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# The hydraulics of constitutional claims: Multiplicity of actors in constitutional interpretation

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## I. Introduction.

Who interprets the Constitution? Conventional accounts have attempted to address this question by focusing either on the political<sup>1</sup> or the legal constitution<sup>2</sup> and stressing the respective roles of Parliament or the courts. Newer, more nuanced proposals aim at overcoming this strict distinction and approach the constitution as a mixed model.<sup>3</sup> Yet another interesting strand in the literature presents the relationship between Parliament and the courts as a constitutional dialogue.<sup>4</sup>

This article aims to tell a new, richer story that involves many more actors. Even the dialogic constitutional theories often do not go so far as to recognize the significance of other actors of constitutional interpretation beyond Parliament and the courts. In a similar vein, the focus of constitutional theory in continental Europe has been traditionally on constitutional courts. By

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<sup>1</sup> J.A.G. Griffith, “The Political Constitution” (1979) 42 *Mod L Rev* 1; J.A.G. Griffith, “The Common Law and the Political Constitution” (2001) 117 *Law Q Rev* 42.

<sup>2</sup> Stephen Sedley, “The Sound of Silence: Constitutional Law Without a Constitution” (1994) 110 *Law Q Rev* 270.

<sup>3</sup> Graham Gee & Grégoire Webber, “What is a Political Constitution?” (2010) 30 *Oxford J of Legal Stud* 273 at 292 (“Britain’s constitution today embraces, perhaps in uncertain ways and to an uncertain extent, both a political model and a legal model”); Adam Tomkins, “What’s Left of the Political Constitution?” (2013) 14 *German LJ* 2275 at 2292 (“the political and the legal of the constitution can and should be mixed. I do not want to go back to the political constitution”).

<sup>4</sup> See the seminal article by Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall Law Journal* 75. In the UK literature there have been different accounts of constitutional dialogue; see, e.g., Francesca Klug, “The Human Rights Act—a ‘third way’ or ‘third wave’ Bill of Rights” (2001) *Eur HRL Rev* 361; Danny Nicol, “Law and Politics After the Human Rights Act” (2006) *Public Law* 722; Tom Hickman, “Constitutional Dialogue, Constitutional Theories and the HRA 1998” (2005) *Public Law* 306; Alison L Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017). See also Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 *Am J Comp L* 707 (even though in his later book with the same title Gardbaum explains that he has become skeptical of the term “dialogue”); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013) at 15).

contrast, in the United States, recent scholarship indicates an intellectual shift toward - or, more accurately, a renewed interest in - extrajudicial constitutional interpretation.<sup>5</sup> This has taken the form of either “departmentalism,” which emphasizes the role of the other branches of government in constitutional interpretation or “popular constitutionalism,” which highlights the role of the people (especially through social movements) in shaping constitutional meaning.<sup>6</sup>

Against this backdrop, I argue that multiple actors play a role in raising, and resolving, constitutional claims on both sides of the Atlantic.<sup>7</sup> These actors may include ordinary lower courts (at the federal or state level), foreign and international courts, the executive (broadly defined to include not only the President or the government but also administrative authorities), local and regional authorities, and, crucially, the people themselves. There are common functional demands for bottom-up democratic involvement in elaborating constitutional principles in various systems. This is “democratic constitutionalism” in action: societal actors leverage constitutional law to make legal and policy claims.<sup>8</sup> These claims respond to what is described in this article as a “hydraulic process.” In the science of hydraulics, force applied to an incompressible fluid at one point of the system is transmitted to another point in the system. The fluid does not disappear but is channeled through a different avenue. The hydraulics metaphor has been employed in other contexts, notably in accounts of campaign finance reform, discretion in the criminal justice system, and constitutional reform.<sup>9</sup> In the context of this article, the hydraulics analogy explains how,

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<sup>5</sup> Tommaso Pavone, “Extrajudicial Constitutional Interpretation: A Review of Two Approaches” (November 2014) [on file with author]

<sup>6</sup> Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

<sup>7</sup> The idea of institutional multiplicity is well-established in other disciplines, including organizational theory, political science, and sociology; see W. Richard Scott, “Institutions and organizations: Toward a theoretical synthesis”, in W. Richard Scott & John W. Meyer, eds., *Institutional Environments and Organizations: Structural Complexity and Individualism* (Thousand Oaks, CA: Sage Publications, 1994) 55 at 75-76; Elisabeth S. Clemens and James M. Cook, “Politics and Institutionalism: Explaining Durability and Change” (1999) 25 *Annual Review of Sociology* 441; Lindsey D. Carsona & Mariana Mota Prado, “Using Institutional Multiplicity to Address Corruption as a Collective Action Problem: Lessons from the Brazilian Case” (2016) 62 *The Quarterly Review of Economics and Finance* 56. This article will demonstrate that institutional multiplicity is well-suited to describing the dynamic nature of constitutional interpretation.

<sup>8</sup> I draw here on Robert Post & Reva Siegel, “*Roe* Rage: Democratic Constitutionalism and Backlash” (2007) 42 *Harv CR-CLL Rev* 373 at 374 (noting that “[t]he premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy . . . sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning”). Post and Siegel add that democratic constitutionalism “analyzes the practices employed by citizens and government officials to reconcile [the] potentially conflicting commitments [to the rule of law and to self-governance]” (*ibid* at 375).

<sup>9</sup> On campaign finance reform, see Samuel Issacharoff & Pamela S. Karlan, “The Hydraulics of Campaign Finance Reform” (1999) 77 *Tex L Rev* 1705 at 1705, 1708 (noting “the First Law of Political Thermodynamics—the desire

across various constitutional systems, similar bottom-up constitutional claims are asserted in different institutional forums. The common driver is the grassroots mobilization of societal actors (and their opponents) advancing their interpretation of the constitution through all available avenues. The precise configuration of these institutional channels is the result of “hydraulic shifts”: when societal actors are forced out of one institutional channel, they redirect their constitutional claims to alternative forums thereby engaging new institutional actors. To continue with the hydraulics analogy, these constitutional claims do not disappear. Instead, as they are “compressed” out of one institutional channel, they are diverted toward another. These dynamic hydraulic responses ultimately generate a picture of multiple institutional actors engaging in the process of constitutional interpretation.

I map out these constitutional actors by using as a case study the legal recognition of same-sex marriage in the United States, Spain, the United Kingdom, and Ireland. The article adopts a historical institutionalist approach focusing on the complex institutional dynamics that illustrate how the map of multiple constitutional actors emerges in the four countries.<sup>10</sup> These four systems were selected because they exemplify distinctive models of recognizing same-sex marriage formally, with different actors taking the lead and appearing to have the final say on this contested issue.<sup>11</sup> Furthermore, the selection of cases representing different cultures, legal traditions, and

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for political power cannot be destroyed, but at most, channeled into different forms” and arguing that “political money, like water, has to go somewhere. It never really disappears into thin air”). More recent literature has drawn on this analogy, see, e.g., Michael S. Kang, “The Hydraulics and Politics of Party Regulation” (2005) 91 Iowa L. Rev. 131 (discussing the broader “hydraulics of party regulation”); Michael S. Kang, “The End of Campaign Finance Law” (2012) 98 Va L Rev 1 at 5 (referring to a “reverse hydraulics” phenomenon whereby “the removal of longstanding restrictions on independent expenditures is causing money rapidly to return to the least regulated, least restricted pathways”); Sarah C. Haan, “The CEO and the Hydraulics of Campaign Finance Deregulation” (2014) 109 Nw UL Rev 269 at 275 (referring to “the hydraulics of campaign finance *de*-regulation”); Anthony Johnstone, “The System of Campaign Finance Disclosure” (2014) 98 Iowa L Rev Bull 143 at 147 (suggesting that “campaign speech itself is subject to hydraulic effects across a regime of disclosure rules”). On the “hydraulic effects” in the criminal justice system, see Candace McCoy, “Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California” (1984) 9 Justice System Journal 256; Terance D. Miethe, “Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion” (1987) 78 J Crim L & Criminology 155; William J. Stuntz, “The Pathological Politics of Criminal Law” (2001) 100 Mich L Rev 505; Sonja B. Starr & M. Marit Rehavi, “Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of *Booker*” (2013) 123 Yale LJ 2. On the hydraulics metaphor in the example of constitutional reform, see Heather K. Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*” (2007) 55 Drake L Rev 925.

<sup>10</sup> Earlier work along these lines has suggested that “public policies are shaped by the structure of political institutions and by the legacies of past policies” (Miriam Smith, *Political Institutions and Lesbian and Gay Rights in the United States and Canada* (New York, NY: Routledge, 2008) at 8).

<sup>11</sup> The article focuses on the formal recognition of same-sex marriage in the different country cases. However, the path toward legalization of same-sex marriage generally included, at earlier stages, a gradual recognition of other gay rights - commonly the decriminalization of intimate relations and the introduction of civil partnerships for same-sex couples.

background constitutional structures brings to the fore not only the different models of legalizing same-sex marriage but also significant commonalities that have been understudied in the literature. The case studies illustrate that common bottom-up constitutional demands respond to similar overarching hydraulic processes, which, in turn, owing to diverse political, institutional, and cultural contexts, bring in the voices of citizens and other constitutional actors in diverse ways.

The case studies also highlight relevant background institutional features in the process of legalizing same-sex marriage. The United States seems to reflect a court-centric approach, with same-sex marriage ultimately recognized nationally in the 2015 Supreme Court case of *Obergefell v. Hodges*.<sup>12</sup> However, the picture within a federal system is more complex than what a single judicial incident might suggest at first sight. This outcome was the culmination of a national conversation going back to at least the early 1990s and involving multiple actors: social movements, the electorate, state courts and legislatures, lower federal courts, and the US Supreme Court itself. The Supreme Court had strategically joined the national debate at different points in cases leading up to *Obergefell* (Part II). In Spain, recognition came through a 2005 statute which, in a rather unusual turn, was then challenged before the Constitutional Court. Again, the picture is more complicated than the model “statute-judicial affirmation” suggests, with important institutional actors such as autonomous communities, political parties, and the people directly entering into this national conversation prior to and in the Constitutional Court decision (Part III). The UK model appears even more straightforward with statutory recognition in 2013 (England and Wales) and 2014 (Scotland), and no judicial affirmation. Compared to the other two examples, judicial involvement in this case has been less pronounced, with key cases pertaining to cohabiting same-sex partners and civil partnerships. However, again, this account should not overlook the role of actors beyond Parliament and the Supreme Court. Furthermore, devolution is an important

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These usual milestones are considered briefly in the historical analysis of the cases as the movement for equal marriage often built on these earlier cases. Another comparative study of gay rights similarly focuses on decriminalization of sexual acts, recognition of same-sex couples as “families,” same-sex marriage, and parental rights, see Angioletta Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (Oxford: Hart Publishing, 2017) at 4-7. Of course, as the case studies will also suggest, the move toward LGBT equality has not been a straightforward linear process. There has been strong resistance, backlash, and setbacks along the way. Furthermore, the decriminalization of same-sex intimate relations did not address fully the vulnerability of the LGBT communities in their encounters with the criminal justice system; see, e.g., Timothy Stewart-Winter, “Queer Law and Order: Sex, Criminality, and Policing in the Late Twentieth-Century United States” (2015) 102 *Journal of American History* 61 at 69-71; Elias Walker Vitulli, “Queering the Carceral: Intersecting Queer/Trans Studies and Critical Prison Studies” (2012) 19 *GLQ: A Journal of Lesbian and Gay Studies* 111; Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, *Queer (In)justice: The Criminalization of LGBT People in the United States* (Boston, MA: Beacon Press, 2011).

<sup>12</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) [*Obergefell*].

institutional factor in the hydraulic processes identified in the UK case (Part IV). In Ireland, the ordinary legislative path for the recognition of same-sex marriage was closed off because of concerns about a potential judicial invalidation. With the legislative and judicial paths removed from the table, popular mobilization was directly channeled into constitutional reform through a referendum (Part V). Part VI draws comparative conclusions and outlines normative considerations that flow from the new paradigm proposed in the article.

