Oñati Socio-Legal Series (ISSN: 2079-5971)
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Same-sex marriage as a human right: How the Strasbourg Court could draw inspiration from the US Supreme Court and the Inter-American Court of Human Rights to affirm marriage equality

OÑATI SOCIO-LEGAL SERIES VOLUME 14, ISSUE 1 (2024), 176–212: DOSSIER ABOUT TRANSNATIONALISATION OF FAMILY LAW
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL/0000-0000-0000-1347
RECEIVED 23 MARCH 2022, ACCEPTED 17 OCTOBER 2022, FIRST-ONLINE PUBLISHED 6 DECEMBER 2022, VERSION OF RECORD PUBLISHED 1 FEBRUARY 2024

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Abstract

In the last fifteen years, the European Court, the US Supreme Court and the Inter-American Court of Human Rights have all ruled on the issue of same-sex marriage. The Strasbourg Court has not, at this stage, dared to affirm the right to marriage, unlike its (inter)American counterparts. The article proposes a comparative analysis of the decisions rendered by the three jurisdictions: it highlights, beyond the (obvious and indisputable) differences between the three legal orders, the similar issues – of applicability, proportionality and subsidiarity – with which the judges responsible for ensuring respect for human rights are confronted. As the analysis also reveals, these issues are sometimes hotly debated within the courts themselves, while their understanding can be enriched by inter-jurisdictional dialogue. In conclusion, it is argued that, with regard to the recognition and protection of same-sex couples, the European Court should draw inspiration from American experiences and (1) clearly (re)affirm that the right to marry (art. 12 ECHR) applies to same-sex couples (2) mobilise the full potential of the prohibition of discrimination (art. 14 ECHR) and (3) move away from strict adherence to the European consensus rule.

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Key words

Private and family life; human rights; same-sex marriage; European Court of Human Rights; Supreme Court of the United States; Inter-American Court of Human Rights

Resumen

En los últimos quince años, el Tribunal Europeo, el Tribunal Supremo de Estados Unidos y la Corte Interamericana de Derechos Humanos se han pronunciado sobre la cuestión del matrimonio entre personas del mismo sexo. El Tribunal de Estrasburgo no se ha atrevido, por el momento, a afirmar el derecho al matrimonio, a diferencia de sus homólogos (inter)americanos. El artículo propone un análisis comparativo de las decisiones dictadas por las tres jurisdicciones: pone de relieve, más allá de las diferencias (evidentes e indiscutibles) entre los tres ordenamientos jurídicos, las cuestiones similares –de aplicabilidad, proporcionalidad y subsidiariedad– a las que se enfrentan los jueces encargados de velar por el respeto de los derechos humanos. Como también revela el análisis, estas cuestiones son a veces objeto de acalorados debates en el seno de los propios tribunales, mientras que su comprensión puede verse enriquecida por el diálogo interjurisdiccional. En conclusión, se sostiene que, en lo que respecta al reconocimiento y la protección de las parejas del mismo sexo, el Tribunal Europeo debería inspirarse en las experiencias estadounidenses y (1) (re)afirmar claramente que el derecho a contraer matrimonio (art. 12 del CEDH) se aplica a las parejas del mismo sexo (2) movilizar todo el potencial de la prohibición de la discriminación (art. 14 del CEDH) y (3) alejarse de la estricta adhesión a la norma del consenso europeo.

Palabras clave

Vida privada y familiar; derechos humanos; matrimonio entre personas del mismo sexo; Tribunal Europeo de Derechos Humanos; Tribunal Supremo de los Estados Unidos; Corte Interamericana de Derechos Humanos

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1. Introduction

Over the past decade, human rights judges – in Europe and the Americas – have been faced with the issue of same-sex marriage. In 2011 the European Court of Human Rights (hereinafter "the European Court" or "the ECtHR") refused in *Schalk and Kopf v Austria* to impose opening the institution of marriage to same-sex couples on European states. It has since confirmed this refusal in several cases, most recently in *Chapin and Charpentier v France* judgment of 9 June 2016. Across the Atlantic, on the other hand, the Supreme Court of the United States (hereinafter "the Supreme Court" or "the SCOTUS") ruled – in their spectacular 26 June 2015 judgment in *Obergefell v Hodges* – that the US Constitution enshrined the right of same-sex couples to marry. In the same vein, the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the IACtHR") considered – in their daring advisory opinion 24/17 of 24 November 2017 – that the American Convention on Human Rights requires that same-sex couples should be able to benefit from the same forms of recognition and protection as heterosexual couples.

Of course, the three jurisdictions did not rule from the same position or in the same context: on the one hand, unlike the European Court and the Inter-American Court, the Supreme Court is a *national court* (albeit in a strongly decentralised federal system, at least as far as family law is concerned) (Rosenfeld 2006);[1] meanwhile, unlike the *Schalk and Kopf* and *Obergefell* judgments, the 24/17 opinion is, *a priori*, *advisory in nature* (although the Court appears to consider its opinion binding on all member states of the Organisation of American States).[2] Moreover, geography, history, and politics explain that Europe, the United States, and Latin America naturally do not necessarily or entirely share the same conception of law or of the family.

In an interconnected global legal universe where human rights are gradually becoming accepted as the ultimate foundation of law and thus as a lingua franca for transnational legal exchanges, this should not discourage comparisons. Those whom we will call, for lack of a better term, "human rights judges" are obviously more and more convinced of this and develop increasingly direct and formal forms of collaboration.[3] The same can be said of the "human rights doctrine" – now regularly engaged in the comparative analysis of decisions made under the banner of human rights by international and national jurisdictions responsible for their defence.[4]

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[1] Although this contribution primarily offers a comparison of the Supreme Court and the European Court of Justice (European Union), the developments in terms of comparability also relate to the European Court of Human Rights and the Council of Europe.

[2] Inter-American Court of Human Rights, Advisory Opinion OC-24/17, §§ 26-27. See also on the controversy relating to the binding nature of advisory opinions the dissenting opinion of Judge Vio Grossi and Cruz and Escoffié 2018.

[3] In addition to mutual references in the case-law, described below, the cooperation between the European Court and the Supreme Court was made concrete, in 2012, by a first in-person official meeting in Washington between ECtHR and SCOTUS judges (the seminar is available in full on the George Washington University Law School YouTube page: https://youtu.be/qgUWrY9sHRc) while the cooperation between the European Court and the Inter-American Court is formalised by the publication, in 2016, of a joint case-law compilation (Council of Europe 2016, 574 p.).

[4] For comparisons of the European Court and the Supreme Court, see notably: Annicchino 2010, pp. 301–23, Kiska 2012, p. 107, Cismas and Cammarano 2016, p. 1, Jenart 2017, p. 613. For comparison of the European Court and the Inter-American Court, see: Hawkins and Jacoby 2010, p. 35.

This contribution follows the same path, offering a comparison of the European **(1)**, American **(2)**, and inter-American **(3)** approaches to same-sex marriage by focusing systematically and sequentially on five aspects: (1) verifying the applicability of guaranteed rights; (2) balancing these against state interests; (3) assessing the legitimacy of judicial interventions; (4) assessing cohesion (or lack thereof) within each jurisdiction; (5) examining dialogue (or lack thereof) with other jurisdictions. This process makes it possible gradually to "characterise" and "distinguish" the approaches taken in Strasbourg, Washington, and San José in order to compare them **(4)** Then, in conclusion, it is respectfully suggested that the European Court could draw inspiration from American experiences and (1) clearly (re)affirm that the right to marry (art. 12 ECHR) applies to same-sex couples (2) fully mobilise the potential of the prohibition of discrimination (art. 14 ECHR) and (3) progressively move away from strict adherence to the European consensus principle to affirm a European right to same-sex marriage (**5**).

2. The European Court and the "small steps" strategy

The European Court initially contributed to reinforcing the rights of gay and lesbian people through criminal law. As soon as 1981 it censured the criminalisation of homosexual relations in *Dudgeon v United Kingdom* (1981).[5] It then found both criminal punishment of private sex acts among several men (*A.D.T. v United Kingdom*, 2000) and the application of different ages of consent for hetero- and homosexual acts (*L. and V v Austria*, 2003) to be in breach of the European Convention.

In the late 1990s, the Court also ruled that it was unacceptable to exclude gay and lesbian people from the armed forces (*Smith and Grady v United Kingdom*, 1999, and *Lustig-Prean and Beckett v United Kingdom*, 1999). At about the same time, it delivered its first decisions on same-sex couples and same-sex parents (Willems 2013): in 2003 the Court found in *Karner v Austria* (2003) that same-sex partners should benefit from the same right as heterosexual partners to continue a deceased partner's lease; in 1999, in *Salgueiro Da Silva Mouta v Portugal*, it ruled that a gay or lesbian parent could not be disadvantaged by his/her sexual orientation in a child-custody dispute. In 2008, it went a step further – in *E.B. v France* (2008) – by ruling that a person's sexual orientation does not justify the refusal to entrust him/her with a child for adoption.

