Marriage Case : Could Decisions from Canada, Europe and South Africa help the SJC ?*, NEW ENG. L. REV. 505 (2004); Anjuli W. McReynolds, *What International Experience Can Tell U.S. Courts About Same-sex Marriage*, UCLA L. REV., 1073 (2006).

<sup>36</sup> See, for instance, the summit between some of these judges organized at the George Washington Law School in March 2012: *Judicial Process and the Protection of Rights: The US Supreme Court and the European Court of Human Rights*.

<sup>37</sup> So far, the Court had heard arguments on four significant cases on gay civil rights, but none of them directly touched upon the marriage issue: *Bowers v. Hardwick* 478 U.S. 186 (1986), *Romer v. Evans* 517 U.S. 620 (1996), *Boy Scouts of America v. Dale* 530 U.S. 640 (2000) and *Lawrence v. Texas* 539 U.S. 558 (2003). For next year’s term, the Court has denied petition to a case from Arizona which raised the issue of domestic partner benefits of state employees (*Brewer v. Diaz*, cert. denied June 27, 2013). However, analysts expect a wave of lawsuits in other courts all over the country.

<sup>38</sup> *Dennis Hollingsworth, et al., v. Kristin M. Perry, et al.*, 570 U.S. \_\_\_\_ (2013) (Docket No. 12-144).



case involved the now famous Proposition 8, a California State ballot initiative amending the State Constitution to restrict the recognition of marriage to opposite-sex couples.<sup>40</sup> The second challenged the Defense of Marriage Act (hereinafter DOMA), a federal Act defining marriage as the union between a man and a woman.<sup>41</sup> Oral arguments took place in March<sup>42</sup> and the two decisions were issued on June 26, 2013. The California case was disposed on narrow procedural grounds<sup>43</sup> and while the Court said nothing about the constitutionality of “Prop 8”, the ruling had the effect of making final the 2010 decision by the U.S. District Court Judge Walker nullifying the measure.<sup>44</sup> This judgment, which included some eighty findings on fact based upon lengthy review of detailed evidence,<sup>45</sup> ruled that Prop 8 violated several constitutional provisions and doctrines, principally the Due Process Clause and the Equal Protection Clause.<sup>46</sup> In the second case, the central section of the DOMA has been struck down because it was contrary to the Fifth Amendment. Writing for a 5-4 majority, Justice Kennedy wrote that DOMA’s “principal purpose is to impose inequality”<sup>47</sup> and found that no sufficient justification was provided to sustain this “deprivation of liberty”.<sup>48</sup>

The first step of our argument addressed to the ECtHR is to recognize that the right to marry is gender neutral (point 1) and that same-sex relationships fall into the ambit of family life, protected by the Convention (point 2). Following the traditional reasoning applied by the Court, we then show that same-sex relationships are comparable to heterosexual relationships regarding the need of legal recognition (point 3). Along with many authors, we urge the Court to apply a strict scrutiny (point 4) and to deny any decisive role to the “European consensus” in its assessment of the discrimination (point 5). We then inquire which potential serious reasons could be invoked to justify the difference in treatment (point 6). On the basis of the Court’s own case law, of recent US judgments and of amicus curiae briefs, we conclude that the exclusion of same-sex couples from marriage is discriminatory because it does not meet the justification requirements. This leads us to review the concrete options available to the Court to hand out a judgment that meets the demands of equality taking into account the political realities it has to face (point 7).

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<sup>39</sup> *United States v. Edith Schlain Windsor*, in Her Capacity as Executor of the Estate of Thea Clara Spyer, et al., 570 U.S. \_\_\_\_ (2013) (Docket No. 12-307).

<sup>40</sup> The question presented to the parties was: “Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman”.

<sup>41</sup> In addition to procedural questions of standing, the main issue was “Whether Section 3 of the Defence of Marriage Act (DOMA) violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State”.

<sup>42</sup> The audio recordings and the transcripts of the oral arguments are available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio.aspx](http://www.supremecourt.gov/oral_arguments/argument_audio.aspx).

<sup>43</sup> State officials had refused to defend the Proposition or recognized that it was unconstitutional. The district court permitted the original proponents of Prop 8 to intervene and the Ninth Circuit found they had standing after asking the California Supreme Court whether they were authorized to represent California under state law. The Supreme Court disagreed.

<sup>44</sup> <http://www.scotusblog.com/?p=168146>

<sup>45</sup> Matthew Flinn, *US Supreme Court opens door to marriage equality, UK coming next*, UK Human Rights Blog, 29 June 2013, at <http://ukhumanrightsblog.com/2013/06/29/us-supreme-court-opens-door-to-marriage-equality-uk-coming-next/> (last accessed August 23, 2013).

<sup>46</sup> Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011).

<sup>47</sup> *US v. Windsor*, 570 \_\_\_\_ (2013) at 26.

<sup>48</sup> *US v. Windsor*, 570 \_\_\_\_ (2013) at 25.

## 1. The right to marry is gender neutral

Article 12 of the Convention provides as follows: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”. Can this right be approached as gender neutral? This is one of the major obstacles overcome by the ECtHR in the *Schalk and Kopf* case.<sup>49</sup>

A first barrier had already been broken down in the Court’s case law concerning the rights of transsexual persons. In the famous *Goodwin* case, the Court held that “the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing the right to marry”.<sup>50</sup> However, this finding was not in itself sufficient to grant the right to marry to same-sex couples. The *Schalk and Kopf* case gave the Court of Human Rights the opportunity to break down a second barrier without totally opening the door to the recognition of same-sex marriage. After having examined the arguments of historical and textual interpretation of Article 12 ECHR, but mainly focusing on a reading in the light of present-day conditions,<sup>51</sup> the Court held somewhat ambiguously that it “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex”.<sup>52</sup> To reach this conclusion, it is worth highlighting the Court’s reference to an external source not legally binding in the ECHR framework. Indeed, the Court of Strasbourg invoked the open formulation of Article 9 of the Charter of Fundamental Rights of the European Union which deliberately dropped the reference to “men and women”. The Court’s reference was two-fold: on one hand, the Court deduced from this that Article 12 should be interpreted as “gender neutral” from now on, but on the other hand, it uses the reference to national laws contained in Article 9 of the Charter as an additional argument which justifies allowing a margin of discretion to Member States, in the absence of a European consensus on this issue.<sup>53</sup>

A similar reasoning had been held by Judge Walker in *Perry v. Schwarzenegger* in 2010 by expressing that “Gender no longer forms an essential part of marriage; marriage under law is a union of equals”.<sup>54</sup> In the same line, the California Supreme Court defined the right to marry – without reference to gender – as “the right to enter into a relationship that is ‘the center of the personal affection that ennoble and enrich human life’”.<sup>55</sup>

By taking a non-gendered approach to marriage in *Schalk and Kopf* and by harmonizing the interpretation of Article 12 ECHR and of Article 9 of the Charter of Fundamental Rights of the EU, the Court paves the way for future developments. The refusal to recognize homosexual marriage can thus be examined from the viewpoint of Article 12 ECHR,

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<sup>49</sup> Eur. Ct. H.R., *Schalk and Kopf v. Austria*, *supra* note 19 at § 55.

<sup>50</sup> Eur. Ct. H.R. (GC), *Christine Goodwin v. The United Kingdom*, App. No 28957/95, 11 July 2002, § 98.

<sup>51</sup> Eur. Ct. H.R., *Schalk and Kopf*, *supra* note 19 at § 57. In any case, the applicants did not rely mainly on the textual interpretation of Article 12. In essence they relied on the Court’s case law according to which the Convention is a living instrument which is to be interpreted in present-day conditions (see *E.B. v. France* (GC), Appl. No. 43546/02, 22 January 2008, § 92 and *Christine Goodwin*, *supra* note 22 at §§ 74-75).

<sup>52</sup> Eur. Ct. H.R., *Schalk and Kopf*, *supra* note 19 at § 61.

<sup>53</sup> *Ibidem*, § 60. See also *infra*, point 4 in our paper.

<sup>54</sup> *Perry v. Schwarzenegger*, 113, 704 F. Supp.2d 921 (N.D. Cal., 2010) at 113.

<sup>55</sup> *In Re Marriage Cases*, 43 Cal. 4th 757, 827, 183 P. 3d 384, 432 (Cal. 2008).

combined with Article 14 ECHR, since marriage between same-sex persons falls “within the ambit” of Article 12 ECHR.<sup>56</sup>

## 2. Same-sex relationships are protected under family life<sup>57</sup>

Assuming that the European Court continues to refuse equal access to marriage, the concept of family life and the question of its scope come into play.

In an established case-law, the ECtHR held that “in respect of different-sex couples, (...) the notion of family under [article 8 of the ECHR] is not confined to marriage-based relationships and may encompass other *de facto* ‘family’ ties where the parties are living together out of wedlock”.<sup>58</sup> However, for lack of European consensus on the legal recognition of stable relationships between same-sex persons, it had, until recently, considered the relationships of homosexual couples exclusively from the viewpoint of the right to respect for private life, but not from that of the right to respect for family life.<sup>59</sup> The *Schalk and Kopf* case was also an opportunity for a step forward in that area. Having regard to the “rapid evolution of social attitudes towards same-sex couples in many member States” and to certain provisions of EU law reflecting this “growing tendency to include same-sex couples in the notion of ‘family’”,<sup>60</sup> the Court holds that a stable relationship between same-sex partners falls within the scope of the concept of family life just as a stable relationship between persons of opposite sex.<sup>61</sup> This position was restated by the same First Section Chamber in the case of *P.B. and J.S. v. Austria*<sup>62</sup> and was confirmed in 2013 by the Grand Chamber in *X v. Austria*,<sup>63</sup> in which “the Court reiterates that the relationship of a cohabiting same-sex couple living in a stable *de facto* relationship falls within the notion of ‘family life’ just as the relationship of a different-sex couple in the same situation would”.<sup>64</sup>

By acknowledging that family models are many and not exclusively built around a heterosexual relationship, the Court is in keeping with societal developments and takes into account the realities of contemporary family life in Europe.<sup>65</sup> Besides the symbolic value of such an acknowledgment, its impact on the opening of marriage to same-sex persons is two-fold. First, it forms an argument in support of the claim that situations of cohabiting couples living in a stable *de facto* relationship, whether they are heterosexual or homosexual, are comparable<sup>66</sup>. Second, it helps convince the Court to draw all the conventional consequences

<sup>56</sup> Eur. Ct. H.R., *Ferguson and others v. the United Kingdom*, Appl. No. 8254/11, § 153, pending.

<sup>57</sup> See, more generally on this point; Nicholas Bamforth, *Families but not (yet) marriages? Same-sex partners and the developing European Convention ‘margin of appreciation’*, 23 CHILD AND FAMILY LAW QUARTERLY, No. 1, 128 (2011).

<sup>58</sup> Eur. Ct. H.R., *Schalk and Kopf*, *supra* note 19 at § 91.

<sup>59</sup> *Ibidem*, § 92.

<sup>60</sup> *Ibidem*, § 93. See also, G. Willems, « La vie familiale des homosexuels au prisme des articles 8, 12 et 14 de la Convention européenne des droits de l’homme : mariage et conjugalité, parenté et parentalité », REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 65 (2013).