## II. The United States.

The United States, probably the most familiar case, provides a helpful backdrop against which to situate the discussion of the three case studies from Europe in the following sections. Firstly, the United States would appear to present a clear example of a court-centric approach with the US Supreme Court being the key actor in the national recognition of same-sex marriage. However, the United States is also the system in which the theories of popular and democratic constitutionalism<sup>13</sup> were developed as more nuanced accounts that challenge such court-centric approaches. Secondly, beginning the discussion of case studies with the US suggests that this is only one model of democratic constitutionalism and sets the stage for the alternative models in Spain, the United Kingdom, and Ireland.<sup>14</sup>

At first sight, the federal recognition of same-sex marriage in the United States could be viewed as an example of legal constitutionalism: in the widely-anticipated *Obergefell* judgment, the US Supreme Court held that the Fourteenth Amendment of the US Constitution requires states to issue marriage licenses to same-sex couples.<sup>15</sup> This was in response to the federal legislature's silence or outright opposition to the possibility of recognizing same-sex unions in the 1990s and 2000s.<sup>16</sup> In a hydraulics fashion, recognizing that the federal legislative avenue for recognition

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<sup>13</sup> For the differences between popular and democratic constitutionalism, see Post & Siegel, *supra* note 8 at 379 (noting that their model of democratic constitutionalism recognizes the “essential role” of both “judicially enforced constitutional rights” and “public engagement . . . in guiding and legitimating the institutions and practices of judicial review”).

<sup>14</sup> Therefore, this section does not present an exhaustive history of the development of LGBT rights in the US. Such a detailed account would be beyond the scope of this article and is available in other works, some of which are cited in the footnotes of this section. Instead, as noted previously, I focus on certain milestones that illustrate the multiplicity of constitutional actors.

<sup>15</sup> *Obergefell*, *supra* note 12.

<sup>16</sup> Indeed, the US Congress's hostility to such demands took concrete forms through the enactment of the Defense of Marriage Act in 1996 and the consideration of the Federal Marriage Amendment, both of which are discussed later in the text.

across all fifty states was not feasible, the LGBT movement directed its energy to individual states and courts (state courts first, federal courts at later stages). The success of the equal marriage movement is striking, particularly if placed against the backdrop of the treatment of same-sex relations in the preceding decades. For instance, as Michael Klarman has noted, in the 1970s courts would not only dismiss legal arguments in favour of same-sex marriage summarily; they would often treat them with derision.<sup>17</sup>

Therefore, the story of equal marriage in the US involves multiple actors at both the state and federal levels. Interestingly, we can glean the operation of these multiple forces even by focusing on the federal judiciary, thus complicating the picture of legal constitutionalism. *Obergefell* was the culmination of a series of cases before the US Supreme Court. Certain milestones in the history of these cases demonstrate how the Supreme Court through its reasoning both reflected and contributed to the national conversation and contestation (even conflict) outside the courts.<sup>18</sup> For instance, in the 2003 case of *Lawrence v. Texas*,<sup>19</sup> at issue was a Texas statute that criminalized sexual relations between consenting adults of the same-sex. The statute was sex-specific, prohibiting same-sex, but not different-sex sodomy. Therefore, the traditional *equal protection* argument was readily available.<sup>20</sup> However, in a majority opinion written by Justice Kennedy, the Court struck down the statute on *liberty* grounds. It held that the statute violated the fundamental right of all persons - regardless of sexual orientation - to control their intimate sexual relations. Interestingly, Justice Kennedy used a *dignity* argument as well, which was based in liberty. He wrote: “[A]dults may choose to enter upon this [personal] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>21</sup> Therefore, *Lawrence* was primarily a case about liberty with clear dignity undertones.

Why would the majority’s preferred grounds be liberty and not equality? Two answers could be suggested. First, the “liberty path” emphasizes what all citizens have in common as human beings. Kenji Yoshino invites us to consider the choice of the majority in *Lawrence* in the following way. How do these two claims sound?

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<sup>17</sup> Michael Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford: Oxford University Press, 2013) at 17-21.

<sup>18</sup> Reva B. Siegel, “Foreword: Equality Divided” (2013) 127 Harv L Rev 1.

<sup>19</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) [*Lawrence*].

<sup>20</sup> Kenji Yoshino, “The New Equal Protection” (2011) 124 Harv L Rev 747.

<sup>21</sup> *Lawrence*, *supra* note 19 at 567.

(1) “Gays should have the right to marry because straights have the right to marry and gays are equal to straights;”

(2) “All adults should have the right to marry the person they love.”<sup>22</sup>

The equality claim (claim 1) invites contemplation on what divides groups, what differentiates or not gay and straight people. It might, therefore, be “prone to sounding like a ‘special rights’ argument, especially to those who associate group-based civil rights with a culture of complaint.”

The liberty claim (claim 2), Yoshino continues, is more likely to sound like a universalist “human rights” argument, pointing to what all people have in common universally.<sup>23</sup> This may, in turn, increase the rhetorical force of the argument and be more persuasive to the segment of the population that is in the middle of this debate. However, there is a powerful counter-argument: “Even as the liberty paradigm pushes towards universalism, it seems to require members of the LGBT community to litigate pieces of their humanity, one by one. First, they assert their right as human beings to have intimate relations with another person. Then they assert the right to marry or to have a family. To work. To serve their country.”<sup>24</sup>

A related account, which is particularly relevant for the purposes of this article, points to the Court’s concern with the reach of a potential equality decision.<sup>25</sup> Robert Post has similarly observed that an equality ruling would have probably required the Court to hold that statutes prohibiting same-sex sex were impermissible classifications based upon sexual orientation. This, in turn, could have rendered “constitutionally suspicious all state laws that [discriminated] based upon sexual orientation, including those dealing with marriage.”<sup>26</sup> Because *Lawrence* went for the liberty option, it needed not make any sweeping pronouncements that would cover statutes in other domains.<sup>27</sup> These advantages were considerable, because they enabled the Court to enter into the national debate about the status of gay rights in a limited and strategic way—only as far as intimate relations were concerned, but not same-sex marriage or other issues. Thus, the Court preserved its

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<sup>22</sup> Yoshino, *supra* note 20 at 793-94.

<sup>23</sup> *Ibid* at 794.

<sup>24</sup> Heather Gerken, “Larry and Lawrence” (2007) 42 Tulsa L Rev 843 at 851.

<sup>25</sup> Pamela S. Karlan, “Foreword: Loving Lawrence” (2004) 102 Mich L Rev 1447 at 1459.

<sup>26</sup> Robert Post, “Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law” (2003) 117 Harv L Rev 4 at 99-100.

<sup>27</sup> Writing in the aftermath of *Lawrence*, Robert Post argued that “due process analysis may be more far-reaching than equal protection analysis, because the framework of due process does not have to work through the doctrinal thicket of facial classifications, disparate impact, and discriminatory purpose (Post, *ibid* at 104n.88). However, the Court hedged the implications of the liberty analysis by emphasizing that protection was “within the private realm” (*ibid* at 104).



options in deciding how far it was willing to go in the future. *Lawrence* has been therefore correctly described as the “opening bid” in a conversation that the Court expected to hold with the American public.<sup>28</sup> There is another societal aspect here: By 2003, only thirteen states still criminalized consensual sodomy. In the seventeen years between *Bowers* (which had upheld the criminalization of same-sex sex) and *Lawrence*, Americans had gone from opposing the legalization of same-sex relations by 55% to 33% to supporting legalization by 60% to 35%. In this sense, Michael Klarman notes, *Lawrence* was an “easy case”: it involved the constitutionalization of a social norm that was already commanding overwhelming popular and state support.<sup>29</sup>

However, some paths could have been more slippery. The *Lawrence* majority carefully disclaimed any implications of its decision for the question of same-sex marriage.<sup>30</sup> The Texas statute, the majority said, seeks “to control a personal relationship that, whether or not entitled to formal recognition in the law” - even the word “marriage” was avoided - it is “within the liberty of persons to choose without being punished as criminals.”<sup>31</sup> Not all justices were convinced by this statement. Justice Scalia writing for the dissent said: “At the end of its opinion the Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Do not believe it.”<sup>32</sup> And then he went on, “This case does not involve the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”<sup>33</sup>

Who is Justice Scalia talking to when he says, “do not believe it”? It is not his colleagues. It is rather the public reading the opinion or the media reports on his dissent. As William Eskridge and John Ferejohn have noted, Justice Scalia’s audience was also Congress, which was considering a proposal for the Federal Marriage Amendment (FMA). Recognizing the “risk” of judicial intervention in the marriage debate (domestically and internationally), the FMA would have prohibited courts from interpreting the US Constitution or a state constitution to require the recognition of same-sex marriage. After *Lawrence*, President George W. Bush endorsed the FMA,

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<sup>28</sup> *Ibid* at 104-05.

<sup>29</sup> Klarman, *supra* note 17 at 85-86.

<sup>30</sup> Karlan, *supra* note 25 at 1459.

<sup>31</sup> *Lawrence*, *supra* note 19 at 567.

<sup>32</sup> *Ibid* at 604.

<sup>33</sup> *Ibid* at 605.

and the Republican Party made it a centerpiece of Bush's socially conservative agenda in his 2004 re-election campaign.<sup>34</sup>

This raises the question of whether Justice Scalia was right to worry that the Court in *Lawrence* had opened the door for the future legalization of same-sex marriage. A pair of cases ten years later, *Windsor* and *Perry*<sup>35</sup>, would ask the Court to revisit these questions. *Windsor* concerned the constitutionality of Section 3 of a federal statute, the Defense of Marriage Act (DOMA), which denied federal benefits to same-sex couples in states that allowed such unions. Again, Justice Kennedy, writing for a narrow majority, held:

DOMA operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. . . . The avowed purpose and practical effect of DOMA are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States. The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States . . . was more than an incidental effect of the federal statute. It was its essence. . . . This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person.<sup>36</sup>

All three themes (equality, liberty, dignity) appear in this opinion. But dignity features more prominently in *Windsor* than in *Lawrence*. The word "dignity" itself appears three times in *Lawrence*, nine times in *Windsor*. As Reva Siegel explains, this rhetorical device is consciously employed to acknowledge the expressive function of the Court's reasoning and the audience it addresses: In explaining its finding of unconstitutionality, "the Court emphasizes the message [that DOMA] communicates to people, what it 'tells' them. . . . This is an account of how people understand and experience the law . . . informed by long-running public debate--and by the experience and standpoint of the excluded."<sup>37</sup>

Once again, the Court trod carefully. The holding was that once a state had recognized a same-sex marriage, the federal government could not ignore this decision and deny federal benefits. However, *Windsor* did not require states that did not permit same-sex marriage to legalize

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<sup>34</sup> William N. Eskridge Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven: Yale University Press, 2010) at 372; Ellen Ann Andersen, *Out of the Closets & into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2004) at 229-30.

<sup>35</sup> *United States v. Windsor*, 133 S. Ct. 2675 [*Windsor*]; *Hollingsworth v. Perry*, 133 S. Ct. 2652 [*Perry*].

<sup>36</sup> *Windsor* at 2693.

<sup>37</sup> Siegel, Foreword, *supra* note 18 at 90.

it. The majority concluded by noting that “this opinion and its holding are confined to those lawful marriages.”<sup>38</sup> Once again, Justice Scalia was not convinced by this latest assurance:

I have heard such ‘bald, unreasoned disclaimer[s]’ before. When the Court declared a constitutional right to homosexual sodomy [in *Lawrence*], we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Now we are told that DOMA is invalid because it “demeans the couple, whose moral and sexual choices the Constitution protects”—with an accompanying citation of *Lawrence*. It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority’s moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: The only thing that will “confine” the Court’s holding is its sense of what it can get away with.<sup>39</sup>

Interestingly, Justice Scalia’s dissent put forward an argument from democracy: “It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it hostes humani generis, enemies of the human race.”<sup>40</sup> This was picked up in Justice Alito’s dissent as well: “Our Nation is engaged in a heated debate about same-sex marriage. That debate is, at bottom, about the nature of the institution of marriage. Respondent Edith Windsor, supported by the United States, asks this Court to intervene in that debate, and although she couches her argument in different terms, what she seeks is a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference. The Constitution, however, does not dictate that choice. It leaves the choice to the people, acting through their elected representatives at both the federal and state levels.”<sup>41</sup> In other words, the dissenting justices would have closed off the judicial avenue and redirected Edith Windsor’s (and the LGBT movement’s) constitutional claims back to the legislative process.

*Perry*, the other 2013 case, would not confirm Justice Scalia’s worst fears quite yet. On November 4, 2008, 52% of California voters had adopted a ballot initiative called Proposition 8, or, more commonly known, Prop 8. Prop 8 had amended California’s Constitution to stipulate that “only marriage between a man and a woman is valid or recognized in California.” Two same-sex couples challenged the constitutionality of Prop 8 in federal court, and the case eventually reached

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<sup>38</sup> *Windsor*, *supra* note 35 at 2696.