This was more or less the state of case-law in Strasbourg as the Court prepared to rule – in *Schalk and Kopf v Austria* (2010) – on the question of the right to marry.

2.1. A revised interpretation of articles 8 and 12 of the Convention

The first step was to verify the applicability of the provisions of the ECHR guaranteeing "men and women" the right to marry (art. 12) and "everyone" the right to respect of his private and family life (art. 8). The Court noted, in this regard, that the textual[6] and contextual[7] interpretation of article 12 excludes its applicability to same-sex couples (§ 55), but that the applicants suggested an "evolving and constructive" interpretation of

[5] See also European Court of Human Rights, *Norris v Ireland*, 26 October 1988 and European Court of Human Rights, *Modinos v Cyprus*, 22 April 1993.

[6] Unlike the other articles, article 12 specifies "men and women" rather than "everyone".

[7] At the time the Convention was drafted, in the 1950s, "marriage was clearly understood in the traditional sense of a union between two persons of the opposite sex" (§ 55).

this provision since the Convention is a "living instrument" (§ 57). It therefore draws inspiration from the more "modern" or "liberal" (Author 2020) formulation of article 9 of the Charter of Fundamental Rights of the European Union (CFREU) for a "renewed" reading of article 12 of the ECHR. The Charter in fact guarantees the right to marry without the reference to "men and women" found in other rights-protection instruments and its official commentary indicates that this is a deliberate choice to widen the scope of the right to marriage. At the same time, article 9 specifies that the right to marriage is exercised in accordance with national laws and it is made clear, in this regard, that it is a question of taking into account the diversity of laws among states. In the light of this cautious overture, the Court ruled that the right to marry should no longer "in all circumstances be limited to marriage between two persons of the opposite sex" and therefore that "it cannot be said that Article 12 is inapplicable to the applicants' complaint" (§ 61). It also relies on European instruments – directives 2003/86 and 2004/38 – to develop its understanding of article 8 by judging that, given society's "rapid evolution", it would be "artificial" to maintain – as the Court had previously – that a same-sex couple would not constitute "family life" and could at most be considered "private life". We can thus see the importance of the judgment for the recognition and protection of same-sex couples: while their inclusion in article 12's sphere of protection may seem ambiguous (Hodson 2011, p. 173; Johnson and Falcetta 2020) and while full affirmation of their right to respect for family life may be considered tardy, the fact remains that the "double revision" of the conventional interpretation implemented by Schalk and Kopf undoubtedly constitutes an essential milestone in Strasbourg's recognition of the rights of gay and lesbian people.

2.2. A summary "proportionality test": the prevalence of "social and cultural connotations"

The renewed interpretation of the right to marriage guaranteed by article 12 normally implied a careful examination of the reasons put forward by Austria to justify banning same-sex marriage (Hodson 2011, p. 173, Johnson and Falcetta 2020). The Court confines itself, however, to noting that marriage "has deep-rooted social and cultural connotations which may differ largely from one society to another" (§ 62). No details are given as to the nature and precise content of these "connotations" which nevertheless appear sufficient – in the eyes of European judges – to justify maintaining the principle of heterosexuality of marriage. As the ECtHR is increasingly reluctant to accept that the objective of protecting the traditional conception of family can justify restrictions on individuals' rights,[8] the Court's choice not to discuss further the interests counterbalancing the rights of same-sex couples has been heavily and justifiably criticised. (Hodson 2011, p. 173, Bribosia *et al*. 2014, p. 14, Shahid 2017, pp. 193–95, Willems 2019, p. 199) The state's arguments were not examined, (Shahid 2017, p. 195) although they should – according to some – have been subjected to strict scrutiny (Bribosia *et al.* 2014, p. 23). Indeed, whereas the terms "deep-rooted social and cultural connotations" arguably refer to the traditional values and beliefs shared by the majority of the Austrian population as regards marriage, it does not seem that such majoritarian views may constitute in themselves and without any further explanation a satisfying

[8] See, notably, European Court of Human Rights (Grand Chamber), *X. and Others v Austria* (2013), § 139. See also Willems 2014, pp. 305–22.

justification for human rights restrictions in contemporary, pluralist and secularised societies.[9] However, in the subsequent case-law, notably in *Chapin and Charpentier v France* in 2016, the Court expressly reaffirmed that article 12 enshrines "the traditional concept of marriage".[10]

The Court's analysis is even more summary from the point of view of the right to respect for family life guaranteed by article 8 combined with the non-discrimination requirement formulated by article 14. It merely recalls that the Convention "is to be read as a whole" and that its articles should be read "in harmony with one another". Therefore, the right to marry refused under article 12 cannot be granted under article 8, "a provision of more general purpose and scope" (§ 101). While one can understand this analysis of the relationship between the right to marry and the right to respect for family life,[11] one can nevertheless regret that it also entails a refusal by the Court to examine the issue from the specific perspective of the prohibition of discrimination provided for in article 14. Subsequent case-law, however, shows that the Court does not intend to interpret article 12 – in the light of this specific requirement – differently than it did in *Schalk and Kopf (Oliari and others v Italy*, 2015, §§ 191-194 (art. 12+14); *Chapin and Charpentier v France*, 2016, §§ 36-40 (art. 12+14)). It thus appears that the ECtHR has to a certain extent "evaded" the singularity of and the potential value added by an approach based on the refusal of arbitrary differences. It is all the more regrettable considering that in *X. and Others v Austria* of 19 February 2013 the Court found that the desire to protect the traditional family was not sufficient to justify a discrimination between same-sex and different-sex partners with regard to the possibility of intra-family adoption of one's children by the other.

This does not mean, however, that the European Court has completely renounced to contribute to the recognition and protection of same-sex couples. The Court firstly required States establishing an alternative couple status to open it to same-sex as well as to different-sex couples (*Vallianatos*, 2013). It subsequently obliged Italy to organise a recognised form of union available to same-sex couples (*Oliari*, 2015). The Court also required that European states which do not allow same-sex marriage should at the very least recognise, in one way or another, same-sex marriages validly concluded abroad (*Orlandi*, 2017). Finally, European judges sometimes require same-sex partners be able to enjoy, in the lack of access to marriage, the same benefits as those granted to (different-sex) spouses in the areas of tax law, social law (*Aldeguer Tomas v Spain*, 2016) or immigration law (*Taddeucci and McCall v Italy*, 2016). It therefore appears that the European Court favours a "small steps" approach (Bribosia and Rorive 2018, p. 345) as regards the rights of same-sex couples, characterised, in our opinion, by a form of "strategic compromise" (Willems 2019, p. 197) that consists of "abandoning" the question of marriage to national legal systems while gradually "crystallising" the right to an alternative status, to recognition of foreign marriages, and to certain particular

[9] See *mutatis mutandis* European Court of Human Rights, *Babiarz v Poland* (2017), dissenting opinion, Judge Pinto de Albuquerque, § 33.

[10] European Court of Human Rights, *Chapin and Charpentier v France* (2016), § 37. See also European Court of Human Rights (Grand Chamber), *Hämäläinen v Finland* (2014), § 96.

[11] The question of the *lex generalis/lex specialis* relationship between article 8 and article 12 has been recently addressed in detail by the UK Privy Council in *Attorney General for Bermuda (Appellant) v Roderick Ferguson and others (Respondents) (Bermuda)* [2022].

rights is several areas of law. From the point of view of proportionality, these different "achievements" come – in a way – to compensate for the refusal of the matrimonial "label".[12]

2.3. The prevalence of the subsidiarist reflex: "States are still *free"*

The refusal to enshrine a fundamental right to same-sex marriage corresponds to an assumed desire by the Court's assumed willingness to uphold the principle of subsidiarity on this issue.[13] Indeed *Schalk and Kopf* underlines that if "the institution of marriage has undergone major social changes since the adoption of the Convention" there is no "European consensus" on same-sex marriage, since only six states out of forty-seven allow it (§ 58).[14] By contrast, in its *Goodwin* decision issued on 11 July 2002, the Court had made the decision to enshrine the right of transsexual persons to marry a person of the sex opposite to their new sex, even though there was as yet no European consensus on the issue. In the Court's view, however, the two cases are different in the sense that Goodwin could rely on a "convergence of standards" with regard to the marriage of transsexual persons and the fact that such marriages remained – in the end – marriages between "partners who [were] of different gender" (§ 59). The Court considers, accordingly, that "it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society" (§ 62). The Court thereafter remained extremely attentive to the evolution of European legislation: by 2014, ten states[15] had authorised gay marriage and the Court reiterated, in *Hämäläinen*, that there was no consensus on such authorisation; in 2015, same-sex marriage was allowed in eleven European states[16] and the Court found, in *Oliari*, that "despite the gradual evolution of States on the matter (…) the findings reached in [Schalk and Kopf] remain pertinent".[17] Things were no different in 2016 when the Court ruled on *Chapin and Charpentier*. It is only with the *Orlandi v Italy* judgment delivered on 14 December 2017[18] that the Court offered a more tangible indication of a possible tightening of European control over the evolution of European legislations. As of 2017, fifteen states[19] allowed same-sex marriage and the Court affirmed, in a way that naturally did not go unnoticed (Carlier 2019, p. 220) that "States are *still* free (…) to restrict access to marriage to different-sex couples".[20] The right balance between untimely interventionism and harmful passivity is undoubtedly difficult to determine: (Popovic 2008, p. 361; Thielbörger 2012) on the one hand, the Court risks "losing its

[12] In *Hämäläinen*, in particular, the Court was able to rule that a same-sex couple could "benefit in the context of a registered partnership essentially from the same legal protection as that which is guaranteed by marriage" (*Hämäläinen v Finland*, 2014, § 83). See also *Chapin* (2016), § 51.