<sup>61</sup> Eur. Ct. H.R., *Schalk and Kopf*, *supra* note 19 at § 94.

<sup>62</sup> Eur. Ct. H.R., *P.B. and J.S. v. Austria*, Appl. No. 18984/02, 22 July 2010, §§ 27-30.

<sup>63</sup> Eur. Ct. H.R. (GC), *X. and others v. Austria*, Appl. No. 19010/07, 19 February 2013.

<sup>64</sup> *Ibidem*, § 129. In its earlier case-law, the Court had already underlined that “*the relationship of a couple, including a same-sex couple*” is “*qualitatively of a different nature*” to “*relationship between two sisters living together*”. (Eur. Ct. H.R. (GC), *Burden v. UK*, Appl. No. 13378/05, 29 April 2008, § 62).

<sup>65</sup> *Ibidem*, § 139.

<sup>66</sup> Eur. Ct. H.R., *Schalck and Kopf*, *supra* note 19 at § 99 and developments *infra*.



of such an affirmation by deducing from it a positive obligation for States to legally recognize these different family models.<sup>67</sup> This is, for that matter, what is brought out in the dissenting opinion shared by the Judges Rozakis, Spielmann, et Jebens in the *Schalk and Kopf* case. In their view, as soon as the Court considered that a same-sex relationship “falls within the notion of ‘family life’”, the Court should have drawn inferences from this finding and deduced a “positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy”.<sup>68</sup>

Still, a number of uncertainties remain. First, this does not necessarily imply that a positive obligation to open marriage to same-sex persons can be deduced from Articles 8 and 14 ECHR. When the dissenting Judges refer to a “satisfactory framework” intended to protect the family life of stable homosexual couples, they do not specify which type of legal recognition would be judged compatible with the requirements of the Convention. Although it appears that the absence of any legal recognition should be condemned, it does not clearly follow whether and under which conditions a registered partnership could be judged satisfactory. “Furthermore (...) no real guidance was offered [by the Court] as to the characteristics which a couple must display in order to count as a ‘family’ rather than merely a ‘private’ relationship”.<sup>69</sup>

### 3. Same-sex relationships are comparable to heterosexual relationships

In discrimination issues, a classical question is whether the complainant is in a relatively similar or analogous situation with another group of persons who are treated more favourably (“but for” test). Such a stage of analysis in the European Court’s case law has been proven problematic as it is often missing or inconsistent when sexual orientation is concerned.<sup>70</sup> As a matter of fact, the way the Court tackles this issue is evolving and depends on the question at stake.

With respect to economic benefits, the Court considered that same-sex couples who have contracted civil partnerships are in a similar situation to heterosexual couples who are married in the United Kingdom. Yet, the Court ruled in Grand Chamber that “Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature (...). There can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand”.<sup>71</sup>

As to access to adoption and parental rights, one paradoxical effect of the ECtHR’s non-discriminatory approach is that it has been until recently more supportive to single homosexuals seeking for adopting a child<sup>72</sup> than to same-sex couples who experience

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<sup>67</sup> N. Hervieu, *supra* note 23. See also Sarah L. Cooper, *supra* note 35 at 63-65.

<sup>68</sup> Joint dissenting opinion of Judges Rozakis, Spielmann & Jebens, point 4 in the case of *Schalck and Kopf*, *supra* note 19.

<sup>69</sup> Nicholas Bamforth, *supra* note 57 at 137.

<sup>70</sup> With respect to the Court’s case law related to sexual orientation, see PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS*, 125 (Routledge, 2012).

<sup>71</sup> Eur. Ct. H.R. (GC), *Burden v. The United Kingdom*, Appl. No 13378/05, 29s April 2008, § 65.

<sup>72</sup> Eur. Ct. H.R., *Fretté v. France*, Appl. No. 36515/97, 26 February 2002; Eur. Ct. H.R., *E.B. v. France*, Appl. No. 43546/02, 22 January 2008.

discrimination in the adoption of a child. For instance, in the *Gas and Dubois* case, the Court had to consider an application by two women in a long-term relationship and in a registered partnership who, although both providing full-time care for the biological child of one of them, were facing the refusal to allow the non-biological take carer to legally adopt the child. The specific status of marriage in the French society (defined, at the time, as a union between a man and a woman) leads the Court to deduct, succinctly, that the applicants are not in a situation comparable to that of married couples.<sup>73</sup> Regarding the difference in treatment between the applicants and a heterosexual couple engaged in a registered partnership (PACS), there is, according to the Court, neither direct discrimination (in both cases, the simple adoption is denied) nor indirect discrimination (no conventional obligation weighing on France to open marriage to same-sex couples).<sup>74</sup> However, the Court went a step further in *X v. Austria* where it “observes that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple. Indeed, the Government did not dispute that the situations were comparable, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples. The Court accepts that the applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to a different-sex couple in which one partner wished to adopt the other partner’s child”.<sup>75</sup>

If we turn now to the issue of access to marriage, the Court expressly admitted in *Schalk and Kopf* that “[w]hile the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship”.<sup>76</sup> In our view, this is the only tenable position after having acknowledged that family models are not exclusively built around a heterosexual relationship. As a result, we might consider as established in the ECtHR’s case law that situations of cohabiting couples living in a stable *de facto* relationship, whether they are heterosexual or homosexual, are comparable regarding their need for legal recognition and protection of their relationship.

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<sup>73</sup> Eur. Ct. H.R., *Gas and Dubois v. France*, Appl. No. 25951/07, 15 March 2012, §§ 65-68. This somewhat tautological reasoning of the Court of Human Rights on the non-comparability of couples in a registered partnership with married couples is usefully compared to that adopted by the Court of Justice of the European Union in the cases *Maruko* (ECJ (GC), 1<sup>st</sup> April 2008, C-267/06) and *Römer* (ECJ (GC), 10 May 2011, C-147/08). While leaving the final word to the national court, the EU Court of Justice suggested that the same-sex life partnership in Germany was comparable to marriage; at least concerning survivor’s benefit granted under an occupational pension scheme and concluded that there was a direct discrimination based on sexual orientation.

<sup>74</sup> Eur. Ct. H.R., *Gas and Dubois v. France*, Appl. No. 25951/07, 15 March 2012, §§ 69-71. On this issue, see Emmanuelle Bribosia and Isabelle Rorive, *Chronique du droit de l’égalité et de la non-discrimination*, JOURNAL EUROPÉEN DES DROITS DE L’HOMME/EUROPEAN JOURNAL OF HUMAN RIGHTS, 134 (2013).

<sup>75</sup> Eur. Ct. H.R. (GC), *X v. Austria*, Appl. No. 19010/07, 19 February 2013, § 112.

<sup>76</sup> Eur. Ct. H.R., *Schalk and Kopf v. Austria*, *supra* note 19 at § 99.

#### 4. Taking suspect criteria seriously

A legal system which refuses to grant to same-sex persons access to marriage leads to a difference in treatment directly based on sexual orientation.<sup>77</sup> Now, even though this criteria does not explicitly belong to the list of grounds contained in Article 14 ECHR, the Court has long held that discrimination based on sexual orientation is covered by this provision.<sup>78</sup>

Moreover, throughout its case law on this matter, the Court has highlighted the particularly suspect nature of differences of treatment based on sexual orientation<sup>79</sup>. “The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons”.<sup>80</sup> If one wants to take the suspect criteria seriously, this should mean that “where a difference of treatment is based on sex or sexual orientation the State’s margin of appreciation is narrow”. The Court went even further by stating that “differences based solely on considerations of sexual orientation are unacceptable under the Convention”.<sup>81</sup>

In doing so, the ECtHR takes a principled stand that is more clear-cut than that which results from current US case law (even if the ECtHR is not always consistent when drawing the consequences of such a principled stand).<sup>82</sup> In the United States, it has long been refused “to recognize sexual orientation as the basis for heightened scrutiny. As a consequence, lesbian and gay rights activists have been forced to assert and defend analogies to other ethnic groups (...)”.<sup>83</sup> The majority of US Circuit Courts of Appeals still applies the lowest scrutiny (rational basis review) to differences of treatment based on sexual orientation.<sup>84</sup> Nevertheless, there is an emerging trend of some US Courts to depart from this view and apply heightened scrutiny to marriage laws’ differential treatment of same-sex couples. This is the case of the high courts of California, Connecticut and Iowa which have, by applying this stricter scrutiny, “all concluded that the differential treatment is not sufficiently related to advancing any

<sup>77</sup> Eur. Ct. H.R., *Ferguson and others v. the United Kingdom*, Appl. No. 8254/11, §§ 154-155, pending

<sup>78</sup> For the first time in the case *Salgueiro da Silva Mouta v. Portugal*, Appl. No. 33290/96, 21 December 1999, § 28.

<sup>79</sup> On the notion of suspect discrimination grounds, see Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUMAN RIGHTS LAW REVIEW N° 1, 99 (2013).

<sup>80</sup> The Court mentions the following cases: Eur. Ct. H.R. (GC), *E.B. v. France*, Appl. No. 43546/02, 22 January 2008; Eur. Ct. H.R., *Kozak v. Poland*, Appl. No. 13102/02, 2 March 2010; Eur. Ct. H.R., *Karner v. Austria*, Appl. No. 40016/98, 24 July 2003; Eur. Ct. H.R., *L. and V. v. Austria*, Appl. Nos. 39392/98 and 39829/98, 9 January 2003; Eur. Ct. H.R., *Smith and Grady v. United Kingdom*, Appl. Nos. 33985/96 and 33986/96, 27 September 1999.

<sup>81</sup> Eur. Ct. H.R., *X v. Austria*, *supra* note 21 at § 99.

<sup>82</sup> See, for instance, in Eur. Ct. H.R., *Schalk and Kopf*, *supra* note 19 at §§ 97-98 (citations omitted): “On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (...). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (...). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States”. For a critical view, see PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS*, 125 (Routledge, 2012).

<sup>83</sup> JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS* 29 (University of Michigan Press, 2004). For example, the case of *Romer v. Evans* was decided under the rational basis standard.