<sup>39</sup> *Ibid* at 2709.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid* at 2711.

the Supreme Court. A six-member majority opinion authored by the Chief Justice found that the litigants bringing the appeal before the Court, namely, the proponents of Prop 8, did not have a “particularized” interest sufficient to create a case or controversy. It was up to the state authorities to defend the amendment after it had been enacted. However, by the time the case had reached the Supreme Court, both the State Attorney General, Kamala Harris, and the Governor, Jerry Brown, had been elected on platforms promising not to defend the lawsuit.<sup>42</sup> Therefore, *Perry* was a decision on standing grounds; the Court did not proceed to examine the substantive issue, namely the constitutionality of Prop 8.

By not reaching the merits in *Perry*, the Court affirmed the decision of the lower federal court which had held that Prop 8 was unconstitutional. In this way, the Supreme Court effectively allowed same-sex marriages to continue in California but did not mandate legalization in all fifty states. The latter approach could have raised the specter of backlash. The “backlash hypothesis” suggests that, when courts draw on constitutional principles to produce significant social reforms, they can be counterproductive because they can instigate counter-mobilization from reinvigorated movements opposing these reforms.<sup>43</sup> The US provides a number of historical examples. In 1993, the Hawaii Supreme Court in *Baehr v. Lewin*<sup>44</sup> ruled that the exclusion of same-sex couples from the institution of marriage constituted gender classification and would thus trigger the most rigorous scrutiny under the state constitution. The mere prospect of same-sex marriage in Hawaii generated a robust response resulting in anti-gay legislation in other states<sup>45</sup> and, at the national level, in the enactment of the Defense of Marriage Act in 1996,<sup>46</sup> Section 3 of which was struck down in *Windsor*. Following a decision recognizing the right of same-sex couples to marry under the state constitution by the Massachusetts Supreme Judicial Court in 2003 in *Goodridge*,<sup>47</sup> constitutional amendments banning same-sex marriage passed in twenty-five states within five

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<sup>42</sup> Kris Perry & Sandy Stier, *Love on Trial: Our Supreme Court Fight for the Right to Marry* (Berkeley, CA: Roaring Forties Press, 2017) at 113.

<sup>43</sup> Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed (Chicago: University of Chicago Press, 2008) at 425, 362, 368; Linda Greenhouse & Reva Siegel, “Backlash to the Future? From Roe to Perry” (2013) 60 UCLA L Rev Discourse 240.

<sup>44</sup> 74 Haw. 530, 852 P.2d 44.

<sup>45</sup> Defense-of-marriage laws were enacted in 22 states in 1996 and 1997. By 2001 the number of states with similar legislation had risen to 35 (Klarman, *supra* note 17 at 59). By 2006, forty-five states prohibited same-sex marriage by legislation, constitutional amendment or both (Rosenberg, *supra* note 43 at 365).

<sup>46</sup> Andersen, *supra* note 34 at 180.

<sup>47</sup> *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

years.<sup>48</sup> *Goodridge* also figured expressly in George W. Bush's endorsement of the Federal Marriage Amendment.<sup>49</sup>

Drawing causal inferences that support the backlash hypothesis is difficult.<sup>50</sup> Recent political science literature suggests that the backlash hypothesis is no longer borne out,<sup>51</sup> and constitutional litigation has a lot to offer to the national debate about same-sex marriage.<sup>52</sup> In a similar vein, legal scholars do not argue that adjudication cannot prompt backlash but that adjudication is not “distinctively more likely” than legislation to do so.<sup>53</sup> However, this recognition did not necessarily alter the calculus of the justices in 2013. The pace of change in the public perception of LGBT rights had been very rapid. When the Court heard arguments in *Perry* in March 2013, same-sex marriage was permitted in nine states and the District of Columbia. In January 2015, the number was thirty-six. In terms of public opinion, Nate Silver has shown that opposition to marriage equality declined from almost 70% to 60% between 1996 and 2004 and fell under 50% in 2011 and 2012, while support rose between 1996 and 2004 and even exceeded 50% in some polls by 2012.<sup>54</sup> Yet still, public opinion did not overwhelmingly favour same-sex marriage when *Perry* came out.

It was Justice Kennedy's time to dissent in *Perry*. Of course, said Justice Kennedy, “the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject.”<sup>55</sup> These comments have been read to suggest that deciding the case on justiciability grounds may have been motivated

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<sup>48</sup> Klarman, *supra* note 17 at 105

<sup>49</sup> Andersen, *supra* note 34 at 230.

<sup>50</sup> Jane S. Schacter, “Making Sense of the Marriage Debate (reviewing M. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (2013))” (2013) 91 *Tex L Rev* 1185, 1194-95. Even Klarman himself concludes that “[o]n balance, litigation has probably advanced the cause of gay marriage more than it has retarded it” (Klarman, *supra* note 17 at 218).

<sup>51</sup> Benjamin G. Bishin, Thomas J. Hayes, Matthew B. Incantalupo & Charles Anthony Smith, “Opinion Backlash and Public Attitudes: Are Political Advances in Gay Rights Counterproductive?” (2016) 60 *American Journal of Political Science* 625.

<sup>52</sup> William Eskridge, “Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States” (2013) 93 *BUL Rev* 275.

<sup>53</sup> Greenhouse & Siegel, *supra* note 43.

<sup>54</sup> Nate Silver, Support for Gay Marriage Outweighs Opposition in Polls, *FiveThirtyEight*, N.Y. Times (May 9, 2012), <https://fivethirtyeight.blogs.nytimes.com/2012/05/09/support-for-gay-marriage-outweighs-opposition-in-polls/? r=0>.

<sup>55</sup> *Perry*, *supra* note 35 at 2674.

by the desire “to allow popular debate over state marriage laws to continue, informed, but not directly controlled, by the Court’s decision on federal law in *Windsor*.”<sup>56</sup>

The time, however, for the Supreme Court to step into the debate in a more decisive way had come by 2015. In *Obergefell v. Hodges*, the Supreme Court granted review of four petitions challenging marriage exclusions for lesbian and gay couples in Michigan, Ohio, Kentucky, and Tennessee. The Court held that the Fourteenth Amendment requires states to license a marriage between two people of the same sex. All the opinions included references to the national conversation about the meaning and requirements flowing from the Constitution. The justices split on this issue. Justice Kennedy, writing for yet another 5-member majority, said:

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage . . . . Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 amici make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question.<sup>57</sup>

Justice Kennedy’s opinion provided a list of these actors of constitutional interpretation and their contributions to an evolving debate. This debate, according to the majority, had reached a stage of deliberative maturity which allowed the Court to channel this conversation into constitutional law rules. Each of the four dissenting justices commented on this issue. The Chief Justice’s well-crafted opinion captured the nature of their opposition:

Nowhere is the majority’s extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been “extensive litigation,” “many thoughtful District Court decisions,” “countless studies, papers, books, and other popular and scholarly

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<sup>56</sup> Siegel, Foreword, *supra* note 18 at 86.

<sup>57</sup> *Obergefell*, *supra* note 12 at 2605.

writings,” and “more than 100” amicus briefs in these cases alone. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers’ “better informed understanding” of “a liberty that remains urgent in our own era.” The answer is surely there in one of those amicus briefs or studies.

The Court’s accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. . . . This deliberative process is making people take seriously questions that they may not have even regarded as questions before. . . . But today the Court puts a stop to all that.<sup>58</sup>

Both sides acknowledged the national debate and identified the relevant actors. However, they parted company when it came to the prioritization of the different institutional forms of this debate with the dissenting opinions taking a narrower view and acknowledging exclusively the role of legislatures. Where the majority saw the Court as consolidating the conclusions of a polycentric debate that empowers a series of constitutional actors, the dissenting judgments saw the Court as stifling this debate by foreclosing the key avenue, which to them was legislative.

### **III. Spain.**

As was the case in other countries as well, Spain took the first, timid but necessary, step on the path toward recognizing same-sex relationships by repealing the law on “danger and social rehabilitation,” which explicitly punished male homosexuality, in 1979.<sup>59</sup> In 1994 the Constitutional Court paved the way for the recognition of same-sex relationships at the regional level.<sup>60</sup> In this case, the surviving partner of a same-sex cohabiting couple requested a widower’s pension. The Constitutional Court rejected the claim noting that “the union between two persons of the same sex is not a legally regulated institution, and there is no constitutional right to its

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<sup>58</sup> *Ibid* at 2624-25.

<sup>59</sup> Réjane Sénac, “Same-Sex Marriage in France and Spain: Comparing Resistance in a Centralized Secular Republic and the Dynamics of Change in a ‘Quasi-Federal’ Constitutional Monarchy”, in Bronwyn Winter, Maxime Forest & Réjane Sénac, eds, *Global Perspectives on Same-Sex Marriage: A Neo-Institutional Approach* (Cham, Switzerland: Palgrave Macmillan, 2018) 105 at 110.

<sup>60</sup> Auto nº 222/1994 de Tribunal Constitucional, Sección 1ª, 11 de Julio de 1994 [ATC 222/1994]; Sperti, *supra* note 11 at 86.

establishment, unlike marriage between a man and a woman, which is a constitutional right (article 32.1 Constitution).”<sup>61</sup> Interestingly, the Court added:

the full constitutionality of the heterosexual principle must be admitted as a qualifier of the matrimonial bond . . . such that public powers can grant a privileged treatment to the family union of a man and a woman compared to a same-sex union. *This does not preclude the legislator from establishing a system of equalization by which homosexual cohabitants can get to benefit from the full rights and benefits of marriage*, as advocated by the European Parliament.<sup>62</sup>

Since the European Parliament’s 1994 Resolution referred to “marriage or an equivalent legal framework,” the Spanish Constitutional Court seemed to recognize the freedom of the legislator to introduce same-sex marriage or registered partnerships.<sup>63</sup> This invitation was taken up at the regional level before being formalized at the national level through centrally enacted legislation. Twelve of the seventeen autonomous communities passed same-sex partnership laws (registries for civil unions), with Catalonia taking the lead in 1998.<sup>64</sup> After the 2004 general election, the Socialist Party came to power. The Socialist Party’s manifesto had included the pledge of amending the Civil Code to legalize same-sex marriage. Indeed, the Zapatero government introduced the bill that was passed by the Congress of Deputies in April 2005. The proposal, however, was rejected at the Senate and sent back to the Congress of Deputies, which overrode the Senate with the support of 187 votes in favour, 147 votes against, and 4 abstentions. Law 13/2005 was therefore approved, amending the Civil Code with respect to the right to marry. More specifically, Law 13/2005 added a second paragraph to Article 44 of the Civil Code, whereby “marriage will have the same requirements and effects when both spouses are of the same or different sex.”<sup>65</sup>

This development was controversial. There were pockets of resistance from city halls, which claimed, unsuccessfully, “conscientious objection” to performing same-sex marriages.<sup>66</sup>

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<sup>61</sup> José María Lorenzo Villaverde, “And the Story Comes to an End: The Constitutionality of Same-Sex Marriages in Spain”, in Macarena Sáez, ed, *Same Sex Couples - Comparative Insights on Marriage and Cohabitation* (Dordrecht: Springer, 2015) 13 at 30-31.

<sup>62</sup> ATC 222/1994 (own translation and emphasis added).

<sup>63</sup> See European Parliament, Resolution on equal rights for homosexuals and lesbians in the EC, OJ 1994 C61/40; Villaverde *supra* note 61 at 31.

<sup>64</sup> Raquel Platero, “Love and the State: Gay Marriage in Spain” (2007) 15 *Fem Leg Stud* 329 at 331; Sperti, *supra* note 11 at 86-87.

<sup>65</sup> Sperti, *supra* note 11 at 87-88.

<sup>66</sup> Platero, *supra* note 64 at 335.



There was further resistance by the conservative People's Party. The conservative "Family Forum" presented a proposal to repeal Law 13/2005, which was supported by the People's Party and part of the Catalanian Conservative Party and was rejected in Parliament in 2007. The Conservative Party further used its objection to same-sex marriage law as an electoral strategy.<sup>67</sup> During the 2011 General Election, the People's Party leader, Mariano Rajoy, who ended up winning the election, stated that he preferred the term "civil union" for same-sex couples.<sup>68</sup> The most notable attack on Law 13/2005 came in the form of a constitutional challenge brought before the Spanish Constitutional Court by 72 members of the People's Party Parliamentary Group in Congress. The resolution of the case took many years as the Constitutional Court handed down its judgment in November 2012.<sup>69</sup>

Both sides built their arguments around two provisions of the Spanish constitution, Articles 14 (equality) and 32 (marriage). Article 14 stipulates that "Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance." Article 32 reads:

- “1. Men and women have the right to marry with full legal equality.
2. The law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof.”