[13] See, notably, Sudre 2013, p. 1917.

[14] The Netherlands (2002), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), and Portugal (2010). Thirteen other Member States (Germany, Andorra, Austria, Denmark, Finland, France, Hungary, Iceland, Luxembourg, the Czech Republic, the United Kingdom, Slovenia, and Switzerland) chose instead to organise an alternative marital status accessible to these couples.

[15] Joining those listed above were Iceland (2010), Denmark (2012), France (2013), and the United Kingdom (2014).

[16] Joining those listed above was Luxembourg (2015).

[17] See also on the subsidiarist approach in *Oliari* (Fenwick and Hayward 2017, p. 544; Draghici 2017, p. 205).

[18] See above, pt. 2.2.

[19] Joining those listed above were Ireland (2015), Germany (2017), Finland (2017), and Malta (2017).

[20] Our emphasis.

credibility and authority in the eyes of [conservative] Member States" and, on the other, "undermining its role and legitimacy as the guardian of the ECHR" (Shahid 2017, p. 193). We may nevertheless join Masuma Shahid in considering that European[21] and international[22] developments on the issue of same-sex marriage are progressively putting the Court in a position to legitimately emancipate itself from a strictly "consensual" or "majoritarian" approach, as it has done in the past and continues to do today concerning other issues such as – for example – the recognition and protection of transgender people.[23]

2.4. Constant unanimity within the European Court

The choice of "compromise" and "restraint" is a matter of remarkable unanimity within the European Court of Human Rights. Since 2010, the question of same-sex marriage has come before the Court in three cases: *Schalk and Kopf*, *Oliari*, and *Chapin and Charpentier*. These cases have been submitted to different formations of the Court: the first, fourth, and fifth sections respectively. Each of these three sections unanimously held that the ban on same-sex marriage did not violate the provisions of the Convention. The only separate opinion was written by Swiss judge Giorgio Malinverni and joined by Russian judge Anatoly Kovler; they support the conclusion that the refusal of same-sex marriage does not breach the ECHR, but argue that the Court has already gone too far in considering article 12 applicable to same-sex couples.[24] No fewer than twenty-one European judges have thus had the opportunity to rule on the issue: all of them decided in disfavour of the right to same-sex marriage. Slightly more marked oppositions may have emerged in the context of cases which are less directly concerned with the question of the right to marry. For example, in the *Hämäläinen* judgment rendered by the Grand Chamber concerning the impossibility for a transgender woman to remain married beyond her change of sex with the woman she had married when she was still a man, fourteen judges concluded that there had been no violation of the Convention, but three judges – András Sajó (Hungary), Helen Keller (Switzerland), and Paul Lemmens (Belgium) – believed that Finland should have allowed the applicant and her wife to stay married without prejudice to the more general question of marriage for same-sex couples. Conversely, in the *Orlandi* judgment relating to the recognition in Italy of a marriage between two women celebrated in Toronto, five judges considered that the respondent state should have taken into account in one way or another a matrimonial bond validly established abroad, but two judges – Aleš Pejchal (Czech Republic) and Krzysztof Wojtyczek (Poland) – held that the Convention had not been violated: they advocated a narrow interpretation of articles 8 and 12, insensitive to social development and the influence of the Charter, according to which the Convention does not impose either same-sex marriage, or even the recognition and protection of same-sex couples. On the fringes of litigation relating to same-sex marriage, we therefore see an internal tension (Voeten 2011, p. 64) between a more "liberal" wing inclined to engage cautiously

[21] Austria legalised same-sex marriage in 2019; Switzerland did the same in 2022.
[22] See below, pts 3 and 4.
[23] See *Goodwin v United Kingdom* (2002) sp. §§ 84-85 (consecration of transsexuals' right to marry authorised in only 54% of states) and *A.P., Garçon and Nicot v France* (2017), sp. §§ 122-125 (condemnation of the sterilisation requirement established in twenty-four Council of Europe Member States).
[24] *Schalk and Kopf v Austria* (2010), concurring opinion of Judge Malinverni, joined by Judge Kovler.

in a reconsideration of the traditional conception of marriage and a frankly "conservative" wing expressly referring to the definition of marriage proposed in Justinian's *Digest* and Gaius's *Institutes*.[25]

2.5. A privileged dialogue with the European Union: a tendency towards regionalism

It has already been pointed out that, in *Schalk and Kopf*, the Court drew inspiration for a "refreshed" interpretation of article 12 of the ECHR from the more "modern" and "liberal" formulation of the right to marriage found in article 9 of the CFREU.[26] European sources certainly enjoy a special place in the ECtHR's frequent and well-known use of "external sources" to inform its interpretation of the Convention. Thus, sources emanating from (other) bodies of the Council of Europe ("home-made") and those emanating from the European Union ("little Europe") clearly fall within a normative "first circle" to which Strasbourg willingly refers.[27] A network of collaborations is thus established between the two European legal orders in which judges in Strasbourg and Luxembourg actively participate:[28] most recent examples include the reference made to EU directives 2003/86 and 2004/38 in the *Taddeucci and McCall* judgment and – more significantly – the reference made to the ECtHR's case-law in the European Court of Justice's important *Coman v Inspectoratul General Pentru Imigrări* decision. Over the course of these exchanges, the two European courts have progressively laid down parallel case-law which complements and/or reinforces each other: if neither crosses the "boundary" of a full-on consecration of a European right to same-sex marriage, they have gradually consolidated a significant (if insufficient) "package" of rights benefiting same-sex couples. References to UN, inter-American, or – *a fortiori* – non-European national systems are more tenuous and enjoy less legitimacy.[29] While they are not non-existent, we cannot fail to note that *Atala Riffo* (2012) the leading inter-American case relating to discrimination based on sexual orientation, is cited only once in the European Court's jurisprudence,[30] while *Obergefell* (2015)[31] the resounding Supreme Court decision, is mentioned in *Oliari*[32]and *Orlandi* (2017, § 115, citing *Oliari*). only among the comparative law elements collected in the judgment's preamble in accordance with the Court's habits. If tenuous signs of a "transatlantic" dialogue may be perceived, the ECtHR's case-law relating to same-sex couples remains imbued with a certain "regionalism" which we may regret, given the spectacular developments that are taking place in courts outside Europe.

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[25] *Schalk and Kopf v Austria* (2010), concurring opinion of Judge Malinverni, joined by Judge Kovler., § 6.

[26] See above, pt. 2.1.

[27] See, notably, Tulkens *et al.* 2012, p. 478.

[28] The Court based its 11 July 2002 decision in *Goodwin v United Kingdom* on the right of transgender people to marry a person of the opposite sex to their new sex on the Charter. *Goodwin* in turn led the Court of Justice of the European Union to rule in *K.B. v National Health Service Agency* (2004), that the impossibility for a transgender man to marry the woman with whom he lived was contrary to article 141 of the Treaty establishing the European Community because it deprived the interested parties of the right to a pension in the event of one partner's death.

[29] See, notably, Tulkens *et al.* 2012, p. 478.

[30] International Court of Human Rights, *Atala Riffo v Chile*, 24 February 2012 (cited by the European Court of Human Rights, *Aldeguer Tomas v Spain*, 14 June 2016, §§ 52-55). See below, pt. 4.

[31] See below, pt. 3.

[32] *Oliari and Others v Italy* (2015), § 65 (the judgment is summarised in a few paragraphs).

3. The Supreme Court and the solemn affirmation of the right to marriage

Like the European Court, the Supreme Court of the United States has approached the matter of sexual orientation primarily through criminal law. Every American constitutional scholar remembers the *Bowers v Hardwick* judgment delivered on 30 June 1986 upholding provisions of Texas law criminalising homosexual acts. It would be nearly twenty years before the Supreme Court reversed this precedent in *Lawrence v Texas* (2003) and asserted that criminal prosecution of homosexuality is contrary to the U.S. Constitution.

It was only in 2011, moreover, that Congress put an end to the "Don't Ask, Don't Tell" policy introduced in 1994 and enshrined the right of gay and lesbian people to serve in the army without concealing their sexual orientation.