<sup>84</sup> Sarah L. Cooper, *supra* note 35 at 67.

important government interests”.<sup>85</sup> In *Perry v. Brown*, the Ninth Circuit Court justified its position in this respect by stating that “gays and lesbians are the type of minority strict scrutiny was designed to protect”.<sup>86</sup>

Similarly, in the *Windsor* case, the Court of Appeals for the Second Circuit decided to examine Section 3 of the Defense of Marriage Act to intermediate scrutiny.<sup>87</sup> The Court underlined that “several courts have read the Supreme Court’s recent cases in this area to suggest that rational basis review should be more demanding when there are ‘historic patterns of disadvantage suffered by the group adversely affected by the statute’”.<sup>88</sup> The Court concluded that the review of Section 3 of DOMA requires heightened scrutiny on the basis of the following factors, used by the Supreme Court to decide whether a new classification qualifies as a quasi-suspect class: (we omit references) “They include A) whether the class has been historically “subjected to discrimination”, B) whether the class has a defining characteristic that “frequently bears a relation to ability to perform or contribute to society”, C) whether the class exhibits “obvious, immutable or distinguishing characteristics that define them as a discrete group”, D) whether the class is a minority or political powerless”. Immutability and lack of political power are not strictly necessary factors to identify a suspect class”.<sup>89</sup> The Court found that all four factors justify that homosexuals should be regarded as composing a class subject to heightened scrutiny. The US Supreme Court decision in this case has been less explicit and did not indicate what standard of review it applied to DOMA, which has been criticized by Justice Scalia, dissenting.<sup>90</sup> The majority only said that “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision”.<sup>91</sup>

In our view, in the *Schalk and Kopf* case, the Court did not apply strict scrutiny and failed to take the suspect ground seriously. Actually, “the Court granted Austria a wide margin of appreciation to determine whether this differential treatment of same-sex and different-sex couples could be justified” under Articles 8 and 14 taken in conjunction. However, as Holning Lau points out, “[this] deference in the non-discrimination context was particularly misplaced”.<sup>92</sup> When a differential treatment is based on suspect ground such as sexual orientation, the Court should apply heightened scrutiny. As a consequence, the burden of

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<sup>85</sup> Holning Lau, “Rewriting *Schalk and Kopf*: shifting the locus of deference”, in E. BREMS (ED.), *DIVERSITY AND EUROPEAN HUMAN RIGHTS*, 243, 251 (2012). See also for an abandon of the rigid “two tiered” equal protection doctrine in favor of a more flexible approach: Randall P. Jr Ewing, *Same-Sex Marriage: A Threat to Tiered Equal Protection Doctrine*, 82 JOHN’S L. REV. 1409 (2008). For another position, advising “minimalism” in cases involving issues that are emotionally fraught, see Lawrence Friedman, *Not the Usual Suspects: Suspect Classification Determinations and Same-Sex Marriage Prohibitions*, 50 WASHBURN L. J. 61 (2010).

<sup>86</sup> *Perry v Brown* at 121.

<sup>87</sup> Edith Schlain Windsor, in her official capacity as executor of the estate of Thea Clara Spyer v. United States of America and Bipartisan Legal Advisory Group of the United States House of Representatives (hereinafter *Windsor v. US*), 699 F.3d 169, 181 (2d. Cir. 2012). It can be underlined that this federal appellate court has jurisdiction over three states which recognize same-sex marriage.

<sup>88</sup> *Windsor v. US*, 22.

<sup>89</sup> *Windsor v. US*.

<sup>90</sup> « The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality”; *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013) at 17.

<sup>91</sup> *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013) at 19.

<sup>92</sup> Holning Lau, *supra* note 85 at 244.

proof would rest upon the Government's shoulders.<sup>93</sup> As the dissenting Judges in *Schalk and Kopf* put it, "in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation".<sup>94</sup>

In areas where what is at stake is the protection of minorities or vulnerable groups against discrimination, recognizing an important national margin of discretion (Europe) or giving free rein to States by applying a control that is rather undemanding (United States) does not appear to be satisfactory because it might leave the protection of minorities between the hands of majorities, which sometimes show little concern for the rights of people belonging to fringe minorities of society.<sup>95</sup>

## 5. European consensus is not decisive

In *Schalk and Kopf*, the absence of European consensus regarding same-sex marriage – no more than six out of forty-seven Convention States allowed same-sex marriage at the time<sup>96</sup> – played a crucial role in the Court's reasoning.<sup>97</sup> According to the Court, this lack of consensus combined with the deep-rooted social and cultural connotations of marriage "which may differ largely from one society to another",<sup>98</sup> should lead to giving a wide margin of appreciation to Member States in this field. As a consequence, the Court stated that Article 12 CEDH should not, "in present-day conditions, be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws".<sup>99</sup>

However, in *Schalk and Kopf*, the Court's ruling only concerned the absence of violation of the right to marriage (Article 12 ECHR read alone), and did not address the issue of discrimination (Article 12 taken in conjunction with Article 14 ECHR). We suggest that, as concerns the situation of minorities, the question of the refusal to open marriage to homosexual couples should be examined by the Court from the viewpoint of non-discrimination, thus allowing the Court "to focus on the reason why the minority has been excluded from an opportunity (falling 'within the ambit' of another Convention right) that is

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<sup>93</sup> Eur. Ct. H.R., *X v. Austria*, supra note 21 at § 141.

<sup>94</sup> Joint dissenting opinion of Judges Rozakis, Spielmann & Jebens, point 8. For an interesting insight on the role of dissent in LGBT cases in the United States (though focusing on custody and adoption cases) see Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases*, 16 LAW & SEXUALITY: A REVIEW OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER LEGAL ISSUES 77 (2007).

<sup>95</sup> See Frances Hamilton, *Why the Margin of Appreciation is Not the Answer to the Gay Marriage Debate*, 1 EUROPEAN HUMAN RIGHTS LAW REVIEW 47 (2013); DIA ANAGNOSTOU AND EVANGELIA PSYCHOGIOPOULOU (EDS), *THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHTS OF MARGINALISED INDIVIDUALS AND MINORITIES IN NATIONAL CONTEXT*, Leiden, Boston, Martinus Nijhoff Publishers (2010).

<sup>96</sup> *Schalk and Kopf*, supra note 19 at § 58.

<sup>97</sup> *Schalk and Kopf*, supra note 19 at §105: "The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes".

<sup>98</sup> *Ibidem*, § 62.

<sup>99</sup> *Ibidem*, § 62.

provided to the majority”.<sup>100</sup> It is within this perspective that we, like other authors<sup>101</sup> or third parties intervening in the *Chapin and Charpentier* case,<sup>102</sup> defend the position that in strictly legal terms the argument of consensus is not relevant to the question of discrimination based on sexual orientation regarding access to marriage.

Interestingly, this was what the three dissenting Judges in *Schalk and Kopf* defended. They emphasized that in the case of a differential treatment based on sexual orientation and in the absence of very cogent reasons alleged by the Government to justify it, “there should be no room to apply the margin of appreciation”. Consequently, the “existence or non-existence of common ground between the laws of the Contracting State”<sup>103</sup> is irrelevant as such considerations are only a *subordinate* basis for the application of the concept of the margin of appreciation. Indeed, it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are in a better position than the Court is to deal effectively with the matter”.<sup>104</sup> It seems to us that this rejection of the consensus argument is all the more justified as its use is often fraught with methodological imprecision and is often a means to conceal or justify a moral positioning of the Court’s judges.<sup>105</sup>

It is obvious that the consensus argument is not a strictly legal tool but rather the instrument of a judicial policy lead by the Court in a context where it must pay attention to the effectiveness of its rulings.<sup>106</sup> As Prof. R. Wintemute put it, “European consensus serves to anchor the court in legal, political and social reality on the ground”.<sup>107</sup> “If the court appeared to force the views of a small minority of countries on all 47, it would risk a political backlash, which could cause some governments to threaten to leave the convention system”.<sup>108</sup> This is probably the Court’s concern when it emphasizes in *Schalk and Kopf* that “it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society”.<sup>109</sup> And indeed, parliaments and national courts

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<sup>100</sup> Eur. Ct. H.R., *Ferguson and others v. the United Kingdom*, Appl. No. 8254/11, pending § 152.

<sup>101</sup> See PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS* 77-83 (Routledge, 2012).; Holning Lau, *supra* note 85 at 247-249; Nicholas Bamforth, *supra* note 57 at 140.

<sup>102</sup> The third party intervention in the case *Chapin and Charpentier v. France* also urged the Court “to consider attaching less weight to European consensus, and focusing instead on the absence of any justification for the difference in treatment”; Written comments of FIDH, ICJ, AIRE CENTRE & ILGA-EUROPE, submitted on 27 October 2009, 8. See also the appendix of the brief.

<sup>103</sup> *Schalk and Kopf*, *supra* note 19 at § 98.

<sup>104</sup> Dissenting Opinion in *Schalk and Kopf*, *supra* note 19 at point 8.

<sup>105</sup> PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS* 140 (Routledge, 2012).

<sup>106</sup> On the concept of consensus in the context of the national margin of appreciation doctrine, see, among others: Y. ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (Intersentia, 2002); E. BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* (Martinus Nijhoff Publishers, 2001); Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, *ELJ* 80 (2011); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 *OXFORD JOURNAL OF LEGAL STUDIES* n° 4, 705 (2006).

<sup>107</sup> Robert Wintemute, *Consensus is the right approach for the European Court of Human Rights*, *THE GUARDIAN*, <http://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus> (12 August 2010).

<sup>108</sup> The risk is attested by the headlines of some British newspapers: Simon Walters, *A great day for British justice: Theresa May vows to take UK out of the European Court of Human Rights*, Mail online, 4 March 2013, <http://www.dailymail.co.uk/news/article-2287183/A-great-day-British-justice-Theresa-May-vows-UK-European-Court-Human-Rights.html>.

<sup>109</sup> *Schalk and Kopf*, *supra* note 19 at § 62.



already play a very important role of guarantors of Convention rights. One cannot lose sight of the fact that the principle of subsidiarity is at the core of a very sensitive debate calling into question the authority and the legitimacy of the European Court of Human Rights. On 16 May 2013, Protocol 15 to the Convention added a very symbolic recital to its Preamble which refers in full words to the national margin of appreciation that States enjoy when securing the rights and freedoms defined in the Convention.<sup>110</sup>

However, the argument according to which national parliaments are better placed to assess and respond to the needs of society does not, in our view, seem relevant when differences of treatment affecting persons belonging to a minority are at stake. The same applies to the argument that often comes up in the debate about homosexual marriage following which, by exercising a tight judicial control, the Court impinges on the democratic functioning of the States. These two arguments deserve to be revisited when minority's rights are at stake. As a matter of fact, "laws that differentiate people based on [sexual orientation] often reflect flawed democratic deliberations. Accordingly, judicial review of such laws ameliorates democratic deficits instead of undermining deliberative democracy".<sup>111</sup> Two reasons justify not leaving the decisions concerning the rights of minorities, notably those defined by sexual orientation, exclusively in the hands of national authorities, and in particular of the legislator.<sup>112</sup> First, minority groups are often less well placed to defend their rights via classical parliamentary channels where the majority prevails. Second, parliamentary debates are still often fraught with stereotypes about sexual orientation, as testified by the recent debates in the French and British national assemblies, not to mention those in Poland and Russia. A recent third-party intervention by international human rights advocates in the *Perry* case stated "The possibility of legislative action does not justify judicial abdication. (...) Respect for democracy has never meant that courts must permit discrimination"<sup>113</sup> and goes on by citing countries where legislatures crafted laws to recognize same-sex marriage *after* courts determined that such recognition was constitutionally required. If the primary responsibility of protecting human rights lies with States in Europe and especially with domestic constitutional courts, the European Court of Human Rights remains the ultimate guardian of those rights.