The petitioners' claim on equality grounds was that, by rendering equivalent the rights held by couples of the same sex and couples of a different sex, Law 13/2005 was contrary to the principle of equality, as it ignored that marriage and couples of the same sex were different realities that required different treatment. The Court was not moved. It held that Article 14 of the Spanish Constitution did not enshrine a right to unequal treatment: "The principle of equality cannot be used to justify a challenge against discrimination on the grounds of non-differentiation, which means that we cannot condemn 'inequality due to excess of equality.' We are also unable to condemn the Law from a principle of equality perspective, due to opening the doors of marriage as an institution to a reality - same-sex couples - that involves specific characteristics with respect

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<sup>67</sup> *Ibid.*

<sup>68</sup> Sarah Rainsford, "Spain gay rights and abortion activists fear backlash", BBC News (November 26, 2011), available at <https://www.bbc.com/news/world-europe-15894536>.

<sup>69</sup> Constitutional Court, Judgment No. 198/2012 of November 6, 2012 (Unofficial translation), available at <https://www.tribunalconstitucional.es/ResolucionesTraducidas/198-2012%20of%20November%206.pdf>.

to heterosexual couples.” Indeed, in the preamble of Law 13/2005, the justification for legalizing same-sex marriage was based on “the promotion of effective citizen equality in the free development of one’s personality (Articles 9.2 and 10.1 of the Spanish Constitution), the preservation of freedom as regards forms of co-existence (Article 1.1 of the Spanish Constitution), and the incorporation of a real equality framework in the enjoyment of rights, without suffering any discrimination on the grounds of sex, opinion or other personal or social condition (Article 14 of the Constitution).

Moving on to the challenge on the basis of Article 32 of the Constitution, the Spanish Constitutional Court reiterated the double content of this provision: marriage as an institutional guarantee and as a constitutional right. Under the first prong (marriage as an institutional guarantee), the question for the Court was whether Law 13/2005 turned marriage into an “unrecognizable and consequently denaturalized institution,” or whether the legislator had acted within the wide margin of action granted by the Constitution. The Court explained that Article 32 only identified the holders of a right to marry, not the other spouse, although, “systematically speaking” it was clear that there was no intention in 1978, when Article 32 was drafted, to extend the exercise of this right to same-sex unions. The Court, however, began with the idea (borrowed from the Canadian Supreme Court) that the Constitution is a “living tree.” This invites a progressive interpretation that allows a constitution to adjust to the realities of modern life as means to guarantee its own relevance and legitimacy. In the words of the Court, “this is so not only because the basic principles of the constitutional text are applicable to situations not envisaged by its founders, but also because the public powers - and the legislator in particular - gradually update these principles. According to this progressive reading of the Constitution, we are able to *build up legal culture*, to the extent that the law is treated as a social phenomenon that is linked to the reality in which it is implemented.”

This begs the question: was same-sex marriage integrated in the Spanish legal culture? The Spanish Constitutional Court looked to other legal systems (foreign law) and the decisions of international bodies (particularly the European Court of Human Rights) and concluded that there was a new “image” of marriage, gradually becoming more common though not totally standard yet. This new image, according to the Court, depicted marriage “from the point of view of Western comparative law, as a plural conception.” More interestingly for present purposes, however, the Court referred to official statistics in Spain. It said: “The Court cannot remain aloof from social

reality, as there are now quantitative data in official statistics to confirm that in Spain there is broad social acceptance of marriage between same-sex couples, given that these couples have gradually exercised their right to marry since 2005.” For example, the June 2004 barometer of the Centro de Investigaciones Sociológicas indicated that 66.2% of those surveyed believed that same-sex couples should have a right to marry. In a November-December 2010 survey, 76.8% of young people (14-29 years old) accepted this right.<sup>70</sup> The Court was quick to add that all these figures are not determinative *per se* to assess the constitutionality of the law being examined. However, “they provide an accurate image of the extent to which marriage right holders feel identified with the institution that is progressively incorporating a partnership between same-sex couples.” The Court’s conclusion was that Law 13/2005, within the broad margin granted by Article 32 of the Spanish Constitution, developed the institution of marriage in accordance with Spanish legal culture “without making it unrecognizable for the image held of this institution in modern Spanish society.”

The last inquiry for the Court was whether same-sex marriage violated the essential content of the fundamental right to marry under Article 32. Again, the answer was that it did not: “The possibility of same-sex persons entering into marriage does not denaturalize or transform this right, nor does it prevent heterosexual couples from freely deciding to marry or not to marry. Heterosexuals are *not* now subject to a smaller scope of freedom than was recognised to them before the reform.” In fact, the Court concluded, as a result of Law 13/2005, “a step forward is being made towards guaranteed personal dignity and the free development of one’s personality (Article 10.1 Constitution<sup>71</sup>), which should be directed at the full effectiveness of fundamental human rights.”

The decision consolidated the recognition of same-sex marriage in Spain which now enjoyed the affirmation of the three branches of government. In the 2015 Eurobarometer, 84% of Spaniards agreed that same-sex marriage should be allowed across Europe.<sup>72</sup> More broadly, the Spanish case highlights a wide range of relevant actors, all contributing to the final resolution of

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<sup>70</sup> A more recent survey, which was not cited by the Court as it came out after the judgment, is a 2013 Ipsos poll showing that 76% of respondents (not just young people) were in favour of same-sex marriage (Ipsos, Same-Sex Marriage Citizens in 16 Countries Assess Their Views on Same-Sex Marriage for a Total Global Perspective, A Global @dvisory – June 2013 – G@45 Same-sex Marriage).

<sup>71</sup> Article 10(1) reads: The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.

<sup>72</sup> Special Eurobarometer 437, “Discrimination in the EU in 2015” (October 2015) at 50.

this contested question: autonomous communities, political parties, the two chambers of the bicameral legislature, the Constitutional Court, foreign courts, and the people themselves. Even though the last point in the timeline was the Constitutional Court judgment, the Spanish case suggests that decentering judicial review is fruitful in revealing the full story. The process of formal recognition of same-sex unions began at the level of autonomous communities but, from a constitutional perspective, this was not the level at which equal marriage could be formally achieved. Therefore, in a hydraulic response, efforts for legal recognition of same-sex marriage had to shift to the legislature. In turn, the bicameral nature of the legislature meant that mobilization both to secure and to oppose same-sex marriage occurred before both chambers. Again, in a hydraulics fashion, when the same-sex marriage bill was first defeated in the Senate, it had to be sent back to the Congress of Deputies. Afterwards, when the People's Party saw its objection in the Senate overridden by the Congress of Deputies, it directed its attention to the judiciary.

#### **IV. The United Kingdom.**

The trajectory of the legalization of same-sex marriage in the UK included the usual milestones: from decriminalization of same-sex sexual relations to civil partnerships to formal legislative recognition of marriage.

The first step was in 1967 when the Sexual Offences Act 1967 decriminalized private homosexual activity between over-21s. However, decriminalization did not mean “condonation or approval.”<sup>73</sup> In fact, the increasing visibility of the gay rights movement also provoked backlash reflected, for instance, in the enactment of section 28 of the Local Government Act 1988 forbidding local authorities from “intentionally promoting homosexuality” or “promoting the teaching . . . of the acceptability of homosexuality as a pretended family relationship.” This was intended to discourage local authorities from funding LGB organizations, or allowing premises to be used for their purposes, and to prevent state schools from presenting any view that suggested that gay relationships could be similar to heterosexual ones. It was repealed in 2003.<sup>74</sup> An interesting feature in the story of increasing liberalization was the Adoption and Children Act

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<sup>73</sup> Stephen Cretney, *Same Sex Relationships: From “Odious Crime” to “Gay Marriage”* (Oxford: Oxford University Press, 2006) at 9.

<sup>74</sup> *Ibid.* at 11-12; Iain MacDonald, “Review: Same Sex Relationships: From ‘Odious Crime’ to ‘Gay Marriage’ by Stephen Cretney” (2007) 27 *Legal Studies* 536.

2002, which permitted gay couples jointly to adopt a child. As a result, opposition to same-sex marriage did not turn on parent-child issues.<sup>75</sup>

Judicial involvement in this area was less pronounced in the UK. However, using its powers under section 3 of the Human Rights Act 1998 (HRA),<sup>76</sup> the House of Lords interpreted domestic legislation in a way to remove incompatibilities with the European Convention on Human Rights (ECHR). In the 2004 case of *Ghaidan v Godin-Mendoza*<sup>77</sup>, the House of Lords had before it paragraph 2 of Schedule 1 to the Rent Act 1977, which guaranteed that the surviving spouse of the original tenant was entitled to succeed to the statutory tenancy after the death of the statutory tenant. These protections also covered the person who was living with the original tenant “as his or her wife or husband.” The House of Lords held that the Rent Act on its ordinary meaning treated survivors of homosexual partnerships less favorably than survivors of heterosexual partnerships without any rational or fair ground for such distinction. Consequently, Godin-Mendoza’s rights under Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the Convention, which is incorporated into domestic law by the HRA, would be infringed. Therefore, section 3 of the HRA required that the legislation at issue be given a Convention-compliant meaning to cover same-sex stable relationships.

Shortly afterwards, civil partnerships were introduced in the UK through the Civil Partnership Act 2004. The bill passed through the House of Commons with little opposition securing 426 votes to 49, although there was more resistance in the House of Lords.<sup>78</sup> Public opinion was supportive of civil partnerships, which proved very popular. Over 100,000 civil partnerships had been formed in the UK by 2011, considerably more than the government’s estimates when enacting the legislation.<sup>79</sup> The introduction of civil partnerships was not the end of the conversation or contestation around the formal recognition of same-sex relationships. Rather, it prompted a new debate on whether equal access to marriage was required under the Human Rights Act 1998.<sup>80</sup> One argument was that civil partnerships were not equal symbolically to

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<sup>75</sup> John Eekelaar, “Perceptions of Equality: The Road to Same-Sex Marriage in England and Wales” (2014) 28 Intl JL Pol’y & Fam 1 at 2.

<sup>76</sup> Section 3(1) HRA provides that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

<sup>77</sup> [2004] UKHL 30.

<sup>78</sup> Eekelaar, *supra* note 75 at 7.

<sup>79</sup> *Ibid.*

<sup>80</sup> Nicholas Bamforth, “Same-sex partnerships: some comparative constitutional lessons” (2007) 1 Eur HRL Rev 47.

marriage.<sup>81</sup> This question confronted the judiciary and was rejected in *Wilkinson v. Kitzinger*<sup>82</sup> on the basis that the availability of civil partnerships satisfied the requirements under Articles 8 (right to respect for private and family life), 12 (right to marry), and 14 (prohibition of discrimination) of the ECHR.

Formal recognition of same-sex marriage would ultimately come by means of national legislation. The Marriage (Same Sex Couples) Act 2013, which allows same-sex marriage in England and Wales, was passed by the UK Parliament in July 2013 and came into force on March 13, 2014. The Marriage and Civil Partnership (Scotland) Act 2014, allowing same-sex marriage in Scotland, was passed by the Scottish Parliament in February 2014 and came into effect on December 16, 2014. The policy had been included in neither the election manifestos of the Conservative Party and the Liberal Party nor in the coalition agreement of these two parties that formed the 2010 coalition government.<sup>83</sup> On March 15, 2012, the government launched a consultation on equal civil marriage asking for views on proposals to enable same-sex couples to marry through a civil ceremony. The consultation period ended on June 14, 2012. The proposals proved highly controversial with strong opinions being voiced both for and against same-sex marriage. The consultation received the highest number of responses to any government consultation—over 228,000 comments were submitted. Certain respondents criticized the consultation process on the grounds that the outcome had been predetermined: the focus was on *how* to provide for same-sex marriage and not on *whether* it should be permitted at all. There were claims that the government was acting without an electoral mandate.