At around the same time, a number of American states began to recognise the right of same-sex couples to marry through legislation or case-law. In 1996, however, President Clinton grudgingly signed the Defense of Marriage Act (DOMA) under which, for the purposes of US federal law, the term "marriage" would designate exclusively the union of a man and a woman. It followed that same-sex couples married in a state which allowed it were expressly deprived of benefits provided to spouses under federal law, in particular in terms of taxation, social security, and immigration. In 2013, in *United States v Windsor*, the Supreme Court – encouraged by President Obama – ruled that this interpretive guideline was contrary to the US Constitution and therefore obliged US administrations to take into consideration same-sex marriages validly celebrated in states which allowed them.

This was the situation in the United States when, in 2014, the Supreme Court was asked to rule in *Obergefell v Hodges* on the case of fourteen same-sex couples claiming for the affirmation of a constitutional right to same-sex marriage.

3.1. The reasoned extension of the right to marriage: "the past alone cannot decide the present"

The American Constitution does not expressly guarantee either the right to respect for private life or the right to marry, but the Supreme Court has gradually considered that private life (*Griswold v Connecticut*, 1965) and marriage (*Loving v Virginia*, 1967) both fall within the scope of the right to "liberty" enshrined in the "due process clause" of the 14th Amendment.[33] The Court recalls – in *Obergefell* – that the protection offered by this clause can be extended to new rights by means of a "reasoned judgment" which must be "guided and disciplined" by history and tradition without them being able to "set its outer boundaries" because "the past alone [cannot] rule the present" (*Obergefell v Hodges*, 2015, 10–11). Indeed, the Supreme Court specifies that the generations who drafted the Bill of Rights and the 14th Amendment could not know "the extent of freedom in all of its dimensions" and therefore entrusted following generations with a charter making it possible to protect "liberty as we learn its meaning" (*Obergefell*, 2015, 11). The Court then admits that all historical references to "the beauty of marriage" in religion, philosophy, arts, and literature refer to the union of a man and a woman, but immediately specifies that marriage has evolved and that its history is a story of "both continuity and change"

[33] For more details and references, see Willems 2019.

(*Obergefell*, 2015, 1, 6). Thus, for example, the conception of marriage as an "arrangement by the couple's parents" or a "male-dominated legal entity" had been abandoned and – in the eyes of the Court – these changes had strengthened the institution of marriage rather than weakened it (*Obergefell*, 2015, 1, 6–7). The same "dynamic" was, moreover, observable with regard to the rights of gay and lesbian couples, as evidenced by the *Lawrence* (2003) and *Windsor* (2013) judgments. The Court then identified four constitutional principles underlying the protection granted – in *Loving* (1967), *Zablocki* (1978) and then *Turner* (1978)[34] – to heterosexual couples' right to marry: (1) marriage is an essential aspect of individual autonomy; (2) it is the best way to support the relationship between two people; (3) it ideally protects children and families; (4) it is a "keystone of [the American] social order" (*Obergefell*, 2015, 1, 12–17). In the eyes of the Supreme Court, these principles have a scope that goes beyond different-sex marriage: their strength and rationality are fully transposable to same-sex couples (*Obergefell*, 2015, 1, 18). Constitutional protection of the right to heterosexual marriage must therefore be "extrapolated" (Yoshino 2015, p. 157) to same-sex couples.[35]

3.2. A mysterious "standard of review": the insufficiency of case-by-case granting of specific benefits

The Court then had to consider whether legitimate state interests were capable of justifying restrictions on the same-sex couples' right to marry as it had just been enshrined. The balancing of individual rights and competing interests in the American system is normally based on a scale comprising three "levels of vigilance": minimal ("rational basis"), high ("strict scrutiny"), or intermediate ("intermediate scrutiny"). It appears, however, that this "multi-tier" system is quite unstable both in terms of the identification of the applicable "standard" and of its effective impact on legal reasoning, and it is therefore sometimes set aside in favour of a uniformly applicable "single analytical tool" (Beschle 2017, p. 385). The *Obergefell* decision follows this trend by refraining from expressly indicating the "degree" of control exerted over the ban on same-sex marriage (Schraub 2015, p. 863). The nature and length of the above described developments affirming the existence of the right to same-sex marriage show, nevertheless, that the SCOTUS intends to give considerable weight to this new right and that convincing arguments are therefore required to justify a state decision to maintain the rule of marriage heterosexuality. Arguments presented by representatives of Michigan, Kentucky, Ohio, and Tennessee did not convince the judges, who promptly dismissed them after only a brief discussion. On the one hand, the idea that opening marriage to same-sex couples would sever the link between marriage and procreation and therefore distract heterosexual couples from the institution is "counterintuitive". Indeed, the choice to marry and raise children is based on "personal, romantic and practical" considerations and it is "unrealistic", in the Court's view, to think that different-sex couples will forgo them "simply because same-sex couples may do so" (*Obergefell*, 2015, 1, 18). On the other hand, sincere and personal opposition to same-sex marriage based on religious or philosophical principles could not justify the state giving its imprimatur to an exclusion that "demeans" and "stigmatises" those whose freedom is restricted. The 1st Amendment allows religious groups and believers to continue to

[34] *Turner v Safley* (1987) (restrictions on the marriage of prisoners).
[35] *Obergefell* (2015), 18. See also Dermine 2015, p. 461.

profess that same-sex marriage should not be allowed and to promote the perpetuation of family structures that are dear to them (*Obergefell*, 2015, 1, 18). The Court found, finally, that the right of same-sex couples to marry as it results from the "due process clause" is still "buttressed" or "invigorated" (Schraub 2015, p. 863) by the requirements resulting from the "equal protection clause" also included in the 14th Amendment to the Constitution (*Obergefell*, 2015, 1, 19–23).

In the Court's view, an approach consisting of refusing the right to marry but allowing a "slower" and "case-by-case" determination of the "specific public benefits" that should be offered to same-sex couples is unsatisfactory because it would deny gays and lesbians "many of the rights and responsibilities intertwined with marriage" (*Obergefell*, 2015, 1, 26). Indeed, throughout history, states have granted spouses an increasingly broad set of "governmental rights" in a large number of areas (such as taxation, inheritance, court testimony, insurance, civil status, adoption, childcare, healthcare, pensions, etc.): they therefore attach to marriage "a constellation of benefits" from which same-sex couples are unfairly excluded (*Obergefell*, 2015, 1, 26). The prejudice is moreover not only "material"; since marriage confers at the same time material advantages and a symbolic recognition, excluding same-sex couples amounts to signalling that they are "unequal" and serves to "demean" them when they, too, can aspire to the "transcendent purposes" of marriage and the "fulfillment in its highest meaning" that it represents (*Obergefell*, 2015, 1, 16–17).

3.3. The risks of prudence: the urgency or the duty to act

At the time of the decision, thirty-five US states had opened marriage to same-sex couples through legislation or case-law.[36] The Court accepted that there might be "an initial inclination (...) to proceed with caution" and to allow legislative, judicial, and public debate to continue at the state level. At the same time, it stressed, the question had already given rise to considerable developments which made it possible to have an "enhanced understanding" of it (*Obergefell*, 2015, 1, 23–24). Moreover, if democracy is *a priori* "the appropriate process for change", the purpose of the Constitution is precisely to "withdraw certain subjects from the vicissitudes of political controversy" (*Obergefell*, 2015, 24–25). The Court noted that its overly cautious decision in *Bowers* in 1986 had caused serious suffering for gays and lesbians until *Lawrence* in 2003 finally asserted the unconstitutionality of laws punishing homosexual acts.[37] The Court did not want to make the same mistake about marriage and considered that given the "urgency" of the need for recognition and protection of same-sex couples, it had a "duty" to respond to their request (*Obergefell*, 2015, 25–26). The Supreme Court therefore renounced judicial restraint and imposed same-sex marriage on the fifteen American States which did not yet allow it by making its reading of the Constitution prevail over their "autonomy" or their "sovereignty"[38].

[36] In eleven cases marriage equality had proceeded from legislative reform; in the other twenty-four, the right to marry resulted from legal interventions, the scope of which was sometimes controversial or debated (Maryland Office of the Attorney General 2015).

[37] See above.

[38] On the relevance of the concept of state sovereignty in American constitutional law, see Zick 2005, p. 233.

Some had expressed concern that a Supreme Court ruling in favour of same-sex marriage would – like the famous *Roe v Wade*[39] – lead to a "backlash" effect and galvanise conservative forces opposed to marriage equality. The *Obergefell* judgment has not, it seems, aroused an "increase" of opposition to same-sex marriage within the population and, on the contrary, one would observe an "alignment" of opinions on the Court's decision (Flores and Barclay 2016, Kazyak and Stange 2018, p. 2045). Nevertheless, some states – such as Nevada – retained legal provisions defining marriage as the union of a man and a woman.[40] Elsewhere, officials refused to issue marriage licenses to same-sex couples (as in *Kim Davis* [Kentucky], Partin 2015) or companies refused to provide their services for the celebration of same-sex marriages (as in the *Masterpiece Cakeshop* case [Colorado]).[41] There have also been refusals to make same-sex marriage produce the same effects as heterosexual marriage, especially in terms of legal parenthood (as in *Pavan v Smith* [Arkansas]).[42] If we take into account all the various bills introduced – here and there – to deactivate or attenuate the implications of *Obergefell*, we can agree with Reva Siegel's conclusion that the Supreme Court's ruling did not definitively close the public and/or legal debate on same-sex marriage, but rather contributed to its being "channelled" or "structured" (Siegel 2016, p. 4).