Although we consider, in terms of legal reasoning, that the reference to the consensus is not relevant to the issue of discrimination against homosexuals, we acknowledge that arguments of judicial policy could lead the Court to make such a reference. If this were the case, two options would be open to the Court:

1°) The first was developed by Holning Lau in his rewriting of the *Schalk and Kopf* ruling.<sup>114</sup> He suggests that the Court explicitly states that "same-sex couples have a right to marriage equality" but to take into account the absence of European consensus at the stage of implementing this principle. Thus the idea, based on the device of prospective overruling, is

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<sup>110</sup> Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 16 May 2013, Art. 1. See also the Brighton Declaration following the High Level Conference on the Future of the European Court of Human Rights, Brighton (United Kingdom), 18-20 April 2012.

<sup>111</sup> Holning Lau, *supra* note 85 at 248.

<sup>112</sup> Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 848 (1999).

<sup>113</sup> Brief of International Human Rights Advocates as Amici Curiae in Support of Respondents, *Hollingsworth et al. v. Perry*, Supreme Court of the United States, submitted on February 28, 2013 at 18.

<sup>114</sup> Holning Lau, *supra* note 85.

not to immediately condemn the States that have not opened marriage to homosexual couples, but rather to grant them a grace period so as to implement it.<sup>115</sup> In the absence of a follow-up or monitoring mechanism within the ECHR system, it is proposed not to specify *ex antes* a period on expiry of which all States should have opened marriage to homosexuals in their legal order<sup>116</sup> and instead to take into account the evolution of the consensus among the Council of Europe's Member States to determine this period in an evolving manner.<sup>117</sup> Therefore, as soon as a consensus emerges among the High Contracting Parties on the establishment of a registered partnership open to same-sex couples, the States that will not yet have introduced it in their legislation would no longer have a margin of discretion and would be required to do so. The same reasoning could apply to the opening of marriage as such to persons of the same sex. However, as its author acknowledges, although the proposition has the merit of taking into consideration the institutional and political constraints on the European Court of Human Rights, it also involves risks.<sup>118</sup> It could potentially lead to mobilization of conservative forces in countries where reforms are currently debated to prevent the consensus from being reached. What is more, this makes the implementation of non-discrimination dependent on the whims of majorities at a national level, which does not, as we have emphasized, constitute a sufficient guarantee for the protection of minorities or vulnerable groups. In addition, and beyond the technical pitfalls linked to the kind of measures the Court is competent to impose on Member States, such a path is likely to *de facto* undermine the power of the Court to supervise the execution of its judgments.<sup>119</sup>

2°) The second option which would be open to the Court if it wishes nevertheless to proceed to the review of the consensus argument, is to address it not according to an arithmetic rule but rather by taking into account the emergence of a European and international tendency in the direction of the legal recognition of same-sex couples, and even in that of the opening of marriage to those couples. What is more, such an approach to the consensus results from the ruling of the Court in the case of *Goodwin v. United Kingdom*.<sup>120</sup> In this ruling, to support the evolution of its case-law, the Court held that it “attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”.<sup>121</sup> In the same line, in *Schalk and Kopf*, even though the Court concluded that “there is not yet a majority of States providing for legal recognition of same-sex couples”, it acknowledged the existence of “a tendency that has

<sup>115</sup> In this line, see, for instance, Eur. Ct. H.R. (GC), *Stec v. the United Kingdom*, Appl. No. 65731/01 and 65900/01, 12 April 2006, where the Court considered that timing of putting right the inequality (different pension age) might be reasonable and fall within the national margin of appreciation.

<sup>116</sup> It should be noted that the option of a precise deadline for the introduction of same-sex marriage in the legal order by the legislator has been the choice of both the Constitutional Court of South Africa (*Fourie & another v. Minister of Home Affairs and Another*, Case CCT 60/04, (Dec., 1, 2005)) and the Constitutional Court of Colombia (sentencia del 26 Julio 2011, C-577/11). The Court exhorted the Congress to legislate before the 20 June 2013 on the rights of same-sex couples, in a systematic and organized way, so as to eliminate the lack of protection which these couples suffer. The Congress having failed to pass the bill, couples made petitions to judges and in July 2013, a judge ordered a notary to marry a same-sex couple.

<sup>117</sup> Holning Lau, *supra* note 85 at 254-257.

<sup>118</sup> Holning Lau, *supra* note 85 at 257.

<sup>119</sup> On the importance of this issue, see the concurring opinion of Justice Pinto De Albuquerque in Eur. Ct. H.R., *Fabris v. France*, Appl. No. 16574/08, 7 February 2013.

<sup>120</sup> Eur. Ct. H.R., *Goodwin v. UK*, Appl. No. 28957/95, 11 July 2002.

<sup>121</sup> *Ibidem*, § 85.

developed rapidly over the past decade” and “an emerging European consensus towards legal recognition of same-sex couples”.<sup>122</sup>

In addition of observing the changes which have occurred within the Contracting Parties of the Council of Europe since *Schalck and Kopf*, the Court could thus take into consideration the evolution on the international plane, the number of foreign countries which recognize same-sex marriage, the case law of national courts within the Council of Europe, the case law of foreign supreme courts etc.<sup>123</sup>

In the United States too, some voices pleading in favour of taking into account a tendency rather than an arithmetically interpreted consensus have been heard.<sup>124</sup> In the recent *Perry* case, an amicus curiae brief by some international advocates urged the US Supreme Court to “solidify” an established and accelerating international trend toward equal marriage rights for same-sex couples. These five human rights advocacy organizations,<sup>125</sup> based in the United States, the United Kingdom, Canada, South Africa and Argentina, believe that an international *consensus* weighs in favor of heightened scrutiny and the recognition of marriage equality. They find evidence of this in adopted and pending bills in many countries and in trends in international law. They recognize that international law does not yet require recognition of same-sex marriages but encourage the Court to take leadership in the development of these norms.<sup>126</sup>

Nevertheless, considering that when a difference of treatment based on sexual orientation is at stake, there should be no room for national margin of discretion and that the existence of a consensus has, in principle, no role to play, the Court should assess the discrimination issue with a strict scrutiny.

## 6. Which serious reasons could be invoked to justify the difference in treatment?

In some cases involving homosexuality, it has been argued that the European Court tends to merge the two elements of the serious reasons (as a suspect discrimination ground is involved) on the one side and of the margin of appreciation on the other. This juxtaposition

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<sup>122</sup> *Ibidem*, § 105.

<sup>123</sup> See Third Party Intervention in the case *Schalck and Kopf*, Written Comments of FIDH, ICJ, Aire Centre & Ilga-Europe submitted on 26 June 2007, § 19 and Robert Wintemute, *Same-Sex Marriage: When Will It Reach Utah?*, 20 BRIGHAM YOUNG UNIVERSITY JOURNAL OF PUBLIC LAW 527 (2006).

<sup>124</sup> For example in the Eight’s Amendment jurisprudence. See *Atkins v. Virginia*, 536 U.S. 304, 316 (2002): “(i)t is not so much the number of jurisdictions that adopt a rule that is significant, but the consistency of the direction of change”.

<sup>125</sup> The International Center for Advocates Against Discrimination, the National Council for Civil Liberties (Liberty – very often present before the European Court of Human Rights too), the Canadian Civil Liberties Association, the Legal Resources Center and the Center for Legal and Social Studies.

<sup>126</sup> Brief of International Human Rights Advocates as Amici Curiae in Support of Respondents, *Hollingsworth et al. v. Perry*, Supreme Court of the United States, submitted on February 28, 2013. On the opposite side, a brief submitted by other international jurists and academics is of the opinion that there is no substantive opinion on the issue; Brief of International Jurists and Academics as Amici Curiae in Support of Petitioner Hollingsworth and Respondent BLAG, *Hollingsworth et al. v. Perry, US v. Windsor*, Supreme Court of the United States, submitted on February 28, 2013.

results in a discretion left to the States which could even be acting pure prejudice<sup>127</sup> or “on the basis of erroneous or even discriminatory reasons”.<sup>128</sup> No robust justification has been required in *Schalk and Kopf*.<sup>129</sup> The Austrian State mainly relied on the fact that the right to marry is “by its very nature” limited to different sex couples.<sup>130</sup> As a reaction, the applicants in the pending case of *Ferguson and others v. the United Kingdom* expressly designed their complaint in the hope that the Government will be required to provide a justification for the difference in treatment.

In the meantime, it is worthy to look at the arguments which have been brought forward before American courts and see how they have been received. Various arguments are to be found, among others, in the case law, in petitions, in the literature,<sup>131</sup> and in the amicus curiae briefs submitted to the courts.<sup>132</sup> We privileged recent material as well as the two cases decided by the US Supreme Court. Among all the arguments brought forward, we identified two principal reasons advanced to justify the restriction of marriage to opposite-sex couples and which could be relevant in the European context too:<sup>133</sup> (a) to preserve the traditional definition of marriage (we include in this the references to “tradition” in general), (b) to encourage responsible procreation.

#### **(a) The preservation of the traditional definition of marriage**

In cases which did not directly involve same-sex marriage, the European Court of Human Rights has accepted that “protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment”.<sup>134</sup> However, it immediately added that the principle of proportionality must be respected and that “The aim of protecting the family in the traditional sense is rather abstract and a broad variety of

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<sup>127</sup> This would not be the first time in issues involving LGBT individuals. In *Smith and Grady v. the UK*, the Court condemned the absolute policy against the participation of homosexuals in the UK armed forces. It noted that « To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour » ; Eur. Ct. H.R., *Smith and Grady v. United Kingdom*, Appl. Nos. 33985/96 and 33986/96, 27 September 1999, §97. Another case decided by the Court involved gender stereotypes: Eur. Ct. H.R., *Konstantin Markin v. Russia*, Appl. No. 30078/06, 7 October 2010.

<sup>128</sup> Frances Hamilton, *supra* note 95, at 50.

<sup>129</sup> As Carmelo Danisi notes, “in the absence of such justification, reliance on the absence of a wide consensus is an easy way out” (Carmelo Danisi, *How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence*, 9 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, n° 3-4, 793, 806 (2011)).

<sup>130</sup> Eur. Ct. H.R., *Schalk and Kopf*, *supra* note 19 at § 43.

<sup>131</sup> See for example Dale M. Schowengerdt, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex Marriage*, 14 REGENT U. L. REV. 487 (2002).

<sup>132</sup> The number of amicus curiae briefs submitted in the case of *Hollingsworth v. Perry* is remarkable: in addition to the eleven briefs submitted before certiorari was granted, 39 briefs support the petitioners and 48 support the respondents. Seventy amicus curiae briefs have been submitted in *US v Windsor* (information retrieved from the “Scotusblog” website, last accessed August 30, 2013).

<sup>133</sup> For example, we left aside the discussions relating to standing and the Due Process Clause.