Notwithstanding the strong opposition from religious groups, the Bill introducing the change passed by 400 to 175 votes at its second reading in the House of Commons in February 2013 and completed its passage in the House of Commons with Labour and Liberal Democrat support. An attempt to reject the Bill in the House of Lords in June was defeated by 390 votes to 148. It was enacted on July 17, 2013. There were long debates in both Houses. The second reading

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<sup>81</sup> For a contemporary account of the arguments that the opposite-sex marriage requirement violated the ECHR and a cautionary note about the likelihood that a domestic court would actually accept these arguments, see Wade K. Wright, “The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales” (2006) 20 Intl JL Pol’y & Fam 249.

<sup>82</sup> [2006] EWHC 2022 (Fam).

<sup>83</sup> Eekelaar, *supra* note 75 at 1.

debate took about 5 hours in the House of Commons on February 5, 2013 and even longer in the House of Lords on June 3 and 4.<sup>84</sup>

However, there were few doubts that the Bill would pass. This may well have had to do with social attitudes by that point. A poll conducted by Populus in June 2009 reported that the majority of the public supported same-sex marriage: 61% of respondents agreed “strongly or somewhat” that “gay couples should have an equal right to get married, not just to have civil partnerships.”<sup>85</sup> Table 1 reflects a similar evolution in public opinion.

**Table 1: How much do you agree or disagree that ... gay or lesbian couples should have the right to marry one another if they want to<sup>86</sup>**

	<b>2007</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
<b>(1) Agree strongly</b>	17%	24%	26%	31%
<b>(2) Agree</b>	30%	33%	30%	29%
<b>(3) Neither agree nor disagree</b>	20%	17%	18%	16%
<b>(4) Disagree</b>	14%	12%	11%	9%
<b>(5) Disagree strongly</b>	14%	10%	11%	10%

One interesting feature of the UK case was that the conventional mode of electoral legitimacy was not at play: same-sex marriage had not been part of an electoral manifesto so the claim to an electoral mandate would be tenuous at best. With the judicial and electoral avenues closed, in a hydraulics fashion, the government’s response to the mobilization of equal marriage advocates was to infuse popular legitimacy into the process through an energized public consultation and hearings at the committee stage of the legislative process. This built on an eight-year long debate around civil partnerships and the visibility of officially sanctioned same-sex relationships. The public consultation process was open to everyone and involved both advocates

<sup>84</sup> *Ibid* at 1, 15.

<sup>85</sup> Populus, The Times ‘Gay Britain’ Poll (June 2009), available at <http://www.populus.co.uk/polls/?search=gay&polls-year=2009>.

<sup>86</sup> Drawn from British Social Attitudes Survey 32, “Gay marriage 2007-2014” (2015), available at <http://www.natcen.ac.uk/media/893151/Gay-marriage-2007-2014.pdf>

for same-sex marriage and their opponents. Admittedly, the public debate was narrowed both through the formulation of the consultation question and due to the absence of a public reading stage which could have been built into the legislative process. The process of “public reading” had been piloted for other bills and would have been aptly applicable in the context of same-sex marriage as well.<sup>87</sup> This additional process, if integrated fully into the legislative process,<sup>88</sup> would have allowed for more specific public involvement in drafting the legislative language and addressed the inherent limitations of the committee stage. In any event, the UK example represents a model of public involvement that was superimposed on the legislative process potentially to address any legitimacy lacunae in the conventional electoral mandate model.

The UK model offers a further example of hydraulics in operation that shape and steer constitutional claims within the different nations of the country—I call this phenomenon the “hydraulics of devolution.” Marriage is a devolved issue in the UK. As already noted, the statutory recognition of same-sex marriage in England and Wales was followed by a similar enactment in Scotland a year later. Against the backdrop of the devolved constitutional architecture of the UK, these developments turned the spotlight on Northern Ireland, which has not legalized same-sex marriage. Northern Ireland’s parliamentary system provided for the mechanism of “petitions of concern”; these triggered the requirement for support of a majority of both nationalist and unionist members for legislation to pass even if there was an absolute majority in favour of the enactment. Consequently, this mechanism allowed for an effective veto of legislation. The Democratic Unionist Party (DUP) used this mechanism five times to block same-sex marriage despite majority support in the legislative assembly since 2015 and strong support among Northern Ireland’s citizens.<sup>89</sup> Under Schedule 2 of the Marriage (Same Sex Couples) Act 2013, a marriage of a same-sex couple under the law of England and Wales is to be treated in Northern Ireland as a civil partnership formed under the Civil Partnership Act 2004.

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<sup>87</sup> On the public reading stage of the UK legislative process, see House of Commons Library, “Public Reading Stage of Bills”, SN/PC/06406 (March 2014).

<sup>88</sup> For an empirical analysis of the public reading stage with respect to another bill and suggestions to increase the effectiveness of this participatory strategy, see Cristina Leston-Bandeira & Louise Thompson, “Integrating the View of the Public into the Formal Legislative Process: Public Reading Stage in the UK House of Commons” (2017) 23 *The Journal of Legislative Studies* 508.

<sup>89</sup> See Siobhan Fenton, “My love isn't second-class”: the struggle for marriage equality in Northern Ireland, *The Guardian* (October 19, 2017), available at <https://www.theguardian.com/inequality/2017/oct/19/my-love-isnt-second-class-struggle-marriage-equality-northern-ireland-dup>.



This asymmetry has singled out Northern Ireland as an outlier and sustained a continued national conversation on the question of same-sex marriage, adding ammunition to both sides of the debate: arguments can be made both that this jurisdiction should be brought in line or that it is precisely the historical, political, and cultural particularities in Northern Ireland which call for a different solution from that adopted in the rest of the UK. Since the Northern Ireland Assembly was unable to resolve this question and consequently the legislative avenue was closed, equal marriage advocates redirected their constitutional claims against the status quo in Northern Ireland into the court system.

In *Close*,<sup>90</sup> two same-sex couples who had entered into civil partnerships in 2005, brought a judicial review challenge against Article 6 of the Marriage (NI) Order 2003 (“2003 Order”) which prohibits same-sex marriage. They argued that the 2003 Order unlawfully discriminated against them on the basis of sexual orientation contrary to the Human Rights Act 1998 and Article 8 (right to respect for private and family life), Article 12 (right to marry), and Article 14 (prohibition of discrimination) of the ECHR. The High Court (O’Hara J) began by noting: “The personal experiences of the applicants are described in moving terms in the affidavits lodged on their behalf. Their distress and feeling of exclusion has only increased in recent years as same sex marriage has been introduced through legislation in England, Wales and Scotland, as a result of a referendum in the Republic of Ireland and as a result of decisions taken by legislatures and courts in a growing number of countries.”<sup>91</sup> In other words, devolution and foreign law turned the spotlight on the real effects of discrimination as experienced by same-sex couples in Northern Ireland.

However, this did not suffice for the judicial review application to be successful. Referring to the case law of the European Court of Human Rights, the High Court of Northern Ireland reiterated that the ECHR does not impose an obligation on states to introduce same-sex marriage but only some form of legal recognition of same-sex relationships. This recognition already existed in Northern Ireland through civil partnerships and therefore the Convention rights of the applicants had not been violated. O’Hara J. concluded:

It is not the role of a judge to decide on social policy. That is for the Executive and the Assembly under our constitution. In certain limited circumstances the courts can intervene but this is not one of them. Put simply, the Strasbourg Court

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<sup>90</sup> *Re Close et al* [2017] NIQB 79.

<sup>91</sup> *Ibid* at para 6.

does not recognise a ‘right’ to same sex marriage. . . . If equality in marriage is to be achieved for gay and lesbian couples such as these applicants, it will have to be achieved through the Assembly. I hope that when the Assembly is next asked to consider the issue, those who have the responsibility of voting will read the evidence in this case and in *Re X* in order to understand more completely the issue before them.<sup>92</sup>

It is interesting that the court recognized the dynamics of devolution and sought to speak to the Northern Ireland Assembly while referring the question back to it.

*Re X*,<sup>93</sup> which was mentioned in the last paragraph of *Close* and was decided again by O’Hara J. on the same day as *Close*, added a layer of complication. This was that in *Re X*, X had lawfully married his partner in London under the Marriage (Same Sex Couples) Act 2013 but the law of Northern Ireland, where they lived, did not recognize their relationship as a valid and subsisting marriage but only as a civil partnership under Schedule 2 of the 2013 Act cited earlier in this section. The petitioner argued that, if this provision of the 2013 Act could not be read and given effect to in a way which was compatible with his ECHR rights (under section 3 of the Human Rights Act 1998), the court should issue a declaration of incompatibility (under section 4 of the Human Rights Act 1998). Demonstrating once again the “hydraulics of devolution,” the petitioner argued that “no attempt has been made to justify on tenable grounds the policy decision not to legislate for same sex marriage in Northern Ireland” and the fact that the Scottish Parliament had also legislated for same-sex marriage made “the impasse in Northern Ireland even harder to sustain and justify.”<sup>94</sup> Devolution provided argumentative force to X’s submissions<sup>95</sup> but ultimately the judicial challenge was not successful for the reasons advanced in *Close* as well, namely that the ECHR did not provide a right to same-sex marriage.

Once again, the High Court of Northern Ireland demonstrated an appreciation of the national conversation around these questions noting that “the social policy arguments in favour of same sex marriage were set out in very strong terms during the consultation process which led up to the 2013 Act and during the Parliamentary debates” and concluding “with the suggestion that when this issue is raised again in the Northern Ireland Assembly, as it inevitably will be, those who carry the responsibility of voting will pause to read the papers from the consultation

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<sup>92</sup> *Ibid* at paras 16-17.

<sup>93</sup> *Re X* [2017] NIFam 12.

<sup>94</sup> *Ibid* at para 24.

<sup>95</sup> *Ibid* at para 25 (“it was argued that the strength of the United Kingdom Government’s case for same sex marriage and the potency of the arguments it advanced undermine any tenable resistance to its extension to Northern Ireland”).

process.”<sup>96</sup> However, this did not make any concrete difference for the petitioner. Anthony Lester has criticized *Re X* because it “asked and answered the wrong question.” He has highlighted that *Re X*, unlike *Close*, was “not about the statutory barrier against same sex marriage in Northern Ireland [but] about the refusal in Northern Ireland to respect a same sex marriage lawfully entered into in England. The Northern Ireland judge and the Strasbourg Court have not pronounced on that question and there are strong arguments in X’s favour for concluding that the refusal to recognise an English marriage in Northern Ireland is incompatible with Convention rights.”<sup>97</sup>

The High Court of Northern Ireland has opened a new round in the national conversation on same-sex marriage in the UK which is invigorated by the country’s devolved constitutional architecture. These cases are currently before the Court of Appeal, but the conversation will continue outside the courthouse both in Stormont, the seat of the Northern Ireland Assembly, and in London.<sup>98</sup> More recently, in yet another instance of the “hydraulic process” and in light of the legislative impasse at Stormont and the unsuccessful litigation in Northern Ireland courts, the efforts for equal marriage were shifted back to the Westminster Parliament. On March 27, 2018, Lord Hayward, a conservative peer introduced a private member’s bill “to make provision for the marriage of same sex couples in Northern Ireland.”<sup>99</sup> The bill passed its first reading.<sup>100</sup> The following day, a Labour MP, Conor McGinn, tabled an identical bill in the House of Commons. The second reading debate had been originally scheduled for May 11, 2018. However, the bill was objected to and second reading is currently scheduled for October 26, 2018.<sup>101</sup> Regardless of the outcome, it was evident that the “hydraulics of devolution” was driving this legislative initiative in the Westminster Parliament. Introducing the bill, Conor McGinn MP noted his pride in bringing the bill but also his “reluctance and disappointment” for two reasons: “First, this measure is long overdue. Northern Ireland is the anomaly in these islands when it comes to lesbian, gay, bisexual

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<sup>96</sup> *Ibid* at paras 29, 33.

<sup>97</sup> Anthony Lester, “Should same sex marriage be legally recognised in Northern Ireland?” (2017) 5 Eur HRL Rev 432 at 433.

<sup>98</sup> See the statement by the new Secretary of State for Northern Ireland, reiterating that the decision on same-sex marriage is a “matter for the elected politicians in Northern Ireland” but then, controversially, adding the roll-out of super-fast broadband as an equivalent example, Jack Sommers, “Northern Ireland Secretary Condemned For Comparing Gay Marriage To Broadband Rollout,” The Huffington Post UK (January 23, 2018), available at [http://www.huffingtonpost.co.uk/entry/northern-ireland-karen-bradley-gay-marriage\\_uk\\_5a671ecce4b0dc592a0c4997](http://www.huffingtonpost.co.uk/entry/northern-ireland-karen-bradley-gay-marriage_uk_5a671ecce4b0dc592a0c4997).