3.4. An obvious ideological divide within the Supreme Court

When it ruled on *Obergefell*, the composition of the Supreme Court was very balanced. Among the nine judges, there were four Democrats and five Republicans;[43] Justice Anthony Kennedy acted as a "swing justice", however, determining the outcome of sensitive cases by rallying to the "liberal" or "conservative" wing of the Court.[44] This is precisely what happened in *Obergefell*; by joining the camp of the four liberal judges, Kennedy allowed the consecration of the right to same-sex marriage by five votes to four. The US Supreme Court therefore appeared extremely divided on the issue of same-sex marriage, as evidenced by the virulence of the criticisms expressed by the minority. In his dissenting opinion, Chief Justice John Roberts denounced an "aggressive application

[39] See, indeed the recent decision in *Dobbs v Jackson Women's Health Organization* (2022) and, for further explanations and references, Willems 2022.

[40] A proposal to amend the Nevada Constitution has been passed by the House and Senate and is due to be put to a ballot in 2020. See the official site of the Nevada legislature (https://www.leg.state.nv.us).

[41] In that case, the Supreme Court ruled that the Colorado authorities had violated the Constitution by sanctioning a pastry chef who refused to make a wedding cake for a male couple. The scope of this decision is uncertain because it is in this case the manifest hostility of the Civil Rights Commission towards the religious convictions of the person concerned which led the Court to find a violation of his right to freedom of religion (*Masterpiece Cakeshop v Colorado Civil Rights Commission*, 2018. See also Flanders and Oliveira 2019.

[42] In that case, the court ruled that the Arkansas authorities had violated the Constitution by refusing to apply the presumption of filiation based on marriage to a couple of married women. In the Court's view, in fact, *Obergefell* enshrines the right of gay and lesbian people to marry by enjoying "the constellation of benefits" associated with marriage.

[43] In order of their nomination, the four Democrats were: Ruth Ginsburg (1993), Stephen Breyer (1994), Sonia Sotomayor (2009), and Elena Kagan (2010). By order of nomination, the five Republicans were: Clarence Thomas (1981), Antonin Scalia (1986), Anthony Kennedy (1987), Samuel Alito (2005), and John Roberts (2005).

[44] He was considered, for that reason, to be one of the most influential people in American public life, and it has been written about him that "in most major affairs the intellectual battlefield of the Supreme Court is limited to the space between this man's two ears" (Calabresi and Von Drehle 2012). See also McGaver 2016, p. 1247.

of substantive due process [breaking] sharply with decades of precedent".[45] The originalists Antonin Scalia (Ramsey 2016, p. 101) and Clarence Thomas (*Book note*, 2007, p. 1431) added that in their eyes the Court was a "threat to American democracy" and the *Obergefell* judgment an attack on "the principles upon which [the] Nation was built". The very conservative Samuel Alito argued, less radically, that "the Constitution leaves that question to be decided by the people of each State" (Gorod 2016). Neutralised in *Obergefell* by the vote of the "swing justice", these conservative forces seem to face to a bright future[46] following the replacement of Kennedy by Brett Kavanaugh (Ash and Chen 2018, p. 70), chosen by Trump for his "vigorous conservatism" (Liptak 2018) and the replacement of Ruth Bader Ginsburg, the feminist icon who passed away in 2020, by Amy Coney Barett.

3.5. A dialogue with oneself: the temptation of insularism[47]

In *Obergefell*, the Supreme Court sought support for its constitutional interpretation in its own history and traditions much more than in dialogue with the other legal systems. We have already pointed out that it is from the history of Anglo-American matrimonial law and the development of its own case-law relating to homosexuality that the Court drew inspiration for a dynamic interpretation of the American Constitution and, more specifically, of an extension to same-sex couples of the right to marry outlined in *Loving*, *Zablocki*, and *Turner*.[48] No reference is made to legislative and judicial solutions developed abroad to recognise and protect same-sex couples. At most, one finds, in the dissenting opinion of Judge Alito, a mention that the Netherlands was the first country to legalise same-sex marriage in 2000 which testified – in his eyes – that the right of same-sex couples to marry is anchored neither in the American tradition "nor in the tradition of other nations". The use of international and comparative law by the Supreme Court (Black *et al*. 2016, p. 901) is a much-debated issue in the United States (Minow 2010, p. 3) and as Rému de Bellescize correctly notes, "the fault line which separates the partisans of legal isolationism from the partisans of legal transnationalism does not correspond to the conservative/liberal divide" (de Bellescize 2020, p. 449). In any case, external references occasionally appear in the case-law of the Court to "explain and justify its position by giving it a 'reasonable aspect' or by making it 'morally acceptable'" when it is called upon to take a "controversial decision" (de Bellescize 2020, p. 446). This was notably the case in the *Lawrence* judgment, where the Court expressly relied on the European Court's *Dudgeon* decision to justify abandoning the solution adopted in *Bowers.*[49] Those who oppose such borrowing see it as a "circumvention of the Constitution", an "alteration of the role of judges", and a "weakening of the common law" (de Bellescize 2020, p. 453 and seq.).

[45] In his opinion, the desire to "preserve the traditional institution of marriage" was sufficient to justify – on a test of "simple rationality" the maintenance of the heterosexual character of marriage.

[46] According to François Vergniole, the current court is "the most conservative at least since the thirties" and seems "more affirmative, and more united, in its will to lead the 'counter-revolution' so long awaited by the right since Nixon" (Vergniolle de Chantal 2016, pp. 28–29).

[47] See van der Mensbrugghe 2007, p. 307.

[48] See above p. 3.1.

[49] *Lawrence v Texas* 539 U.S. 558, 16 (2003). See above pt. 3.1. and 3.4.

4. The Inter-American Court and the spontaneous consecration of marriage equality

The first Inter-American Court decision on sexual orientation related to the parental rights of gay and lesbian people. In its *Atala Riffo v Chile* judgment issued on 24 February 2012, the Court ruled that Chile had violated the American Convention by removing a mother from the custody of her daughters because of her homosexuality. This judgment is considered an essential leading case, specifically in so far as it lays the foundations of the Court's case-law on discrimination based on sexual orientation (Gianella and Wilson 2016, p. 71 and seq.; Celorio 2012, p. 335). The Court affirms that sexual orientation is a "protected category" ("*categoría protegida*") under the Convention (art. 1.1) (§ 91) and adds that the requirement of non-discrimination is not limited to the "fact of being homosexual per se" in itself, but includes its "expression" and its "ensuing consequences" for the life project of persons (§ 133) and that the lack of consensus in some countries concerning respect for the rights of minority sexuality cannot be a valid argument for perpetuating historical discrimination (§ 92).

The Court then applied these fundamental principles to other issues similar to those submitted to the European Court and the Supreme Court. In its *Angel Alberto Duque v Colombia* decision of 26 February 2016, it found that Colombia had violated the Convention by denying a man the benefit of a survivor's pension after the death of his same-sex partner. In its *Flor Freire v Ecuador* decision of 31 August 2016 it ruled that Ecuador had violated the Convention by excluding from the armed forces a man who had engaged in sexual acts in military installations.

This was the state of inter-American jurisprudence when Costa Rica invited the Court to take a position – by means of an advisory opinion – on "the patrimonial rights" ("*derechos patrimoniales*") which should be offered to same-sex couples and on the "legal status" ("*figura jurídica*") they should be able to enjoy.[50]

4.1. A flexible understanding of the family: the "natural and fundamental" part of a changing society

The American Convention protects not only private and family life (art. 11.2), but also the family itself, as "the natural and fundamental group unit of society" (art. 17.1). In its advisory opinion 24/17 (2017), the Court underlined that neither the text of these provisions nor their immediate (§§ 181-182) or broader (§§ 183-186) context makes it possible to delimit the contours of the family[51] and noted that the ACHR is a "living instrument" (§ 187) lending itself to an "evolutive interpretation" (§ 188). Indeed, the

[50] Costa Rican President Luis Guillermo Solis had expressed his desire to advance gay rights during his election campaign. To defuse internal dissent on the issue, his government took the strategic position of asking the Inter-American Court to examine the requirements of the Convention in this regard (Carrillo-Santarelli 2018a).