<sup>134</sup> Eur. Ct. H.R., *Mata Estevez v. Spain*, Appl. no. 56501/00; *Karner v. Austria*, Appl. no. 40016/98, 24 July 2003, §40; *Kozak v. Poland*, Appl. no. 13102/02, 2 March 2010, § 98. In the case of *Marckx v. Belgium*, it had even said “support and encouragement of the traditional family is in itself legitimate or even praiseworthy”; Eur. Ct. H.R., Appl. No. 6833/74, 13 June 1979, § 40.

concrete measures may be used to implement it”.<sup>135</sup> Although the Court recognizes that “the institution of the family is not fixed, be it historically, sociologically or even legally”<sup>136</sup> and that it has shown some openness, it seems to leave latitude to maintain “the strongest traditions of the old European nations”.<sup>137</sup> In this line, it is also noteworthy to mention that the Court has accepted to include the respect of the “traditional way of life” in the ambit of article 8,<sup>138</sup> which concerns respect for private and family life.<sup>139</sup> However, this case concerned the traditional lifestyle of Gypsies, and it might thus be that the Court would adopt a different reasoning when it is not a person belonging to a minority who invokes this argument for protection, i.e. the State. This is exactly what applicants and third party interveners argue in the same-sex marriage cases: “The possible desires of the heterosexual *majority* to maintain a tradition that favours it, or to impose dominant religious beliefs on the lesbian and gay minority, cannot be valid justifications”.<sup>140</sup>

What can the North American experience teach us?

First, commenting the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman, Judge Greaney, concurring in the first US case finding that same-sex couples had the right to marry (*Goodridge v. Department of Public Health*)<sup>141</sup> wrote “To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide”.<sup>142</sup> As one author asks, in order to demonstrate the absurdity of the argument and by making a link with the miscegenation laws which historically prohibited interracial marriages, “(...) imagine if the U.S. Supreme Court held that the right to marry cannot extend to a person of a different race, because by definition, a marriage relates to two people of the same race”.<sup>143</sup>

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<sup>135</sup> *Ibidem*.

<sup>136</sup> Eur. Ct. H.R., *Mazurek v. France*, Appl. No. 34406/97, 1 February 2000, § 52.

<sup>137</sup> Jean-Pierre Marguénaud, *La liberté matrimoniale au sens de la Convention européenne des droits de l’homme*, in F. KRENC & M. PUÉCHAVY (DIR.), *LE DROIT DE LA FAMILLE À L’ÉPREUVE DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* 15, 27 (Bruylant, 2008).

<sup>138</sup> Eur. Ct. H.R., *Chapman v. UK*, Appl. No. 27238/95, 18 January 2001.

<sup>139</sup> Florence Benoît-Rohmer, *La Cour de Strasbourg et la protection de l’intérêt minoritaire : une avancée décisive sur le plan des principes? (en marge de l’arrêt Chapman)*, *REV. TRIM. DR. H.*, 999 (2001).

<sup>140</sup> (we underline) Oral submissions on behalf of the third-party interveners (the FIDH, the ICJ, the AIRE Centre, and ILGA-Europe) in *Schalk and Kopf v. Austria*, 25 February 2010 and application in *Ferguson and others v. UK*, *supra* note 29 at §158.

<sup>141</sup> *Goodridge v. Department of Public Health*, Massachusetts Supreme Judicial Court, 440. Mass. 309, 798 N.E.2d 941 (2003).

<sup>142</sup> Greaney, concurring in *Goodridge v. Department of Public Health*, Massachusetts Supreme Judicial Court, 440. Mass. 309, 798 N.E.2d 941 (2003), 17. The ECtHR has also been confronted with this type of argument. In a case involving a pension claim from a ‘resident non-citizen’, the Latvian Government’s argument was that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of the pension. The Grand Chamber did not accept this argument and held that “the prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim’s claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance”; Eur. Ct. H.R. (GC), *Andrejeva v. Latvia*, Appl. No. 55707/00, 18 February 2009, §91.

<sup>143</sup> In *Loving v. Virginia*, the U.S. Supreme Court held that such statutes were unconstitutional (388 U.S.1(1967)).

In 2008, the Supreme Court of Connecticut stated: “That civil marriage has traditionally excluded same-sex couples—i.e., that the ‘historic and cultural understanding of marriage’ has been between a man and a woman—cannot in itself provide a [sufficient] basis for the challenged exclusion. To say that the discrimination is ‘traditional’ is to say only that the discrimination has existed for a long time. A classification, however, cannot be maintained merely ‘for its own sake’. Instead, the classification ([that is], the exclusion of gay [persons] from civil marriage) must advance a state interest that is separate from the classification itself. Because the ‘tradition’ of excluding gay [persons] from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of ‘history.’ Indeed, the justification of ‘tradition’ does not explain the classification; it merely repeats it.”<sup>144</sup>

A year later, the Iowa Supreme Court called this type of approach «an empty analysis»<sup>145</sup>: «A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged. When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification».<sup>146</sup>

Many versions of the ‘tradition’ argument have been advanced, with slight differences. For example, in the case of *Perry v. Schwarzenegger*, it was argued that “Proposition 8 is rational because it preserves: (1) ‘the traditional institution of marriage as the union of a man and a woman’; (2) ‘the traditional social and legal purposes, functions, and structure of marriage’; and (3) ‘the traditional meaning of marriage as it has always been defined in the English language’ (...)”.<sup>147</sup> The District Court did not accept this argument, finding that “Tradition alone, however, cannot form a rational basis for a law. (...). The ‘ancient lineage’ of a classification does not make it rational. (...) Rather, the state must have an interest apart from the fact of the tradition itself”.<sup>148</sup> The District Court judge then made an analogy with the tradition of gender restriction.<sup>149</sup>

DOMA’s stated purpose too was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws”.<sup>150</sup> In the case challenging it, the Court of Appeals for the Second Circuit made a similar statement: “[a]ncient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis” (...). A fortiori, tradition is hard to justify as meeting the more demanding test of having a substantial relation to an important government interest. Similar appeals to tradition were made and

<sup>144</sup> (citations omitted) *Kerrigan v. Commissioner of Public Health*, Supreme Court of Connecticut, 289 Conn. 135, 957 A. 2d 407 (2008) at 63.

<sup>145</sup> *Varnum v. Brien*, Iowa Supreme Court, 763 N.W.2d 862 (2009).

<sup>146</sup> *Varnum v. Brien*, Iowa Supreme Court, 763 N.W.2d 862 (2009).

<sup>147</sup> *Perry v. Schwarzenegger* (2010), the United States District Court for the Northern District of California, No C 09-2292 VRW, 123.

<sup>148</sup> *Perry v. Schwarzenegger* (2010), the United States District Court for the Northern District of California, No C 09-2292 VRW, 124.

<sup>149</sup> See also the analysis of Paul Johnson, according to whom the California District Court judgment shows that the Court adopted a critical standpoint in respect of heteronormativity; Paul Johnson, *Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority*, 20 SOCIAL & LEGAL STUDIES n° 3, 349, 358 (2011).

<sup>150</sup> H. R. Rep. No. 104–664, pp. 12–13 (1996).



rejected in litigation concerning anti-sodomy laws (...).<sup>151</sup> It then quoted a powerful line of Justice Stevens, dissenting in *Bowers v. Hardwick*: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; *neither history nor tradition* could save a law prohibiting miscegenation from constitutional attack.”<sup>152</sup>

The mobilization of tradition and history are thorny issues. First, these arguments sometimes do not gather consensus or can be used to reach opposite results. For example, William Eskridge, Professor of Jurisprudence at Yale Law School, also uses the “tradition” argument, but to demonstrate that same-sex unions have been a valuable institution for most of human history and in most known cultures.<sup>153</sup> Similarly, the historical evidence and academic narrative of sexual identities mobilized in *Bowers v. Hardwick*<sup>154</sup> and then seventeen years later in *Lawrence v. Texas*<sup>155</sup> highlights how this scholarship can have problematic implications.<sup>156</sup> As Daniel Hurewitz notes “Historical arguments are, by definition, interpretations, and eventually any analytic consensus will be replaced by another”.<sup>157</sup>

In addition to the fact that history can be relied on in competing ways, there is another paradox: the evidence of a long-standing history of discrimination is necessary in order to obtain protection by the courts and thus justifies judicial intervention. As we have seen above, “historic patterns of disadvantage suffered by the group” are required to benefit from certain type of judicial scrutiny. Likewise, many historical references are to be found throughout the US cases, such as references to the historical prevalence of race restrictions on marital partners.<sup>158</sup>

#### **(b) To encourage responsible procreation and child-rearing<sup>159</sup>**

The first US case of a State court finding that same-sex couples had the right to marry disagreed with the Superior Court judge who had endorsed the rationale that “the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation”. Chief Justice Margaret Marshall writes “This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of

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<sup>151</sup> *Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer, Petitioner v. United States, et al.*, 699 F.3d 169 (2d. Cir. 2012), 40.

<sup>152</sup> *Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer, Petitioner v. United States, et al.*, 699 F.3d 169 (2d. Cir. 2012), 40 quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting).

<sup>153</sup> William N. Eskridge Jr, *A history of same-sex marriage*, VA. L. REV. 1419 (1993).

<sup>154</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>155</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>156</sup> Daniel Hurewitz, *Sexuality Scholarship as a Foundation for Change: Lawrence v. Texas and the Impact of the Historians' Brief*, 7 HEALTH AND HUMAN RIGHTS, No. 2, 205, 211 (2004).

<sup>157</sup> *Ibidem* at 211.

<sup>158</sup> See *Perry v Schwarzenegger* (2010), the United States District Court for the Northern District of California, No C 09-2292 VRW, at 112: “(...) once common in most states (they) are now seen as archaic, shameful or even bizarre”.

<sup>159</sup> We acknowledge that by reviewing these arguments which are raised, we enter into the field of “the protection of family” and other delicate questions such as filiation or interest of the child we cannot explore in detail.

marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married”.<sup>160</sup>

In Europe too this argument should easily be dismissed.<sup>161</sup> As developed earlier in this paper, the ECtHR, in *Christine Goodwin v. UK*, stated that “the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right [to marry]”.<sup>162</sup> The Court has divided the right to marry from the right to found a family.

Over time, this argument has thus been refined and opponents to gay marriage frame it taking these elements into account. For example, proponents of Proposition 8 in California asserted that the essential purpose for maintaining a separate legal definition for same-sex partnerships is to protect traditional, natural and important arrangements for heterosexual marriage that are vital for society: marriage is essential, for instance, to “promote stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children”<sup>163</sup> and because “it promotes ‘statistically optimal’ child-rearing households ; that is, households in which children are raised by a man and a woman married to each other”.<sup>164</sup>

Some courts have also accepted this argument. For example, the Indiana Court of Appeal concluded that since opposite-sex reproduction may be accidental, then the institution of marriage should be preserved for heterosexuals as a way of ensuring that heterosexual reproduction occurs in a stable environment, i.e. since same-sex couples can only reproduce responsibly, marriage is unnecessary to create a responsible environment for children of same-sex couples because the manner in which they reproduce already ensures this.<sup>165</sup> The Court of Appeal of the Second Circuit agrees that it can be an important government objective but does not see how DOMA is substantially related to it: “Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before”.<sup>166</sup>

On the point that children must have both a father and a mother, the Californian Court found that these opinions were “‘not supported by reliable evidence or methodology’ and were

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<sup>160</sup> *Goodridge v. Department of Public Health*, Massachusetts Supreme Judicial Court, 440. Mass. 309, 798 N.E.2d 941 (2003) at 11. The procreation argument, raised by the lawyer for the proponents of Prop 8 during the oral arguments before the Supreme Court, led to a comical exchange with the Justices, see Oral Arguments, *Hollingsworth v. Perry*, March 26, 2013, Transcripts, at 24-27, in particular Justice Kagan: “No, really, because if the couple - I can just assure you, if both the woman and the man are over the age of 55, there are not a lot of children coming out of that marriage”; 24:19.