<sup>99</sup> Marriage (Same Sex Couples) (Northern Ireland) Bill (HL Bill 95).

<sup>100</sup> HL Deb 27 March 2018, vol 790, col 723.

<sup>101</sup> The progress of the bill is available on the UK Parliament’s website at <https://services.parliament.uk/bills/2017-19/marriagesamesexcouplesnorthernirelandno2.html>.

and transgender rights. . . . Secondly, this measure should be enacted in the Northern Ireland Assembly. Let me say clearly that that is my strong preference. I know that Members across the House desperately want to see the power-sharing institutions restored at Stormont. However, the Assembly being in cold storage should not mean that Northern Ireland remains a cold house for LGBT rights. The de facto suspension of the devolved legislature does not mean that equality for same-sex couples can be suspended indefinitely, because rights delayed are rights denied.”<sup>102</sup>

## V. Ireland.

If Northern Ireland brings to the fore the mechanics of devolution, the Republic of Ireland presents a different institutional novelty, direct citizen involvement in constitutional change through referendums. Indeed, citizen involvement is considered of utmost importance when it comes to changes in the fundamental law in the country, namely constitutional amendments.<sup>103</sup> The requirement of citizen involvement in amending the Irish Constitution, though solely at the invitation of Parliament (Oireachtas), has been described as a “notable feature” of the Constitution.<sup>104</sup> The legalization of same-sex marriage via referendum makes Ireland stand out as, until that point, direct citizen involvement in popular initiatives had mostly resulted in defeats for the cause of same-sex marriage. However, Ireland is not an outlier when it comes to the operation of the hydraulics dynamics described earlier: the decision was put to a referendum because the legislative and judicial avenues were not (or were perceived not to be) available.

The first step on the road to legalizing same-sex marriage was the decriminalization of private, consensual sexual activity between adults of the same sex. In 1988, the European Court of Human Rights held that provisions in the Offences against the Person Act, 1861 and the Criminal Law Amendment Act, 1885, which penalized “certain homosexual activities,” violated the right to respect for private life (including sexual life) under Article 8 of the ECHR.<sup>105</sup> Decriminalization took effect through domestic legislation five years later.<sup>106</sup> However, courts had consistently held

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<sup>102</sup> HC Deb 28 March 2018, vol 638, col 790.

<sup>103</sup> See, e.g., Cheryl Saunders, “Constitution Making in the 21st Century” (2012) 4 *International Review of Law 1* (noting, in a broader context, that people “now expect actually to be involved in the constitution-making process and not just symbolically associated with it”).

<sup>104</sup> Fergus Ryan, “Ireland’s Marriage Referendum: A Constitutional Perspective” (2015) DPCE Online (*Diritto Pubblico Comparato Ed Europeo*) 2015-2 at 2.

<sup>105</sup> *Norris v Ireland* (Application no. 10581/83), Judgment of 26 October 1988.

<sup>106</sup> Ryan, *supra* note 104 at 7.

that the definition of marriage involved a man and a woman.<sup>107</sup> In 2004, the Civil Registration Act 2004 codified the common law prohibition of same-sex marriage.<sup>108</sup> This 2004 Act was enacted to modernize the procedures for registering births, deaths, adoptions, and marriages. Section 2(2)(e) stated: “For the purposes of this Act there is an impediment to a marriage if . . . both parties are of the same sex.”

This provision lent support to the holding in the 2006 *Zappone* case<sup>109</sup> which, in conjunction with other case law, may have contributed to the path of a constitutional referendum in Ireland. In *Zappone*, a same-sex couple, who had married in Vancouver in 2003, requested that they be recognized as a married couple for the purposes of the Irish Tax Code. The High Court rejected their claims, holding that neither Article 41 of the Irish Constitution, which protects the family and the “institution of marriage,”<sup>110</sup> nor the European Convention on Human Rights recognized the right to same-sex marriage. The High Court began by noting that the framers of the Irish Constitution accepted the “traditional understanding” of marriage.<sup>111</sup> However, the Court also accepted that the Constitution is a “living instrument”<sup>112</sup> endorsing an earlier case in which Walsh J. had stated that “no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.”<sup>113</sup> This raised the question of the basis on which the court is to interpret or ascertain the “prevailing ideas and concepts.”

Adopting this approach, the High Court held that it could not “redefine” marriage to cover same-sex couples. It continued that there was “little evidence” of a “changing consensus” around same-sex marriage with “some limited support” in Canada, Massachusetts, South Africa, Belgium, the Netherlands, and Spain. However, “in truth, it is difficult to see that as a consensus, changing or otherwise.”<sup>114</sup> By contrast, the High Court noted that section 2(2)(e) of the Civil Registration Act 2004, which set out what was previously the common law exclusion of same-sex couples from

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<sup>107</sup> See Brian Tobin, “The regulation of cohabitation in Ireland: achieving equilibrium between protection and paternalism?”, in Robert Leckey, *Marital Rights* (London: Routledge, 2017) 177 at 178n.2. See, in particular, *DT v CT* [2003] I ILRM 321 at 374 (in which Murray J described marriage as “a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution”).

<sup>108</sup> Brian Tobin, “Marriage Equality in Ireland: The Politico-Legal Context” (2016) 30 *Intl JL Pol’y & Fam* 115 at 116 [Tobin, Marriage Equality].

<sup>109</sup> *Zappone v Revenue Commissioners* [2006] IEHC 404 [*Zappone*].

<sup>110</sup> Article 41.3, in particular, provides that “[t]he State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”

<sup>111</sup> *Zappone*, *supra* note 109 at para 262.

<sup>112</sup> *Ibid* at para 275.

<sup>113</sup> *McGee v. Attorney General* [1974] I.R. 284 at 319.

<sup>114</sup> *Zappone*, *supra* note 109 at para 278.

the institution of marriage, was “of itself an indication of the prevailing idea and concept in relation to what marriage is and how it should be defined.” Since the 2004 Act was in force, it was entitled to a “presumption of constitutionality.”<sup>115</sup>

The High Court’s deference to the approach to marriage reflected in section 2(2)(e) of the Civil Registration Act 2004 was criticized: this section had never been properly debated by Parliament prior to its enactment, thus casting doubt on the assertion that the provision represented the “prevailing legislative view” on the understanding of marriage.<sup>116</sup> *Zappone* also gave rise to opposing views as to the relationship between ordinary legislation and the Irish Constitution on the question of same-sex marriage. If Article 41 of the Constitution does not *mandate* the recognition of same-sex marriage, does it *prohibit* such recognition? While the historical reading of the Constitution would suggest that only opposite-sex marriage is contemplated, if “the key factor was consensus in society today, as represented in the most recent legislation on the point,” then Parliament could arguably choose to reflect a “new consensus” by legislating for same-sex marriage.<sup>117</sup> Like the Civil Registration Act 2004, the statute introducing same-sex marriage would then be entitled to a presumption of constitutionality. However, this conclusion was far from certain. Indeed, key political actors stated publicly their understanding that legalization of same-sex marriage through ordinary legislation could be on constitutionally shaky ground.<sup>118</sup>

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<sup>115</sup> *Ibid* at paras 279-80.

<sup>116</sup> Tobin, Marriage Equality, *supra* note 108 at 119.

<sup>117</sup> See Conor O’Mahony, “Constitution is not an obstacle to legalising gay marriage,” *The Irish Times* (July 16, 2012), available at <https://www.irishtimes.com/opinion/constitution-is-not-an-obstacle-to-legalising-gay-marriage-1.537288>. See also Eoin Daly, Democracy, citizenship and the marriage referendum (July 8, 2013), available at <http://humanrights.ie/children-and-the-law/democracy-citizenship-and-the-marriage-referendum/> (“Marriage is not defined in the Constitution, and the courts have emphasised that the meaning of constitutional terms can evolve over time along with social change. We are not, thankfully, stuck in the permafrost of 1937 in interpreting our basic law”); Tobin, Marriage Equality, *supra* note 108 at 119 (noting that the High Court’s deference to the legislative understanding of marriage was “most significant, and because of the synergy between any future legislation altering the capacity to marry and the constitutional right to marry that [the court] envisaged, the recent Marriage Equality Referendum may not have been at all necessary”); Ryan, *supra* note 104 at 12 (“The Constitution does not in fact expressly define or delimit marriage. It was, thus, arguably, open to the legislature to do so. In interpreting and applying the Constitution, the courts have tended to defer heavily to the Oireachtas (Parliament) in its role as lawmaker”).

<sup>118</sup> Ryan, *supra* note 104 at 12 (noting that this was the advice of successive Attorney Generals); O’Mahony, *supra* note 117 (reporting that, after *Zappone*, “the late Brian Lenihan, minister for justice at the time, stated it was his ‘strong belief, based on sound legal advice, that gay marriage would require constitutional change’. This view has since been repeated ad nauseam by politicians queuing up to make the point”); Tobin, Marriage Equality, *supra* note 108 at 121 (noting that “when civil partnership legislation was proposed, the then Minister for Justice, Dermot Ahern, claimed that the Government was acting on the advice of the then Attorney General, Paul Gallagher, who was of the view that ‘anything that would provide, or try to replicate “marriage” in this legislation would not stand constitutional scrutiny”); RTE, Full gay marriage would require referendum – Quinn (July 10, 2012), available at <https://www.rte.ie/news/2012/0710/328518-gay-marriage-referendum/> (“Minister for Education Ruairi Quinn has

This constitutional interpretation did not pose any obstacles to the introduction of civil partnerships by ordinary legislation in 2010.<sup>119</sup> However, it did influence how Ireland came to recognize same-sex marriage five years later. With courts refusing to read Article 41 of the Irish Constitution as mandating same-sex marriage, with key political actors considering the ordinary legislative avenue closed or strategically avoiding testing out their understanding of the Constitution,<sup>120</sup> and with members of the LGBT movement being cautious about pushing for recognition in the legislature with the risk of seeing this overturned by the Supreme Court, the only available route was constitutional amendment.<sup>121</sup>

The coalition government of Fine Gael and the Labour party, which came to power in 2011, set this process in motion. A resolution of the two Houses of Parliament set up a special Constitutional Convention to discuss amendments to the Constitution of Ireland, including same-sex marriage. The Constitutional Convention consisted of 100 members: 66 citizens selected randomly so as to be broadly representative of Irish society; 33 parliamentarians (29 members of the Oireachtas and 4 from the Northern Ireland Assembly); and an independent Chairperson appointed by the government.<sup>122</sup> The Constitutional Convention was described as “a major experiment in deliberative democracy” involving for the first time in Irish history a process of deliberation among ordinary citizens in the lead-up to a referendum.<sup>123</sup> On April 13-14, 2013, the members of the Convention considered a record number of submissions (1077) by citizens,

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said there would need to be a referendum to introduce gay marriage in Ireland”); Dáil Éireann Debate Vol. 823 No. 1, Written Answer 120 by Minister for Justice and Equality (Deputy Alan Shatter) (November 28, 2013): “The clear position arising from case law in Ireland - and there is ample case law to this effect - is that marriage is understood as being between one man and one woman, ideally for life. The Government considers that it would be constitutionally unsound to legislate for marriage between same-sex couples in the absence of a constitutional amendment.”

<sup>119</sup> This ordinary legislation was the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Between April 2011 and June 2014, almost 3,000 same-sex couples had registered civil partnerships (Peter Dunne, “Civil partnership in an Ireland of equal marriage rights” (2015) 53 *Irish Jurist* 77 at 78).

<sup>120</sup> See Johan A. Elkink, David M. Farrell, Theresa Reidy & Jane Suiter, “Understanding the 2015 marriage referendum in Ireland: context, campaign, and conservative Ireland”, (2017) 32 *Irish Political Studies* 361 at 364 [Elkink et al.] (“The decision to opt for a referendum over legislation probably arose from a cautious streak in the governing parties. Fearing the political repercussions if a marriage equality law was struck down by the Supreme Court and had to go to referendum anyway, the government opted for the referendum route”).

<sup>121</sup> See Fiona de Londras, “In defence of judicial innovation and constitutional evolution”, in Laura Cahillane, James Gallen & Tom Hickey, *Judges, Politics and the Irish Constitution* (Manchester: Manchester University Press, 2017) 9 at 12 (noting that “from the mid 2000s the Irish government claimed, on the advice of law officers, that same-sex marriage was unconstitutional” and adding that, even though this was a contested question, “it became accepted wisdom that marriage equality could be achieved only by referendum and constitutional change”).