[51] On the one hand, if article 17.2 of the ACHR protects the "right of a man and a woman to contract marriage and to found a family", it does not devote "a restrictive definition of the manner in which to define marriage or in which a family must be founded" (§ 182). On the other hand, other inter-American instruments do not contain any definition of the family, either; some are formulated in broader terms even than those of the ACHR: the American Declaration on the Rights and Duties of Man enshrines thus the right of "everyone" to create a family, while the American Declaration on the Rights of Indigenous Peoples refers to the "family systems" specific to these peoples (§§ 183-185).

opinion underlines that its authors could not "know the absolute scope of fundamental rights and freedoms" and therefore entrusted it with "task of identifying and protecting [their] scope in accordance with the passage of time" (§ 193). The Court then admits that the family is a social institution whose importance is "crucial" to the cohesion of communities, societies, and peoples (§ 176), but immediately specifies that "the family has accompanied the development of society" and that "its conceptualization has varied and evolved over time" (§ 177). It is for this reason, the opinion explains, that the Court had, from the outset, always interpreted the concept of family in a "broad and flexible" way (§ 190).[52] The Court therefore declares that it fully subscribes to the finding made by the European Court in *Schalk and Kopf v Austria* according to which it would be "artificial" today to consider a couple of the same sex incapable of enjoying a family bond in the same way as a heterosexual couple. This, the Court further specifies, does not diminish other family arrangements, nor does it ignore the importance of the family: it is simply a matter of recognising "the same dignity" to the emotional ties formed by "a historically oppressed and discriminated minority" (§ 192). The provisions of the Convention which guarantee equality – articles 1.1 and 24 – therefore require that same-sex couples may benefit not only from economic rights ("*derechos patrimoniales*") (§§ 196–197), but also from all other rights granted by states to heterosexual couples (§ 198).

4.2. A strict "test de igualdad"*: the insufficiency of alternative institutions*

To determine how Latin American states should ensure that same-sex couples enjoy these rights, the Court examines "relevant international practice" (§ 201). It then examines its own case-law (especially *Duque*)[53] as well as that of the European Court (in particular *Oliari*);[54] before detailing the solutions adopted in Latin America, Canada, and the United States (§§ 201-216). The Court notes that the various measures aimed at guaranteeing the rights of same-sex couples are of a different nature (§ 217), but immediately affirms that in their view the extension of marriage offers the "most simple and effective" means (§ 218). The Court further adds that establishing a difference in treatment between couples concerning "the way in which they can form a family" cannot satisfy a "strict test of equality" ("*test estricto de igualdad*") (§ 220). Indeed, according to the Court, there is no "no purpose acceptable under the Convention" for this distinction to be considered "necessary and proportionate" (§ 220). Thus, on the one hand, the idea that the aim of marriage is procreation is degrading for all couples who, for whatever reason, cannot or do not want to procreate (§ 221). In this regard, the etymology of the term marriage (which refers to motherhood) cannot be decisive in determining its current meaning (§ 222). On the other hand, "philosophical or religious" oppositions to same-sex marriage cannot, in a democratic society, justify discrimination on the basis of sexual orientation. As important as they are for the life and dignity of the people who profess them, they cannot determine the rights of human beings (§ 223). It is thus the

[52] See, notably, Inter-American Court of Human Rights, *Loayza Tamayo v Peru* (1998), § 92 (in the context of this arbitrary arrest case, the court stated that "*el término 'familiares de la víctima' debe entenderse como un concepto amplio que abarca a todas aquellas personas vinculadas por un parentesco cercano*").

[53] See above introduction of pt. 4.

[54] See above pt. 2.2.

principle of equality that is at stake here, while the right to marriage – guaranteed by article 17.2. of the ACHR – plays only a very marginal role.[55]

In the eyes of the Court, creating an institution endowed with the same effects as marriage but bearing a different name would make no sense and would only "draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them" (§§ 224–225). Such a solution renews "the stereotype of heteronormativity" by designating some as "normal" and others as "abnormal". Therefore, according to the Court, one cannot accept the coexistence of "two types of formal unions" to legally establish different-sex and same-sex cohabitation, which constitutes a discriminatory distinction incompatible with the Convention. Some see in advisory opinion 24/17 a new manifestation of a tendency of the Inter-American Court "to view cases in black and white terms, rejecting nuanced approaches" (Carrillo-Santarelli 2018a, 2018b, p. 483) or "half-measures" (Pou Giménez 2018). In the eyes of Nicolás Carrillo-Santarelli, this can be explained by the fact that the Court has historically had to respond to "heinous abuses" involving obvious attacks on the right to life or physical integrity. Such rights violations leave no room for qualification and call for a clear-cut approach: perhaps, he suggests, the Court now considers such an attitude to be appropriate for "all cases and rights" (Carrillo-Santarelli 2018a).

4.3. Institutional difficulties: the possibility of "transitional" measures

At the time the Court issued advisory opinion 24/17, only five of the twenty-two states having accepted the Court's contentious jurisdiction (art. 62 CADH) allowed same-sex marriage: Argentina (2010), Brazil (2013), Uruguay (2013), Mexico (2015), and Colombia (2016). The Court announced they were perfectly aware of the "institutional difficulties" that certain states would have to overcome in order to establish the right to marriage for same-sex couples. It emphasised, however, that the progressive interpretation of the Convention corresponds in this case to a "juridical, judicial or legislative evolution" observable in other areas of the continent (§ 226). It follows that states must "in good faith" drive the reforms necessary to adapt their legal orders (§ 226). As a transitional measure, they may guarantee same-sex couples– at the very least – the same "derived rights" as heterosexual couples (§ 227). The Inter-American Court therefore undeniably takes the side of "dynamism" by imposing its understanding of equality on the states which have accepted its jurisdiction (and other OAS members),[56] without worrying about their possible reluctance. The Court relies on the evolutions observable at the continental level and does not at any time refer to the idea of "subsidiarity" or to a "margin of appreciation" to be left to the states (Carrillo-Santarelli 2018a, 2018b, p. 483): it orders them to "follow certain specified paths" (Pou Giménez 2018) somehow recusing the idea of a plurality of "state options" acceptable in certain limits (Carrillo-Santarelli 2018a). If we recall, moreover, that the questions posed by Costa Rica[57] did not relate explicitly to marriage as such, but "only" to "patrimonial rights" and the "legal status" to be granted to same-sex couples, it appears that opinion 24/17 is a spectacular

[55] See above note 51.
[56] See §§ 26-27 and above note 2.
[57] See above introduction of pt. 4.

illustration of the notorious (Pou Giménez 2018)[58] jurisdictional activism of the Inter-American Court.

Since marriage is a sensitive political issue at the national level, the voluntarism of the Inter-American Court has given rise to contrasted comments. On the one hand, of course, the opinion is certainly a "victory" for LGBTI communities in the Americas (Abrusci 2018) and human rights and LGBT rights activists around the world therefore greeted it with approval (Saez 2019, p. 351). Some states have already adapted their legal system to advisory opinion 24/17: in an 8 August 2018 decision, the Supreme Court of Costa Rica asked the legislature to act within eighteen months to allow the marriage of same sex couples[59]; in a 12 June 2019 ruling, Ecuador's Constitutional Court similarly ordered the registry office to allow same-sex marriage registration.[60] On the other hand, however, San José's very "proactive" stance on such a sensitive issue presents an indisputable risk of a "backlash" detrimental to the Court's authority (Soley and Steininger 2018, p. 242). So we cannot ignore that in Costa Rica, opinion 24/17 had an impact on the electoral campaign by "boosting" the candidacy of the Christian evangelist Fabricio Alvarado, who campaigned on the protection of traditional values and finished ahead in the first round of the election, only to lose in the second (Abrusci 2018). Likewise, it should be noted that these political difficulties in Costa Rica have "energised" anti-LGBT activists in the region: Former Brazilian President Jair Bolsonaro in particular had made clear his opposition to the legalisation of gay marriage (Saez 2019, p. 351). It thus appears that same-sex marriage continues to polarise Latin American opinion and that while certain states immediately followed the path traced by the Inter-American Court, others appear ready to engage in resistance against opinion 24/17: in this context, as Macarena Saez underlines, "it is impossible, at this stage, to know the real political impact of this opinion" (Saez 2019, p. 351).

4.4. Strong ideological homogeneity within the Inter-American Court

Spectacular though it may have been, the Court's decision was able to rally a comfortable majority, with six judges ruling in favour of marriage equality and only one against. Only the Chilean judge Eduardo Vio Grossi dissociated himself from the position of the Court; he maintained that the American Convention imposes neither recognition and regulation of same-sex unions (sp. §§ 70-75) nor *a fortiori* a broadening of marriage (sp. §§ 80 et seq.).[61] Advisory opinion 24/17 can thus be seen as reflecting the strong

[58] See on the relevance of the idea of margin of appreciation in the inter-American system (Burgorgue-Larsen 2014, p. 141, Martinón Quintero 2018, p. 111).

[59] Sala Constitucional, Resolución Nº 12782 – 2018 del 8 de Agosto del 2018 (in a long separate opinion, Judge Castillo Viquer said in his eyes Costa Rica was not obligated to open marriage to same-sex couples).