<sup>161</sup> In addition, according to Jernow and Rafiq, procreation is not the heart of the controversy in Europe, where legislatures would be more concerned by filiation issues (as the recent debates at the French National Assembly also demonstrate); Alli Jernow and Arianna Rafiq, *The Kids-Marriage Conundrum and the Limited Reach of American Reasoning*, 3 CITY UNIVERSITY OF HONG KONG LAW REVIEW n° 2, 213, 235 (2012).

<sup>162</sup> Eur. Ct. H.R., *Goodwin v. UK*, Appl. No. 28957/95, 11 July 2002, §98. According to Ludovic Hennebel “It is interesting to note that apart from the arguments relating to the evolution of science, all the arguments raised by the Court are transferable to the claims of access to the institution of marriage for the benefit of homosexuals”; L. Hennebel, *Conjugalités en droit international des droits de l’homme*, in ALAIN-CHARLES VAN GYSEL, *CONJUGALITÉS ET DISCRIMINATIONS* 67, 73 (L.G.D.J., 2012).

<sup>163</sup> *Perry v Schwarzenegger* (2010), the United States District Court for the Northern District of California, No C 09-2292 VRW at 8.

<sup>164</sup> *Ibidem*.

<sup>165</sup> *Morrison v. Sadler* (2005) 821 N.E. 2d. 15 (Ind. Ct. App.).

<sup>166</sup> *Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyer, Petitioner v. United States, et al.*, 699 F.3d 169 (2d. Cir. 2012), at 42.

therefore ‘unreliable and entitled to essentially no weight’<sup>167</sup>.<sup>167</sup> In a historic document<sup>168</sup>, the Obama Administration filed a brief as amicus curiae in the *Perry* case reinforcing these positions. With regard to these argument, the United States brief argues that Proposition 8 fails heightened scrutiny: “(...) as this Court has recognized, marriage is far more than a societal means of dealing with unintended pregnancies. (...). Even assuming, counterfactually, that the point of Proposition 8 was to account for accidental offspring by opposite-sex couples, its denial of the right to marry to same-sex couples does not substantially further that interest”. Regarding the interest of “favoring child-rearing by married opposite-sex couples, Proposition 8 neither promotes that interest nor prevents same-sex parenting. The overwhelming expert consensus is that children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents”.<sup>169</sup> The previous point highlighted the problematic role of historical evidence, and this one shows the role social sciences evidence is called to play.

Finally, as said above, it must be stressed that many other arguments are brought forward. Alternatively, some briefs and some authors argue that it is important to “proceed with caution”. This argument has two branches. The first rests on the idea that there is not enough evidence of the implications of recognizing same-sex marriage and proceeding with caution aims at avoiding the “unknown consequences of a novel redefinition of a foundational social institution”.<sup>170</sup> Regarding this interest, the United States brief submitted in the *Perry* case before the US Supreme Court recalls that “similar calls to wait have been advanced—and properly rejected—in the context of racial integration, for example”.<sup>171</sup> The second branch rests more on a general call for judicial restraint in these highly debated topics.<sup>172</sup> We imagine that this argument would not be brought forward before the European Court of Human Rights under this stage of the analysis but would be used to support the request for a wide margin of appreciation. This point will be further analysed in the last section. Lastly, some briefs raise the interest of protecting the rights of believers.<sup>173</sup> Indeed, same-sex marriage legislations in the various US States often include exemptions afforded to religious groups. It is indeed a sensitive issue. However, it should be stressed that the extent to which religious organizations

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<sup>167</sup> *Perry v Schwarzenegger* (2010) at 49 cited in Paul Johnson, *Challenging the Heteronormativity of Marriage*, *supra* note 149 at 358.

<sup>168</sup> The Administration was under no legal obligation to file anything, as it is not a party.

<sup>169</sup> Brief for the United States as Amicus Curiae Supporting Respondents, *Hollingsworth v. Perry*, United States Supreme Court, submitted in February 2013.

<sup>170</sup> A related argument is the ‘slippery slope’ argument, with the invoked threat that opening marriage to same-sex couples is the open door to polygamous and incestuous marriages. This argument is easily dismissed because of public health and rights of others imperatives. Moreover, these marriages trigger specific, different reasons, which must be evaluated on their own merits and as such cannot be advanced to exclude same-sex couples from the right to marry.

<sup>171</sup> Brief for the United States as Amicus Curiae Supporting Respondents, *Hollingsworth v. Perry*, United States Supreme Court, submitted in February 2013, 8.

<sup>172</sup> For example, the amicus curiae brief of fifteen States says “Judicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short vigorous democratic debates and uses of political processes. This principle recognizes that courts disrupt the democratic process and deprive society of the opportunity to reach consensus when they prematurely end valuable public debate over moral issues”; Brief of Indiana, Michigan, Virginia, Alaska, Arizona, Idaho and 9 other States as Amici Curiae in Support of the Petition for a Writ of Certiorari in the case of *Hollingsworth v. Perry*, submitted on August 31, 2012, 27.

<sup>173</sup> Brief of Catholic Answers, Christian Legal Society and Catholic Vote Education Fund in the cases of *Hollingsworth v. Perry* and *United States v. Windsor*, US Supreme Court, submitted on January 28, 2013; Brief of the United States Conference of Catholic Bishops in the case of *Hollingsworth v. Perry*, submitted on January 29, 2013, 21.

might be compel to perform same-sex marriages is a totally different question which raises the specific issues of the separation of the Church and the State and the position of minorities within their own religious organizations. In Europe, the issue is not one of compelling but of choice of religious organizations. For instance, since 2007 the Church of Sweden has offered gay couples a religious blessing of their union. More recently, the Church of Sweden even decided to conduct wedding ceremonies for both heterosexual and homosexual couples.<sup>174</sup>

Since no argument has yet been provided to the ECtHR, we looked to the American side. In case those arguments are brought forward before it (and as the Court repeated in *X. v. Austria*, the burden of proof rests on the State), the Court will have to assess whether they can be qualified as “serious reasons” justifying the difference in treatment. Many US courts have found these unconvincing because of fallacious or circular reasoning or because they are based on unproven assumptions.<sup>175</sup> In addition, denying access to marriage to same-sex couples does not seem to advance the claimed interests and some even argue that legalizing same-sex marriages would on the contrary better further the interests outlined above.

## **7. The options opened to the European Court of Human Rights**

In this final section, we examine the different options available to the European Court of Human Rights, while indicating which ones should be favoured and which ones could alternatively be considered, in our humble opinion.

In order to address the lacking access of same-sex couples to marriage, the European Court of Human Rights should logically decide the question under Article 12 – right to marriage – in conjunction with Article 14 of the ECHR (a). However, it is not excluded that the Court will apply the same reasoning as it did in *Schalk and Kopf*, thus adopting a position of self-restraint on access to marriage until a consensus is reached within the Member States of the Council of Europe. In this case, it would apply a combination of Article 8 – the right to family life – and 14 of the ECHR to assess the discriminatory aspect [or not] of a legal alternative to marriage or of the lack of legal recognition of stable relationships between persons of the same sex (b).

### **(a) A right to marriage to same sex-couples (Art. 12 + 14 CEDH)**

The question that should be addressed here by the Court is that of the discriminatory nature [or not] of the exclusion of same-sex couples to marriage. Given the Court’s case law, it seems highly unlikely that the objectives pursued by a national law would be found illegitimate. Indeed, “the protection of the traditional family” will most likely be accepted as a legitimate goal. In this case, the Court should resolve the following question: can the exclusion of same-sex persons from marriage be considered necessary and proportionate to the achievement of this goal? This question engenders a proportionality test in the broad

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<sup>174</sup> Church Synod, Liturgy Committee, “Wedding and Marriage”, Report, Sweden, 2009:2. On the opposite side, the UK Marriage Bill currently awaiting approval from the House of Lords makes it illegal for the Church to conduct gay marriage but foresees a system of ‘opt-in’ if its own canon law changes (the Quakers and the Unitarians for example have decided to opt-in).

<sup>175</sup> J. Ennis, *Marriage: Redefined and Realigned with Bunreacht na hÉireann*, IRISH JOURNAL OF LEGAL STUDIES 29, 62 (2010).

sense. In this paper, we advocate that it cannot, and that the right to marry should be open to persons of the same sex. Otherwise, a discrimination based on sexual orientation would persist (i). If, however, for reasons of judicial policy, the Court does not follow this line of principle, we consider two more alternative options that could be used (ii and iii).

Indeed, we know that the European Court of Human Rights must take into account contextual factors which directly impact the effectiveness of its judgments. Prof. Wintemute highlighted that “if the Court appeared to force the views of a small minority of countries on all 47 [Contracting States] it would risk a political backlash, which could cause governments to threaten to leave the convention system”.<sup>176</sup> In this context, other options could be favored, which less frontally attack the political and legal systems of States that refuse gay marriage. The same discussion animated advocates of same-sex marriages in the US. It evolved not only on whether courts should decide this issue but also, if courts were involved, to which extent they should or could impose far-reaching rulings. Some authors were arguing that “(...) the cultural ground has shifted so deeply as well as rapidly in recent years that the Court would simply lack credibility were it to claim that the equal protection of the laws – and the Constitution’s protection of fundamental liberty could be satisfied by relegating same-sex couples either to a second-class form of civilly sanctified relationship or to a social space in which their love, commitment, and dignity are denied any legal recognition at all. As a basis for judicial inaction, overblown fears of socio-political backlash grow harder to defend with every passing month”.<sup>177</sup> Others were advocating in favour of an incremental approach. In this line, William Eskridge has argued that “such incrementalism is a desirable form of pragmatic liberalism because law reform helps to cultivate inclusive social attitudes that prevent popular backlash against same-sex marriage”.<sup>178</sup> During the oral arguments before the US Supreme Court this year, Justice Samuel Alito said “[t]he Court should not move too fast. You want us to step in and render a decision based on an assessment of the effects of this institution, which is newer than cellphone and the Internet”.<sup>179</sup> Lawrence Friedman wrote « (...) there may be advantages in moving slowly. Slowness allows time for public acceptance, if not approval, and, as Cass Sunstein has argued, “[a] court that leaves things open will not foreclose options in a way that may do a great deal of harm.” One kind of harm is to the court itself, to its prestige. Alexander Hamilton famously remarked that courts are possessed of “neither the sword nor the purse;” as a result, they should have an institutional interest in not getting too far ahead of the public in respect to issues about which citizens may have differing and strong opinions. A court’s prestige is critical, particularly when its budget and daily functioning may depend upon the good will of those legislators who disagree with its decision-making »<sup>180</sup> This dilemma surely resonates among ECtHR judges.

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<sup>176</sup> Robert Wintemute, *Consensus is the Right Approach for the European Court of Human Rights*, *supra* note 107.

<sup>177</sup> Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 478-479 (2012).

<sup>178</sup> WILLIAM ESKRIDGE, *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS*, 158 (Routledge, 2002) cited in Holning Lau, *supra* note 85 at 255. See also for a criticism of the incremental approach ; Erez Ben Zion Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL’Y 105 (2010).