<sup>122</sup> The Convention on the Constitution, Third Report of the Convention on the Constitution: Amending the Constitution to provide for same-sex marriage (June 2013).

<sup>123</sup> Elkink et al., *supra* note 120 at 361-62.

advocacy groups, and representative organizations; attended presentations by experts in law and social science (family therapy/ psychology) as well as by advocacy groups; participated in roundtable discussions and plenary sessions on the themes emerging from the roundtable discussions; and finally voted by a majority of 79% in favour of amending the Constitution to provide for same-sex marriage.<sup>124</sup> In the referendum that took place on May 22, 2015, with a turnout of 60.5%, a 20-year record in the history of Irish referendums until that point, 62% of the electorate approved the proposed amendment.<sup>125</sup> The 34<sup>th</sup> Amendment to the Irish Constitution provides that “marriage may be contracted in accordance with law by two persons without distinction as to their sex.”<sup>126</sup>

Putting the question of same-sex unions to a popular vote was not novel<sup>127</sup> although the constitutionalization of equal marriage via referendum was a first worldwide. The institutional dynamics that favoured this institutional route were similarly not novel. The bottom-up demands for recognition of same-sex marriage were first channeled through the usual judicial and legislative avenues. When these avenues appeared closed to these constitutional claims, these demands were diverted to the constitutional route. The familiar “hydraulics model” was in operation in Ireland as well. In light of the country’s background constitutional structure, the “constitutional route” mandated direct citizen involvement through a referendum.

It was this institutional particularity of the Irish case that made it controversial. There were two broad lines of criticism—I will call them the “democracy argument” and the “liberal argument.” The “democracy argument” decries the “over-constitutionalization” of politics: “it is often argued that the fact of the ‘people’ having the final say on important social questions, such as the meaning

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<sup>124</sup> Convention on the Constitution, *supra* note 122 at 3-8; Elkink et al., *supra* note 120 at 363.

<sup>125</sup> Elkink et al, *supra* note 120 at 361-62. Placed in historical perspective, this referendum had the tenth highest participation rate out of 39 referendums held in Ireland since 1937 (Gavin Barrett, “The Use of Referendums in Ireland: An Analysis” (2017) 23 *The Journal of Legislative Studies* 71 at 85-88). Since this study, a more recent referendum has been added to the history of referendums in Ireland. On May 25, 2018, 66.4% of the Irish electorate voted to repeal the Eighth Amendment to the Constitution, which provided that “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.” The turnout for this referendum was 64.1%, thus surpassing the referendum on same-sex marriage; see Henry McDonald, Emma Graham-Harrison & Sinead Baker, “Ireland votes by landslide to legalise abortion,” *The Guardian* (May 26, 2018), available at <https://www.theguardian.com/world/2018/may/26/ireland-votes-by-landslide-to-legalise-abortion>.

<sup>126</sup> Legal challenges that had sought to prevent the validation of the referendum result and delay the introduction of the necessary legislation were unsuccessful; see Donncha O’Connell, “Ireland - marriage equality introduced by referendum” (2015) Public Law 705.

<sup>127</sup> See, e.g., ballot initiatives in the United States. The question had normally been put in terms of a constitutional ban on same-sex marriage, such as Prop 8 discussed earlier in the text. By contrast, in November 2012, voters in Maine, Maryland, and Washington voted to approve the statutory legalization of same-sex marriage.



of marriage, is a sign of democratic vitality. Yet the reluctance of our parliament to independently appraise equal marriage rights – in marked contrast to our neighbours – is, at one level, simply a further sign of dysfunction in our parliamentary democracy, a negation of political choice.”<sup>128</sup> The “liberal argument” cautions against putting the equal rights of citizens to a popular vote where constitutionally impermissible motives (or “animus,” to use a term from US case law) may be covered by the secrecy of the voting booth.<sup>129</sup> The outcome of the Irish referendum may have been positive, the argument would go, but this had not been the past and may well not be the future of popular initiatives.

Both of these concerns are valid but should be contextualized in the Irish case. The referendum had been preceded by deliberation in the Constitutional Convention. In a recent study, awareness of the Convention, which was the case in 46% of the sample, was positively correlated with a “Yes” vote to legalization of same-sex marriage. While there was “no discernible impact on the likelihood of turning out to vote,” the study suggests that “the involvement of the Convention in the establishment of the referendum has had an impact on the deliberative nature of the referendum in the wider community.”<sup>130</sup> This observation should be combined with the high visibility media campaign and extensive canvassing efforts which resulted in a record-setting turnout.<sup>131</sup> The referendum was a “major political event [that helped] establish the Constitution as an active site for debates about society’s values and principles”<sup>132</sup> when the legislative and judicial sites of constitutional contestation favoured the status quo and meant that democratic constitutionalism could take the form of neither political nor legal constitutionalism *per se*.

## **VI. Conclusion: Comparative and normative lessons.**

What is to be learned from these maps of the multiple actors raising, and resolving, constitutional claims? It had already been pointed out in the literature that we should not be quick

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<sup>128</sup> Daly, *supra* note 117.

<sup>129</sup> See Kenji Yoshino, *Speak Now: Marriage Equality on Trial* (New York, NY: Crown Publishers, 2015) at 58 (noting that for faith-based opponents to same-sex marriage “a ballot initiative is the friendliest forum. Shielded, often literally, by a curtain, voters may cast their ballots on whatever grounds they wish, including religious ones. If the law is challenged in court, it will be much harder to discern whether it was passed with the requisite secular purpose because it will be harder to discern purpose of any kind”).

<sup>130</sup> Elkind et al., *supra* note 120 at 371-72.

<sup>131</sup> *Ibid* at 366, 373, 376.

<sup>132</sup> Scott Stephenson, The Constitutional Referendum in Comparative Perspective: Same-Sex Marriage in Ireland and Australia, Int’l J. Const. L. Blog, June 4, 2015, available at: <http://www.iconnectblog.com/2015/06/the-constitutional-referendum-in-comparative-perspective-same-sex-marriage-in-ireland-and-australia>.

to associate controversies over same-sex relationships with “bold judicial pronouncements on constitutional rights [since] much of the worldwide progress for same-sex relationship recognition has occurred at the legislative level, often without overt prompting from courts.”<sup>133</sup> This conclusion is important and correct but should not lead to an oversimplification of the role of actors beyond the courts. The conventional account of judicialization should not be replaced by the alternative conventional account of legislative supremacy.

Instead, this article argues that both accounts have explanatory value to the extent that they turn the spotlight on key actors (courts or legislatures) without, however, obscuring the role of other stakeholders who seek and play a role in the development of constitutional law in different countries. We have seen, for instance, that decentralization arrangements empower a set of local actors. This is especially salient in the US example where the social movement strategy for equal marriage (up until *Perry*) had been to target state legislatures and state courts. There was a parallel process in Spain where autonomous communities took the lead in establishing civil unions. Of course, the different institutional frameworks shape the role of these actors: for example, the Spanish Constitution stipulates that autonomous communities cannot regulate civil marriage (Art. 149.1.viii). This accounts for the form of official recognition of same-sex relationships as civil unions. In an analogous fashion, marriage is a devolved issue in the UK. Recognition of same-sex marriage in England and Wales was followed by a similar legislative move in Scotland and new rounds of litigation in Northern Ireland which remained an outlier by not following the pattern of statutory legalization.

Either way, the debate in one jurisdiction is enriched thanks to developments in other jurisdictions within a country. All these sub-national (or decentralized) developments contributed to the national conversation and added impetus to the process of generalizing same-sex marriage nationally. The US Supreme Court declined to intervene to legalize same-sex marriage across the nation in 2013 but did so in 2015 on the basis of wider agreement at the state level. In other words, the process was not as court-driven as the standard account may suggest. Conversely, in Spain the last word was neither the legislature’s nor the Constitutional Court’s but rather shared through an inter-institutional consensus. The Constitutional Court judgment came in last, but the institutional

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<sup>133</sup> Kenji Yoshino & Michael Kavey, “Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law”, in Michel Rosenfeld & András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1079 at 1091.

setting was significant: the Court did not legalize same-sex marriage itself but recognized the margin of legislative judgment, which the legislature had exercised in accordance with constitutional principles. It would be difficult to imagine a different outcome when significant majorities in the autonomous communities, the legislature, and the public were moving in the same direction. Last, in all the country cases, the national conversation around these issues will continue in terms of reconciling advances in LGBT rights with claims made on the basis of other individual rights, notably freedom of conscience, religion, and expression.<sup>134</sup> In an interesting inversion, former majorities employ the language of individual rights to seek accommodation.<sup>135</sup>

This analysis should not be taken to suggest that variations in the institutional, historical, political, and social contexts do not matter. They do, among other reasons, because they help to explain the different institutional forms that the voices of multiple actors take. Even though institutional and procedural forms vary, the case studies demonstrate that the same overarching hydraulic processes are at play across jurisdictions. This is the common underlying mechanism that prompts and sustains constitutional evolution. When social movements are shut out of one forum, they channel their constitutional claims through other institutional avenues.<sup>136</sup> For instance, when pro-LGBT advocates faced the silence or hostility of legislators in the US, they steered their energy toward courts (state courts first, federal courts at later stages). When the conservative People's Party in Spain saw its objection in the Senate overridden by the Congress of Deputies, members of the party directed their attention to the judiciary. When judicial avenues were blocked and political campaigns not utilized in the UK, the voices of different actors were brought in through unprecedented involvement in a public consultation process. When neither the ordinary legislative nor the judicial avenues appeared as fruitful options in Ireland, the same bottom-up

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<sup>134</sup> See, e.g., the interesting and difficult cases of “gay wedding cakes” that reached the US and UK Supreme Courts: *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Docket 16-111 and *Lee v Ashers Baking Company*, UKSC 2017/0020, respectively. The US Supreme Court handed down its judgment on June 4, 2018 (584 U. S. \_\_\_\_ (2018)).

<sup>135</sup> See Reva Siegel, “The constitutionalization of abortion”, in M. Rosenfeld and A. Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1057 at 1077 (noting that “rhetorical inversions of this kind may emerge as movements employ the discourse of a reigning constitutional order in order to challenge it”).

<sup>136</sup> The “hydraulics process” proposed in the text as a key explanatory factor for constitutional evolution are not a new phenomenon. For an example from the 19th century, see Kent Roach, “The Judicial, Legislative and Executive Roles in Enforcing the Constitution: Three Manitoba Stories”, in Richard Albert & David R. Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2017) 264 at 300 (“The Manitoba minorities made their rights claims to the executive, the legislature and the courts. They asserted their rights to anyone who would listen”).

constitutional claims were transformed into Constitutional amendment claims in the course of a referendum campaign that altered the Irish Constitution.

Furthermore, the focus in this article is not on *how* bottom-up demands around specific issues are generated in the first place or on the detailed conditions of success—for example, through the politics of visibility in the context of LGBT rights.<sup>137</sup> Rather, the historical institutionalist approach applied in this article sheds light on how bottom-up demands for same-sex marriage responded to hydraulic processes and were thus channeled institutionally in diverse ways in countries with different constitutional structures. Of course, institutional positions and policy milestones contribute or feed back into the cultural, political, and social forces that sustain and invigorate grassroots mobilization. Indeed, the analysis in this article has pointed to such instances, namely the role of institutions as part of the legal and political culture and as important participants in national conversations around same-sex marriage. From this perspective, this article is in conversation with earlier scholarship on “legal opportunity structure” (LOS), which has highlighted that legal reform is “contingent on the interaction of a variety of institutional, cultural, and strategic factors.”<sup>138</sup> The LOS framework suggests that social movements advocating legal change are constrained by the availability of both “cultural” and “legal stock.” The latter means that societal actors must structure their claims to correspond with “categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law.”<sup>139</sup> This analysis further suggests that while litigation creates “moments of opportunity” for legal reform, these are “bounded by the specific legal and political context.”<sup>140</sup> Consequently, “similar legal decisions occurring in different [countries] may create dissimilar opportunities for action because of differences in each [country’s] LOS.”<sup>141</sup> The focus in this article has been on the institutional side of this story, on the institutional dynamics that explain why the recognition of same-sex marriage took the particular institutional forms and how these forms channel democratic demands for constitutional evolution.

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<sup>137</sup> For a recent, interesting account on this point, see Phillip M. Ayoub, *When States Come Out: Europe's Sexual Minorities and the Politics of Visibility* (New York, NY: Cambridge University Press, 2016).