[60] Corte Constitucional del Ecuador, Sentencia Nº 1-18-CN (matrimonio igalitario) del 12 de junio de 2019 (Judge Salgado Pesantes, joined by four colleagues, issued a separate opinion against opening marriage).

[61] The Chilean judge rejected the Court's evolving interpretation ("the evolutive interpretation of the Convention, or considering the Convention a living law, does not mean interpreting it to legitimize, almost automatically, the social reality at the time of the interpretation because, in that case, the said reality would be the interpreter and even exercise the normative function" (§ 93)) and defended the legitimacy of taking religious beliefs into account when interpreting the Convention ("by presuming, without providing explanations or grounds for this, that those who oppose marriage between persons of the same sex have inappropriate religious or philosophical convictions (and, therefore, to interpret the Convention), OC-24 runs the risk that some may consider that such persons are opposed to human rights and, consequently, that their opinions can be suppressed, which is definitively discriminatory" (§ 101)).

ideological homogeneity that prevails in San José, articulated on an uncompromising interpretation of human rights and assumed judicial dynamism. Nevertheless, as Laurence Burgorgue-Larsen underlines, the Inter-American Court, long characterised by "legendary activism", now occasionally renders decisions demonstrating "self-restraint" while "the opposition between activism and jurisdictional restraint (…) is more and more present in the inter-American case-law" (Burgorgue-Larsen 2014, p. 141). Judge Vio Grossi is also notoriously the "champion" of dissenting opinions marked by "analytical classicism inclined to restraint", professing a more "orthodox" and "restrained" interpretation of the Convention.[62] At the opposite end of the spectrum, the Mexican judge Eduardo Ferrer MacGregor embodies the Court's "progressive" or even "activist" wing.[63] We will see how these trends develop in the inter-American case-law and whether, in the long term, a tool such as the margin of appreciation, dedicated to the search for a certain balance between interventionism and pluralism, may find its place in the IACtHR approach (Burgorgue-Larsen 2014, p. 145).

4.5. A broad, open dialogue: the example of universalism

One of the most remarkable aspects of advisory opinion 24/17 is the constant references made at every stage to sources outside the inter-American system and – in particular – to the jurisprudence of the European Court: the contrast with the customs which prevail in Strasbourg[64] and Washington[65] in this respect is striking.

In arguing for an extension of protected family life and for the examination of possible modalities for the recognition and protection of same-sex couples, the Court constantly refers to its "European counterpart" ("*par europeo*").[66] The Court also constantly refers, in its reasoning, to the instruments, decisions,[67] and recommendations[68] emanating from the universal system of protection of human rights. The Court's opinion on same-sex marriage therefore testifies to the Court's propensity to "import" in a massive yet selective way the interpretations of human rights formulated in "extra-American" systems (Neuman 2008, p. 101). For Domenico Giannino, this is due not only to "the OAS's 'political' indifference toward human rights protection issues" and "the difficult environment in which the Court operates", but also to the "universal approach to human-rights protection" the Court has always supported (Giannino 2019, p. 15). This tendency to emancipate itself from regional consensuses in order to favour a transnational approach is, in the eyes of this author, ambivalent: it undeniably confers a

[62] His emblematic dissent – in *Artavia Murillo* – thus sets out, in a particularly detailed and articulate manner, the evolving interpretation as conceived by the majority of inter-American judges (*Artavia Murillo v Costa Rica*, 2012; Burgorgue-Larsen 2014, p. 143).

[63] Less numerous than those of Vio Grossi, his separate opinions nonetheless offer a very elaborate "theorisation" of the control of conventionality (see in particular *Cabrera y Montiel Flores v Mexico*, 2010, and Burgorgue-Larsen 2014, p. 142).

[64] See above, pt. 2.5.

[65] See above, pt. 3.5.

[66] See notably §§ 68, 77, 180, 187, 192, 204, and 205.

[67] When considering the modalities of the regulation of same-sex unions, the Court in particular looks to the Human Rights Committee's 2003 observations in *Young v Australia* (differential treatment of same-sex couples with regard to retirement pensions) (§ 203).

[68] When considering the implications of the principle of non-discrimination, the Court refers in particular to the Yogyakarta Principles drawn up in 2007 by a group of independent experts at the initiative of the United Nations and updated in 2017 ("Yogyakarta + 10") (§ 196).

certain "argumentative prestige" on the decisions of the Court, but it can have a negative impact on the creation of a "corpus of common standards" in the field of human rights (Giannino 2019, p. 15).

There are fewer references to Canadian and American options, even if North American developments are expressly mentioned and the *Obergefell* judgment in particular is specifically called upon in the Court's discussion of the benefits gradually extended to same-sex couples (§ 197). The limited attention given to solutions adopted in North America probably stems from a number of factors: the non-ratification of the ACHR by the United States and Canada probably partly explains this relative "mistrust"; but, as far as the U.S. is concerned, one must probably also take into account the weight of a very violent common history and of still extremely complex and tense political relations.[69]

5. Comparatist thoughts

Faced with the paradigmatic question of same-sex marriage, European, American, and inter-American human rights judges have come up with contrasting answers by taking different paths. The comparison of their decisions and opinions through the prism of the five issues identified in the introduction highlights the *dialectical tensions* that underlie the interpretation of fundamental rights and the possible *methods for their resolution*.

TABLE 1

	Dialectic	European Court	Supreme Court	Inter-American Court
Applicability of rights	Continuity/ change	Prudent revision based on EU law	Extension by extrapolation of four principles	Consolidation of an originally flexible understanding
Balancing rights and interests	Collective/ individual	Priority to states' aims but strategic compromise	Priority to rights (marriage) and deliberate refusal to compromise	Priority to rights (equality) and deliberate refusal to compromise
Legitimacy of the court	Passivism/ activism	Provisional consensualism with a warning addressed to states	Activism tempered by the clear pre-existing tendency in the USA	Activism tempered by the allocation of a transition period
Intra-jurisdictional cohesion	Unanimity / dissensus	Constant unanimity, with limited peripheral dissent.	Well-balanced ideological division, now followed by a conservative turn.	Strong cohesion, with a single dissent maybe expressing rising subsidiarist concerns
Inter-jurisdictional dialogue	Universalism/ insularism	Regionalism	Insularism	Universalism

Table 1. Schematic comparison: dialectical tensions and methods for their resolution.

[69] Thus Laurence Burgorgue-Larsen underlines that among the elements which contribute to the political context in which the Inter-American Court intervenes are "the horrors generated by the policy of the United States of America. have long considered their 'backyard'" (Burgorgue-Larsen 2014, p. 110).

5.1. The applicability of rights: bringing text to life

It is by relying on the legal instruments of the European Union that the Strasbourg Court "invigorated" its understanding of marriage and family life: the more open perceptions conveyed by the Charter and family reunification directives provided, in a way, a "support" for "renovating" the interpretation of the ECHR.[70] Although singular, this approach has remarkable similarities to those adopted at the Supreme Court and the Inter-American Court.

By referring, as the Strasbourg Court, to the rules of the Vienna Convention, the Inter-American Court followed a very similar reasoning: the text and the context of the treaty's provisions do not limit the interpretation of "living" rights, requiring an "evolutive" interpretation and, in view of transformations to society, it would be "artificial" to exclude same-sex couples from the scope of application of family life protected by article 11.2.[71] Without being bound by the Vienna Convention, the Supreme Court offered a substantially similar analysis: history and tradition guide the analysis of "due process" without "defining its outer boundaries" and, given the evolution of marriage and of perception of homosexuality.[72] the constitutional right to marry had to be extended to same-sex couples. In Europe as well as in America, the extension of rights therefore proceeds from a tension between tradition and modernity: the always provisional resolution of the dialectic of continuity and change leads to a gradual extension of conventional or constitutional protection (Dzehtsiarou and O'Mahony 2013, p. 309). In this sense, the Inter-American Court and the Supreme Court both insisted on the mandate given to future generations by those who drafted conventional or constitutional provisions for rediscovering and relearning meanings constantly renewed by the passage of time (*Obergefell*, 2015, 1, 11; OC-24/17, 2017, § 193).

The American and inter-American courts also emphasised the "beauty" of marriage and the "crucial importance" of family but insist that they evolve with changes in society: accordingly, the desire of a historically oppressed minority to be allowed to enjoy them confirms their centrality and enrich their meaning, without removing anything in dignity and rights from other family arrangements. This approach is much bolder that the interpretation of the ECtHR which is cautious to the point of ambiguity[73] or contradiction[74] and led the IACtHR and the SCOTUS to a frank consecration of the right to same-sex marriage, that will have a considerable, even decisive, weight in the subsequent balance of interests. They do not, however, take exactly the same path: the Supreme Court supported marriage equality using an elaborate construction articulating four broad constitutional principles,[75] while the inter-American court refers more laconically to the "flexible and broad" understanding of the family which has prevailed since the beginning in its jurisprudence.[76]

[70] See above, pt. 2.1.
[71] See above, pt. 4.1.
[72] See above, pt. 3.1.
[73] See above, pt. 2.1.
[74] See above, pt. 2.2.
[75] See above, pt. 3.1
[76] See above, pt. 4.1.