<sup>179</sup> Oral Arguments, *Hollingsworth v. Perry*, March 26, 2013, Transcripts, 56.

<sup>180</sup> Lawrence Friedman, *supra* note 85 at 75.

- **(i) A right to marriage as a matter of principle**

The issue of proportionality requires asking the following question: “How does excluding same-sex couples from access to legal marriage ‘protect’ different-sex couples, or in any way improve their lives?”<sup>181</sup> Is this exclusion necessary to the protection of different-sex couples? Aren’t there alternative less restrictive means to achieve this end? As was bluntly stated by a third intervener in *Schalk and Kopf*: “[t]here is no shortage of marriage licenses and no need to ration them”.<sup>182</sup> The question was also explicitly raised during the oral arguments held before the Supreme Court this year. Justice Kagan asked the petitioners’ attorney: “What harm you see happening and when and how and what harm to the institution of marriage or to opposite-sex couples, how does this cause and effect work?”<sup>183</sup> We push the ECtHR to ask the States the same question which will probably lead to the conclusion that no valid reason can be invoked to rule out the access of same-sex couples to marriage and that it is difficult to devise a strict proportionality test that would benefit the mere view of a majority at the expense of a vulnerable group.

In the end of the day, this issue touches upon the dignity of same-sex couples and the core of the equality principle. The majority in *US v. Windsor* did not mince its words when writing “by authorizing same-sex unions and same-sex marriages, New York sought to give further protection 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 ».”<sup>184</sup>

- **(ii) A right to marriage implemented incrementally**

This is the option proposed by Holning Lau in his exercise of “rewriting” *Schalk and Kopf*. As explained above in more details (see point 4 “consensus”), he suggests to the Court to adopt an incremental approach by shifting the locus of judicial restraint from determinations about *whether* a right should be protected to determinations about *how* and *when* to implement protections of that right.<sup>185</sup> His proposal may be wrapped up as follows: the Court should explicitly states that “same-sex couples have a right to marriage equality” but, at the same time, taking into account the absence of European consensus at the stage of

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<sup>181</sup> Third party intervention in the case of *Schalk and Kopf*, § 17.

<sup>182</sup> Third party intervention in the case of *Schalk and Kopf*, § 17. The Court of Appeal for Ontario said in a similar way: “The question to be asked is whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples”; *Halpern v. Canada* (Attorney General) 2003 CanLII 26403 (ON CA), § 91. It added: “Denying same-sex couples the right to marry perpetuates the (...) view (...) that same-sex couples are not capable of forming loving and lasting relationship, and thus same-sex relationship are not worthy of the same respect and recognition as opposite-sex relationships”; § 94. It ultimately ruled that the common-law definition of marriage as ‘the voluntary union for life of one man and one woman to the exclusion of all others’ violates the principle of equality and non-discrimination enshrined in the Canadian Charter of Rights and Freedoms.

<sup>183</sup> Oral Arguments, *Hollingsworth v. Perry*, March 26, 2013, Transcripts, 17.

<sup>184</sup> *US v. Windsor*, 570\_\_\_(2013) at 20.

<sup>185</sup> Holning Lau, *supra* note 85 at 244.



implementing this principle. Thus the idea is not to immediately condemn the States that have not opened marriage to homosexual couples, but rather to grant them a grace period so as to implement it.<sup>186</sup>

- **(iii) A right to marriage derived from the need of consistency and the prohibition of segregation**

This third option would consist in imposing the opening of the right to marry between persons of the same sex on some states only in the first place. This option might even be considered by the Court in the currently pending case of *Ferguson v. United-Kingdom*. The argument which is advanced is to impose on States a duty of consistency while insisting on banning segregation on the basis of sexual orientation. Thus, a State which has made the choice of creating a legal framework for stable same-sex relationships (i.e. a different but equivalent recognition of marriage), should open marriage to homosexuals in the name of the prohibition of segregation and the need for consistency. In this perspective, states are not required to open marriage to same-sex couples overnight. However, when a State does give quasi-identical rights to same sex couples as to married couples, it must take this reasoning to its logical conclusion and give them access to marriage as such. Thus, it avoids the persistence of a “separate but equal” system. This argument is explained in detail in the *Ferguson v. the United Kingdom* application. First, the following premise is stated: “[...] same-sex civil partners and different-sex spouses in the United Kingdom enjoy virtually identical rights and obligations, including the same right to apply to adopt children jointly, and the same access to medically assisted procreation and the parental rights and obligations that follow such procreation”. On the basis of this premise, it is argued that “[t]here are no ‘particularly serious reasons’ that could justify excluding same-sex couples from the traditional, public, legal institution of marriage, and different-sex couples from the new, public, legal institution of civil partnership”.<sup>187</sup> Therefore, “[t]he only reason for maintaining the two forms of exclusion is to use the law to stigmatize: to mark same-sex couples as inferior, and different-sex couples as superior. Same-sex couples are excluded from marriage, which is the universal system for legally recognizing a loving, committed, sexual relationship between two adults. [...] Using the law to maintain a social hierarchy based on sexual orientation is not a legitimate aim of government, for the purposes of Article 14, Article 12 or Article 8”.<sup>188</sup> And concluding that “The Court should, as a matter of consistency and to preclude pettiness, require the United Kingdom, and any other Council of Europe member states in the same position, to take the final step and grant access to the traditional, public, legal institution and word ‘marriage’”.<sup>189</sup>

In the United States, this option was the so-called “eight-state solution” suggested to the Supreme Court in the Californian case. “Without reaching the question whether a state could justify denying to same-sex couples substantial benefits and privileges that it offers to opposite-sex couples, the Court could conclude that once a state *has* offered same-sex couples all or virtually all of the incidents of marriage that it offers to similarly situated opposite-sex couples, there is no legitimate justification for denying those couples the status of “marriage” itself, and that therefore it is fair to conclude that such a denial is designed only to stigmatize, or to deny respect, on the basis of sexual orientation, which the Constitution forbids”. Such a

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<sup>186</sup> See above point 4.

<sup>187</sup> Eur. Ct. H.R., *Ferguson and others v. the United Kingdom*, Appl. No. 8254/11, pending, § 144.

<sup>188</sup> *Ibidem*, § 145.

<sup>189</sup> *Ibidem*, § 147.

statement “would directly affect only those states (California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island) that already treat same-sex couples the same as opposite-sex couples in virtually all ways but one”.<sup>190</sup> Earlier during the litigation, in *Perry v. Brown*, such a line of argumentation had been adopted under the due process obligation: “[t]he evidence shows that domestic partnerships do not fulfil California’s due process obligation to plaintiffs for two reasons. First, domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. Second, domestic partnerships were created specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples. (...) The evidence at trial shows that domestic partnerships exist solely to differentiate same-sex unions from marriages. A domestic partnership is not a marriage; while domestic partnerships offer same-sex couples almost all of the rights and responsibilities associated with marriage, the evidence show that the withholding of the designation “marriage” significantly disadvantages plaintiffs. The record reflects that marriage is a culturally superior status compared to a domestic partnership. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same-sex couples”.<sup>191</sup>

While the Supreme Court ultimately did not rule on the merits of this case, it was apparent in the oral arguments that the Justices were not convinced by the suggested solution of condemning States which already grant most rights to same-sex couples. Justice Breyer declared: “so a State that does nothing hurts them much more, and yet your brief seems to say it's more likely to be justified under the Constitution”<sup>192</sup> and Justice Sotomayor underlined the ironical point that States that do more would then have less rights.<sup>193</sup>

#### **(b) A legal recognition granted to same sex-couples (Art. 8 +14 CEDH)**

As argued above (point 2), at least since the *Schalk & Kopf* case, same-sex relationships are protected under family life in the system of the ECHR. As emphasized by the Judges Rozakis, Spielmann and Jebens in their dissenting opinion to the *Schalk and Kopf* case, the Court should have drawn inferences from this finding and deduced a “positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection

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<sup>190</sup> See Marty Lederman, “The Court’s five options in the California marriage case”, SCOTUSBLOG (Mar. 1, 2013, 11:11 AM), <http://www.scotusblog.com/2013/03/the-courts-five-options-in-the-california-marriage-case/>. In addition, four of the eight states that provide same-sex couples with virtually all incidents of marriage (Delaware, Illinois and Oregon, in addition to California itself) have filed amicus curiae briefs urging the Court to affirm the judgment declaring that Proposition 8 is invalid, and making an argument that would, if accepted, appear to seal the fate of their own laws, as well. See Brief of Massachusetts, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Vermont and Washington in the case of *Hollingsworth v. Perry*, submitted on 28 February 2013 and Brief of the State of California in the case of *Hollingsworth v. Perry*, submitted on 27 February 2013.

“The eight-state holding would permit the Court to avoid for now any decision on whether some other states might have a sufficient justification for denying same-sex couples substantial benefits and privileges that they offer to opposite-sex couples. (...) the Court would cast a shadow over the laws of the other thirty-three states, without resolving just yet whether they are constitutional”; *Ibidem*.

<sup>191</sup> *Perry v. Brown*, 116.

<sup>192</sup> Oral Arguments, *Hollingsworth v. Perry*, March 26, 2013, Transcripts, 53.

<sup>193</sup> Oral Arguments, *Hollingsworth v. Perry*, March 26, 2013, Transcripts, 54-55.

any family should enjoy”.<sup>194</sup> Of course this statement leaves numerous questions unanswered and especially it does not clarify which type of legal recognition would be held as a “satisfactory framework” and therefore judged compatible with the requirements of the Convention under articles 8 and 14 ECHR.

Following this reasoning, it seems obvious that the States parties to the Convention should at least provide for some kind of legal recognition.<sup>195</sup> This is also in line with one of the 2010 Committee of Ministers Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity.<sup>196</sup> The Committee underlines that “[w]here national legislation does not recognize nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live” (§ 25).

This being stated, it is rather difficult to draw the line between a legal recognition that would be acceptable and another that would be held incompatible with the conventional requirements. In *Schalk & Kopf*, the Court acknowledged “an emerging European consensus towards legal recognition of same-sex couples”.<sup>197</sup> Nevertheless, in the absence of a majority of States providing for legal recognition of same-sex couples, it granted a margin of appreciation to the States “in the timing of the introduction of legislative changes”.<sup>198</sup> Moreover, the Court considered “that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition” of same-sex couples.

In the US, twenty States and the District of Columbia recognize some form of civil union between same-sex couples. In most of them, this form of recognition originates from legislative action. In 1999, the Vermont Supreme Court ruled<sup>199</sup> that same-sex couples had the right to a treatment equivalent to that afforded to different-sex couples but left the Legislature the choice to allow marriage or to implement an alternative legal mechanism.<sup>200</sup> In 2000 the Legislature opted for civil unions. However, in the meantime, Vermont has also legalized

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<sup>194</sup> Joint dissenting opinion of Judges Rozakis, Spielmann & Jebens, point 4 in the case of *Schalck and Kopf*, *supra* note 19.

<sup>195</sup> To recall, in its case *Schalk and Kopf*, the Court expressly stated “it is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8” (§ 103).