<sup>138</sup> Andersen, *supra* note 34 at 200, 8 ff.

<sup>139</sup> *Ibid* at 12.

<sup>140</sup> *Ibid* at 15.

<sup>141</sup> *Ibid* at 176. This argument is made in the context of different states within the United States but can easily be transferred to apply to different countries.

Two concluding observations are in order. The main argument in this article is analytical and explanatory. The previous pages have provided a comparative account of institutional interactions and forms of citizen engagement in the process of advancing constitutional claims. These processes respond to similar forces—that is, common functional demands for democratic involvement in shaping constitutional meaning which, in turn, are shaped by the “hydraulic processes” described earlier. In other words, the case studies have demonstrated how the interface between common bottom-up demands and the same overarching hydraulic process on the one hand and different institutional contexts and background structures on the other generated different modalities of recognizing same sex-marriage. Therefore, despite important variations across jurisdictions owing to fundamental legal and contextual differences, the story is ultimately one of constitutional development arising from a multiplicity of constitutional actors. This analytical framework can be applied to other case studies.<sup>142</sup> For instance, still in the context of same-sex marriage but in another country, Christine Bateup has offered a “positive, society-wide account of dialogue” in Canada arguing that “[n]ot only have judicial decisions acted as the catalyst for widespread political and popular debate on the issue of same-sex marriage, but the bold moves of the judiciary in this area appear to be connected to emerging popular support.”<sup>143</sup> More recently, Brenda Cossman has offered a rich story of same-sex marriage in Canada that moves beyond the “simplistic dichotomies . . . pitting courts against legislatures.” Cossman’s account sheds light on the deep divisions and contestation within the Canadian federal government over the question of same-sex marriage, and on the use of court decisions by proponents of equal marriage to convince both cabinet colleagues and the public.<sup>144</sup>

Moreover, the story told in this article is an invitation for further research applying this framework to other constitutional rights claims, such as trans rights or abortion.<sup>145</sup> One recent

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<sup>142</sup> At the time of this writing, twenty-seven jurisdictions around the world have recognized same-sex marriage (Pew Research Center, “Gay Marriage Around the World” (August 8, 2017), available at <http://www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/>). The paradigm proposed in this article is an invitation for further scholarship examining the complex historical, institutional, and cultural contexts that, in conjunction with “hydraulic processes,” have shaped the forms of same-sex marriage recognition in other countries over the past two decades.

<sup>143</sup> Christine Bateup “Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective” (2007) 21 *Temple Int’l & Comp LJ* 1 at 47. This account is developed further *ibid* at 47-56.

<sup>144</sup> Brenda Cossman, “Same Sex Marriage beyond Charter Dialogue: Charter Cases and Contestation within Government” (forthcoming in *UTLJ*). I wish to thank Brenda Cossman for sharing her manuscript with me.

<sup>145</sup> See, e.g., the special volume on “Transfiguring Justice: Trans People and the Law” in the *University of Toronto Law Journal* (vol. 68(1)), especially Florence Ashley, “Don’t be so hateful: The insufficiency of anti-discrimination

development is presented here by way of example. Several themes discussed in this article emerged again in a recent UK Supreme Court decision on abortion in Northern Ireland.<sup>146</sup> Under sections 58-59 of the Offences against the Person Act 1861 and section 25(1) of the Criminal Justice Act (Northern Ireland) 1945, it is a criminal offence to receive or perform an abortion in Northern Ireland except when the abortion is carried out in good faith to preserve the life of the woman, or where continuing the pregnancy would make her a “physical or mental wreck.”<sup>147</sup> The Northern Ireland Human Rights Commission (NIHRC) challenged the compatibility of the law in Northern Ireland with Articles 3 and 8 of the European Convention on Human Rights (ECHR), insofar as this law prohibits abortion in cases of fatal and other foetal abnormality, rape, and incest. On the substantive compatibility issues, a majority of the UK Supreme Court held that the current law is incompatible with the right to respect for private and family life under Article 8 of the ECHR, insofar as it prohibits abortion in cases of rape, incest, and fatal foetal abnormality. However, a majority of the Court also concluded that the NIHRC did not have standing to bring these proceedings and accordingly that the Court did not have jurisdiction to make a declaration of incompatibility in this case under s. 4 HRA.

Interestingly for present purposes, the majority inserted the voice of the public into the judgment by referring to opinion polls which had been submitted by the NIHRC. These surveys demonstrated strong public support for changes in the law to permit abortion in cases of rape, incest, and fatal foetal abnormality.<sup>148</sup> Even so, Lord Mance continued: “Views elicited by opinion polls cannot by themselves prevail over the decision to date by the Northern Ireland Assembly to maintain, at least for the present, the existing policy and law.”<sup>149</sup> However, other members of the Court noted that “this evidence cannot be lightly dismissed when the argument is that profound

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and hate crime laws in improving trans well-being” (2008) 68 UTLJ 1; Brenda Cossman, “Gender identity, gender pronouns, and freedom of expression: Bill C-16 and the traction of specious legal claims” (2008) 68 UTLJ 37; Kyle Kirkup “The origins of gender identity and gender expression in Anglo-American legal discourse” (2008) 68 UTLJ 80. On abortion, the enactment of the Eighth Amendment to the Irish Constitution in 1983 and its repeal in May 2018 would be a fruitful example to explore the application of this model; see, e.g., Fiona de Londras & Mairead Enright, *Repealing the 8<sup>th</sup>: Reforming Irish abortion law* (Bristol: Policy Press, 2018). As noted previously, on May 25, 2018, 66.4% of the Irish electorate voted to repeal the Eighth Amendment to the Constitution.

<sup>146</sup> *Re Northern Ireland Human Rights Commission’s Application for Judicial Review* [2018] UKSC 27.

<sup>147</sup> This is the “Bourne exception” following *R v Bourne* [1939] 1 KB 687.

<sup>148</sup> *Ibid* at para 110 (Lord Mance).

<sup>149</sup> *Ibid* at para 111.

moral views of the public are sufficient to outweigh the grave interference with the rights of the pregnant women entailed in making them continue their pregnancies to term.”<sup>150</sup>

Recalling themes that we encountered in the context of same-sex marriage in Northern Ireland, the UK Supreme Court further noted that, in the case of criminalizing abortion, once again Northern Ireland was an outlier compared to both the rest of the United Kingdom and the Republic of Ireland:

Northern Ireland is . . . almost alone in the strictness of its current law, with Ireland’s even stricter regime having been reconsidered in the referendum held on 25 May 2018, in which the people of that country voted by a large majority (66.4%) to replace the Eighth Amendment of the Irish Constitution . . . . None of this of course means axiomatically that the Northern Irish position may not be justifiable. The margin of appreciation has its domestic homologue in the respect due to “the decisions of a representative legislature” . . . . *But the close ties between the different parts and peoples of the United Kingdom make it appropriate to examine the justification for the differences in this area with care. One might think that this would also apply as between peoples living and able freely to interchange with each other on the same island.*<sup>151</sup>

Just as in *Close*, which as discussed in Part IV involved a challenge against the prohibition of same-sex marriage in Northern Ireland, devolution and foreign law turned the spotlight on the real effects of discrimination as experienced by same-sex couples in Northern Ireland, devolution and foreign law in this context turned the spotlight on the real effects of the abortion law and “ongoing suffering being caused by it”<sup>152</sup> as experienced by women in Northern Ireland. This is one example in which the analytical framework proposed in this article has broader implications beyond the marriage context and invites future studies to tell more complex stories in other domains.

Last, this analytical framework can also lay the groundwork to engage in broader normative debates on constitutional development.<sup>153</sup> These normative questions cannot be treated

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<sup>150</sup> *Ibid* at para 24 (Lady Hale). In a similar vein, Lord Kerr (with whom Lord Wilson agreed) stated that “at the least, [the surveys] served to cast substantial doubt on the claim . . . that opposition to the change in the law is firmly embedded in the minds and attitudes of the people of Northern Ireland” (*ibid* at para 325).

<sup>151</sup> *Ibid* at para 120 (Lord Mance) (emphasis added).

<sup>152</sup> *Ibid* at para 135 (Lord Mance).

<sup>153</sup> In an earlier article, Barry Friedman had stressed the descriptive nature of the account of constitutionalism he proposed while also recognizing that it was not always possible to bracket the normative questions; see Barry Friedman, “Dialogue and Judicial Review” (1997) 91 Mich L Rev 577 at 580 (noting that the goal of his article “was to redescribe the landscape of American constitutionalism in a manner vastly different than most normative

exhaustively in the context of this article; however, the preceding analysis can contribute, to evoke the familiar image from an earlier section, to the ongoing conversation in constitutional theory about the appropriate role of different institutions. From a normative perspective, our starting point should be neither political nor legal constitutionalism but instead *democratic* constitutionalism. The focus on democratic constitutionalism reflects a normative commitment to inclusive interpretive communities, which include both elite actors but also grassroots movements that test their claims through every possible institutional avenue drawing on a broader public debate that occurs outside the courthouses and the legislatures.<sup>154</sup> This emphasis on inclusive, public, and inter-institutional conversation facilitates a dynamic and sustainable interpretation of constitutional principles that reflects bottom-up constitutional evolution rather than top-down delivery of constitutional meaning.

In other words, democratic constitutionalism is the fundamental normative commitment and the main driving force for the recognition of constitutional claims. This article has suggested that democratic constitutionalism can take multiple forms as it operates within the institutional environment and constraints of each jurisdiction and is shaped by hydraulic processes. In turn, these various forms may have been captured by the conventional labels of legal or political constitutionalism, but this should not be a simple binary choice. The US model of legal constitutionalism reflected in *Obergefell* was, in fact, the culmination of a national conversation involving multiple actors at all levels of government as well as grassroots mobilization (and counter-mobilization) which shaped judicial reasoning and outcomes. In Spain, neither legal nor

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scholarship. At times this article slips across the line into prescription, but by and large the task is descriptive. The idea is to clear the way so that later normative work can proceed against the backdrop of a far more accurate understanding of the system of American constitutionalism”).

<sup>154</sup> Beginning with the idea that “adjudication is interpretation,” Owen Fiss has linked the notion of an “interpretive community” to authority: “authority can only be conferred by a community. Accordingly, the disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative” (Owen M. Fiss, “Objectivity and Interpretation” (1982) 34 Stan L Rev 739 at 745). However, Harold McDougall has noted that Fiss’s delineation of an “interpretive community” is exclusive as it covers only an elite group of lawyers and judges who wield state power (Harold A. McDougall, “Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process” (1989) 75 Cornell L Rev 83 at 100, 110). McDougall advances instead the idea of an “implementive community,” which he defines as a “system-oriented leadership group, sprung from an interpretive community, which seeks to advance the social causes of the community by resort to the legal system, including the courts, legislature, and administrative bureaucracy” (*ibid* at 85n.10). McDougall’s broader definition is consistent with the approach in this article. Indeed, he recognizes the idea of institutional multiplicity noting that the actors in the dialogue around civil rights “have extended far beyond the three principal branches of the federal government. Policy-making agencies and officials of government-federal, state, and local-may be called upon to implement federal civil rights law, both by official pronouncement and by force of example. . . . Private participants of various stripes, including corporate executives, labor union officials, and school administrators, join the public actors” (*ibid* at 120).



political constitutionalism can describe accurately the process of inter-institutional consensus that drew on the evolving legal culture, which in turn reflected domestic public opinion, “Western comparative law,” and previous initiatives in the autonomous communities. In the UK, the label of political constitutionalism might appear to have intuitive appeal but should not sideline the direct public involvement and the “hydraulics of devolution” discussed in Part IV. In Ireland, neither the ordinary legislative nor the judicial avenues were available. Therefore, democratic constitutionalism took the form of neither political nor legal constitutionalism *per se*. Instead, bottom-up constitutional claims were transformed into Constitutional amendment claims which involved the people directly in the course of the referendum campaign but also in the Constitutional Convention.

In conclusion, adopting democratic constitutionalism as our starting point allows flexibility in approaching a range of different jurisdictions with a view to tracing how different institutional configurations bring in the voices of multiple constitutional actors, including notably the people themselves. Analytically, this framework captures more accurately the complex institutional dynamics across various legal systems; these institutional dynamics are generated by hydraulics processes that prompt societal actors to shift between different institutional settings to advance their constitutional claims. Normatively, this framework encourages inclusive and dynamic constitutional interpretation that reflects evolving political and social demands instead of top-down constitutional development.