<sup>196</sup> Committee of Ministers (CoE) Recommendation (CM/Rec(2010)5) on measures to combat discrimination on grounds of sexual orientation or gender identity (31 March 2010).

<sup>197</sup> Eur. Ct. H.R., *Schalk and Kopf*, *supra* note 19 at § 105.

<sup>198</sup> *Ibidem*.

<sup>199</sup> *Baker v. Vermont*, 744 A. 2d 864 (Vt 1999).

<sup>200</sup> “We hold only that plaintiffs are entitled (...) to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as ‘domestic partnership’ or ‘registered partnership’ acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners.”, 39.

same-sex marriage.<sup>201</sup> In 2006, the Supreme Court of New Jersey held that “Denying committed same-sex couples the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relationship to a legitimate governmental purpose. The Court holds that under the equal protection guarantee of (...) the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by opposite-sex couples under the civil marriage statutes. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process”.<sup>202</sup>

Back to the system of the Council of Europe, would it be acceptable to have only a legal recognition equivalent to the one open to the unmarried heterosexual couples? If the Court opts for an incremental approach, it may accept such a recognition, at least until a consensus on a more formalized form of recognition (marriage or partnership) emerges within the Council of Europe. Moreover, it is also what seems to derive from another recommendation of the Committee of Ministers of the Council of Europe according to which “[w]here national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights” (§ 23).

It is still in conformity with this incremental approach that the Committee of Ministers of the CoE recommends to member states recognizing registered same-sex partnerships, to “seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation” (§ 24).

However this statement is unclear. Indeed, what is meant by “heterosexual couples in a similar situation?” Do we speak of heterosexual couples who have entered into a registered partnership? It is from this standpoint that the Grand Chamber will be called upon to rule in the case *Vallianatos and Mylonas v. Greece* and *C.S. and Others v Greece*,<sup>203</sup> currently pending, which concerns the question of the discriminatory character (Article 8 in conjunction with Article 14 of the ECHR) of the Greek “pact of common life”, opened only to heterosexual couples.

Such a partnership is sometimes created solely to the benefit of same-sex couples, as in the United Kingdom<sup>204</sup>. In such a case, is the “heterosexual couple in a comparable situation” with the married heterosexual couple? In the *Schalk and Kopf* judgment, the Court did not go until the end of its reasoning in this regard. It considers that “the Registered Partnership Act gives the applicants a possibility to obtain a legal status equal or similar to marriage in many respects. While there are only slight differences in respect of material consequences, some substantial differences remain in respect of parental rights. However, this corresponds on the whole to the trend in other member States”.<sup>205</sup> Since the Court was not required to examine all

<sup>201</sup> Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, THE WASHINGTON POST, April 7, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html>

<sup>202</sup> *Lewis v Harris*, 188 N.J. 415; 908 A.2d 196 (N.J. 2006).

<sup>203</sup> Eur. Ct. H.R., *Vallianatos and Mylonas v. Greece*, Appl. No. 29381/09 and *C.S. and Others v Greece*, Appl. No. 32684/09, pending before the Grand Chamber.

<sup>204</sup> Previously, it was also the case in Denmark.

<sup>205</sup> Eur. Ct. H.R., *Schalk and Kopf*, supra note 19 at §109 (citations omitted).

the differences between the registered partnership and marriage, it considers that there is no evidence that “the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership”.<sup>206</sup>

If we follow the recommendation of the Committee of Ministers cited above, it seems difficult to identify which rights or obligations – if any – stemming from marriage could be excluded for homosexual couples engaged in a registered partnership, in addition to the fact that the argument of indirect discrimination would certainly be raised, to the extent that homosexual couples do not have the possibility – unlike heterosexual couples – to access marriage.<sup>207</sup> Could we reasonably argue that it is necessary and proportionate to achieve the protection of traditional family or the interest of the child to exclude same-sex couples from the right to adopt or to access to medically assisted procreation techniques? In light of the jurisprudence of the ECtHR, especially in the cases *EB v. France* and *X v. Austria*, we do not see which compelling reasons would justify such discrimination based on sexual orientation in matters of filiation, because “in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples”.<sup>208</sup>

Therefore, if a State in which the marriage is not open to same-sex couples creates a registered partnership to their benefit, it would, in principle, be required to attach to it all the rights and obligations associated with marriage. However, in this case, we fall back on arguments of the risk of segregation (separate but equals) developed above, which would ultimately impose upon those States to open marriage to same-sex couples.<sup>209</sup>

It thus appears very difficult to design a type of alternative legal recognition to marriage which satisfies the requirements of the protection of family life and the prohibition of discrimination. The gradual approach the Court could opt for to take into account the lack of consensus on the matter also has drawbacks and may even lead to paradoxical effects. Indeed, it appears that a State opting for a form of registered partnership thereby loses almost all its discretion and must, because of the requirement of consistency, prohibition of indirect discrimination and segregation, take it to its logical conclusion and open marriage to same-sex couples. This could be a “bonus” to immobility and encourage mobilization against the adoption of rights towards LGBT. As highlighted by N. Hervieu, “[t]he discriminatory prism can [...] produce paradoxical effects [in that] it allows to punish the states which have recognized more rights without affecting those who are less generous”.<sup>210</sup>

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

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<sup>206</sup> *Ibidem*.

<sup>207</sup> See also the third party intervention in *Schalk & Kopf*.

<sup>208</sup> Eur. Ct. H.R., *X. v. Austria*, *supra* note 21 at §112.

<sup>209</sup> See above point 7 (a) (iii).

<sup>210</sup> Nicolas Hervieu, *Un long chemin vers la pleine reconnaissance des familles homoparentales*, in LETTRE “ACTUALITÉS DROITS-LIBERTÉ” DU CREDOF, 26 February 2013.

## Conclusion

The case law of the ECtHR has globally been progressive towards LGBT rights. Today, it is confronted with the contentious issue of same-sex marriage. This article comes to the conclusion that the Court should find State laws which prohibit same-sex marriages or which foresee only some form of registered partnerships in violation of the Convention. This conclusion grounded on legal arguments – which we acknowledge, is in many respects a delicate and difficult one to take given the political situation – could be reached by application of the Court's own methods of interpretation and precedents. Under these, it has been found that the right to marry is gender neutral and that same-sex relationships are protected under family life. Then, applying the usual lens through which discrimination claims are examined, it is also established that same-sex couples are in a relevantly similar situation to different-sex couples as regard their need for legal recognition and protection of their relationship. The refusal to grant access to marriage for the first is thus a difference in treatment based on sexual orientation. Facing this, the Court claims that this type of difference require particularly serious reasons by way of justification. And this is the sticking point. On paper, by claiming that States should provide convincing and weighty reasons, the ECtHR takes a more principled stand than the US Supreme Court, which still seems to struggle to define what standard of scrutiny it applies in sexual orientation cases. However, the reality is that the ECtHR does not take this suspect criteria seriously and instead, on the basis that no European consensus exists on this issue, grants the States a wide margin of appreciation. We join other authors in deploring reliance on these concepts in the same-sex marriage cases. They seem misplaced as minorities' rights are at stake and their concrete application lack clarity. In addition, it means in practice that the ECtHR does not investigate the reasons behind States' decisions on the issue of gay marriage and that States could thus be acting on the basis of erroneous or even discriminatory reasons.<sup>211</sup> Looking at the American situation, it is clear that “(t)he litigation process has served the useful purpose of airing the rationalizations for discriminating against homosexuals”.<sup>212</sup> The main arguments which have been brought so far against same-sex marriage (to maintain the traditional definition of marriage and to encourage responsible procreation and child-rearing) have been found unconvincing by many US judges. US courts have been labelled as “bastions of rationality in dealing with same-sex marriage, as compared to other governmental actors”<sup>213</sup> and we would like to see the ECtHR take a similar approach. The ECtHR could at the very least require the States to provide a justification for not granting the same rights to same-sex couples. Publicly setting out the reasons in writing, as a beginning, can already create moments of opportunity for a wide range of actors acting within specific legal and political contexts.<sup>214</sup> The ECtHR, after evaluating these justifications, could at the stage of the proportionality analysis, come to the conclusion that “(i)n the absence of evidence on the part of the States showing how differential treatment leads to the protection of very weighty interests not amenable to being otherwise served, the interests of the Government need take second place to those of the

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<sup>211</sup> Frances Hamilton, *Why the Margin of Appreciation is Not the Answer to the Gay Marriage Debate*, *supra* note 95.

<sup>212</sup> Jeffrey Toobin, *Wedding Bells*, *THE NEW YORKER*, April 1, 2013.

<sup>213</sup> Evan Gerstmann, *Litigating Same-Sex Marriage: Might the Courts Actually Be Bastions of Rationality?*, 38 *PS: POLITICAL SCIENCE AND POLITICS*, n° 2, 217 (2005).

<sup>214</sup> ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 200 (University of Michigan Press, 2006).



applicant alleging discrimination”.<sup>215</sup> We realize how sensitive in terms of judicial policy it could be for the Court to affirm this. We therefore reviewed the alternative options available to the Court. The Court could explicitly state that same-sex couples have an equal right to marry but, in the absence of a European consensus, grant the States a grace period to implement it. Another option would be to impose granting access to marriage to same-sex couples to States which already possess a legal framework for stable same-sex relationships. The argument, which derives from the need of consistency and the prohibition of segregation has been made both before the US Supreme Court and the ECtHR. Finally, on the basis of the obligation to protect family life, the Court could require the State to at least provide for some kind of legal recognition to same-sex couples. However, these alternative options all have serious flaws in their principle, their practicability or their consequences and ultimately it appears that the principled solution is the only defensible from a legal point of view.

Such a decision would no doubt be controversial, certainly in countries where backlash against LGBT individuals is not only starkly present but even growing. It also raises the debated question of whether courts should merely reflect or lead public opinion. The Court’s rulings have already been “instrumental in socializing a pan-European consensus on intimate and sexual privacy”<sup>216</sup> for LGBT individuals and should continue to have an agenda-setting effect that catalyses domestic mobilization in favour of policy changes<sup>217</sup>. In addition, particularly in the same-sex marriage debate, words carry particular weight and the performative effect of court rulings play a role, conveying powerful discursive resources. Quotes from Judge Vaughn Walker’s decision in the Californian case have been reproduced in many instances and the strong words used by Justice Kennedy in the *US v. Windsor* case on “the equal dignity of same-sex marriages” could soon find an echo in Strasbourg.

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<sup>215</sup> Eirik Bjorge, *A History of Sexuality in Europe: LGBT Rights and Dynamic Interpretation of the ECHR*, SSRN SCHOLARLY PAPER, available at <http://papers.ssrn.com/abstract=1554901> (last consulted August 28, 2013).

<sup>216</sup> Paul Johnson, ‘*An Essentially Private Manifestation of Human Personality*’: *Constructions of Homosexuality in the European Court of Human Rights*, 10 HUMAN RIGHTS LAW REVIEW 67 (2010).

<sup>217</sup> Laurence Helfer and Erik Voeten, *Do European Court of Human Rights Judgments Promote Legal and Policy Change?*, INTERNATIONAL ORGANIZATION (forthcoming), currently available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1850526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526) (last accessed September 6, 2013), 7.