5.2. Balancing rights and interests: domesticating incommensurability

While in *Schalk and Kopf* and subsequent case-law, the Strasbourg Court sidesteps the specific approach based on the equality principle,[77] the American courts "combine" the right to marry and the prohibition of discrimination. *Obergefell* pays a powerful tribute to marriage whose importance in American society is such that it is no longer conceivable to exclude same-sex couples, and the equality principle only acts as a "reinforcement" or "in addition".[78] Opinion 24/17 carries in turn a strict vision of equality and the opening of marriage is the simplest and most effective way to put an end to discrimination against same-sex couples: marriage does not appear to be an "end" in itself, but rather the "means" of equality.[79]

Some authors think that the Supreme Court's insistence on the centrality of marriage risks ostracising families living outside the framework of marriage while only offering a limited/sectorial protection to the LGBT community: the inter-American approach – centred on equality – would thus perhaps be preferable (see, e.g., Murray 2016, p. 1212; Walls 2017, p. 138). Be that as it may, the (inter-) American "prioritisation" of the right to marriage or of the principle of equality seems preferable to the European renunciation of any "cooperation" between substantive rights and the principle of equality. It is even more problematic – in our view – that the European Court does not even discuss the arguments formulated against same-sex marriage and sticks to the validation of "cultural and social connotations" whose nature and content are not otherwise disclosed. By contrast, on the other side of the Atlantic, human rights judges do not hesitate to examine (and reject) arguments drawn from the procreative dimension of marriage and religious convictions hostile to homosexuality.

Beyond the unexplained invocation of these "cultural and social connotations", is it the weight of religious beliefs relating to marriage that currently stops the European Court from engaging in a true test of proportionality? The religious concept of marriage was at the heart of the recent *Babiarz v Poland* decision, in which the Court finally confirmed the absence of a European right to divorce:[80] it is therefore possible to think that religion is not entirely foreign to the Strasbourg Court's current choice to favour a compromise approach over the bolder consecration of the right to marriage privileged by American and inter-American judges.

5.3. The legitimacy of judges: respecting sovereignty

The European Court takes a restrained approach which (for the moment) leaves the question of marriage to the states,[81] in stark contrast to the more daring attitudes of the Supreme and Inter-American courts. It is certainly in the European system that the principle of subsidiarity is best anchored, as evidenced by the pervasiveness, in the

[77] See above, pt. 2.2. and Jenart 2017, p. 613.
[78] See above, pt. 3.2.
[79] See above, pt. 4.2.
[80] Portuguese judge Paulo Pinto de Albuquerque argued in his dissenting opinion that "the Convention is a 'religious-friendly' text, but it does not allow the state to impose religious or moral values, even when they are shared by the majority of the population" (*Babiarz v Poland*, 2017, dissenting opinion of Judge Pinto de Albuquerque, § 33). About this judgment see Thomas Hochmann's harsh criticism comparing the Court's decision with "Catholic fundamentalist aims" (Hochmann 2017, p. 1015).
[81] See above, pt. 2.3.

Strasbourg case-law, of the mechanism of the "European consensus" and its correlate the "national margin of appreciation".[82] "Subsidiarist" considerations are, however, not absent from the other two systems.

This is certainly true in the United States, where a relatively loose principle of "judicial restraint" balances the power of judicial review. It is less clear at the Inter-American Court, whose "activism" has long been described as "legendary", but "traces" (Burgorgue-Larsen 2014, p. 145; Willems 2015, pp. 225–52) of subsidiarity are nevertheless detectable in the case-law. Prominent authors argue that the "margin of appreciation" system could eventually be deployed in American constitutional law (Calabresi and Bickford 2014, pp. 76–78) and/or in the inter-American system (Burgorgue-Larsen 2014, p. 145). Either way, while the Strasbourg Court considered that the conditions for imposing a European right to same-sex marriage were not met, the (inter-) American courts have found that it was "necessary and urgent" to enshrine the right to marriage, even if it meant cutting short democratic debate at the state level[83] and regardless of institutional difficulties which states will face.[84] It is also necessary to specify, to soften the contrast, that, on the one hand, the Supreme Court could rely on the choice already made by thirty-five American states to allow same-sex marriage and that, on the other hand, the Inter-American Court left Latin American states a certain latitude to implement "in good faith" the transition towards marriage equality.

As we have pointed out, *Obergefell* and opinion 24/17 did not end (inter-)American debates on same-sex marriage, but instead reorganised it in new forms: it is still too early to measure their precise political and societal impact and find out whether the risk of a conservative "backlash" has materialised or not. In the recent *Fedotova and Shipitko v Russia* decision (2021), the ECtHR decided that the lack of any form of union available to same-sex couple was in breach of the Convention: it emphasised that the organisation of a same-sex partnership would "not be in conflict with the 'traditional understanding of marriage' prevailing in Russia, or with the views of the majority (…), as those views oppose only same-sex marriages, but they are not against other forms of legal acknowledgment" (§ 56). It seems, then, that the Court, for now, intends to strengthen the positive obligation to provide some form of recognition, without intensifying the pressure on States as regards the specific issue of marriage. In this respect, the formulations of *Fedotova* seem to indicate that traditional conceptions and majoritarian views remain sufficient to justify that the issue remains in the hands of states.[85]

5.4. Intrajurisdictional cohesion: speaking with one voice

It is striking to note the unanimity prevailing in Strasbourg concerning the "strategic compromise" of denying the right to same-sex marriage while progressively deploying a "network" of state obligations allowing for the recognition and protection of same-sex couples. No fewer than twenty-one European judges have ruled on the issue in three

[82] Following the so-called "Interlaken" process, subsidiarity has also been forcefully "reaffirmed" as a fundamental guiding principle for the European Court: Additional Protocol No. 15 incorporates a reference to the margin of appreciation mechanism in the preamble to the ECHR (see notably Sudre 2014).
[83] See above, pt. 3.3.
[84] See above, pt. 4.3.
[85] See above, pt. 2.3.

judgments, and all have found that maintaining the principle of marriage heterosexuality was acceptable under the Convention.[86]

It is only at the margins, in cases that only indirectly affect marriage,[87] that a struggle between moderate supporters of marriage inclusiveness and discreet advocates of marriage heteronormativity emerges, similar to the observable tensions in the (inter-)American case-law. Opinion 24/17, adopted by an overwhelming majority of six votes to one, shows that – temporarily?[88] – judges dedicated to the "maximum protection of rights" outnumber their colleagues who embrace "classic theories of international law where the will of the state remains decisive" (Burgorgue-Larsen 2014, p. 117). *Obergefell*, decided by five votes to four (and ultimately determined by the choice of a now-retired "swing voter"), reflects – in turn[89] – the partisan divide between "liberals" and "conservatives" in the Supreme Court and in the American nation (Bailey and Maltzman 2008, p. 369). Beyond the current terms of (im)balance characterising the three systems[90], it is, basically, a similar "tension" that appears between two opposed conceptions of human-rights justice: one "dynamic" and "pro-rights", the other "orthodox" and "sovereignist" with judges adhering to one "doctrine" or the other depending on the collective dynamics operating in each system and on their personal trajectory as lawyers and judges (Voeten 2011, p. 64).

Undoubtedly the opposition operates in a more diffuse way at the ECHR, which has forty-seven magistrates divided into several trial formations: the contrasts are necessarily more marked when – as at the IACHR and the Supreme Court – a single group of seven or nine judges hears all cases. Undoubtedly, the European case-law is also, for the same reason, less sensitive to the renewal of the Court's staff:[91] in the (inter-)American systems, the replacement of one or two judges can have a significant or even decisive impact on jurisprudential orientations. We note, in this regard, the concerns raised – in particular as regards reproductive and LGBT rights – on the appointment of Neil Gorsuch, Bret Kavanaugh and Amy Coney Barrett to the Supreme Court. Similar questions have accompanied the appointment of judges Alberto Perez Perez and Eduardo Vio Grossi in San José.

5.5. Interjurisdictional dialogue: enriching your perspective

The case-law of the European Court relating to same-sex couples has developed over the past ten years under the guidance of the Charter of Fundamental Rights of the European Union. Since the inaugural *Schalk and Kopf* judgment, the cooperation has grown richer and – gradually – the case-law of Strasbourg and Luxembourg tend to complement and strengthen each other in order to tighten the network of state obligations to recognise and protect same-sex couples. On the other hand, references to inter-American and American decisions remain at this stage quite scattered and superficial, even though

[86] The Court also unanimously ruled that Italy should create an alternative form of recognition for same-sex couples (*Oliari*). States, however, remain free to determine the precise nature and effects of such alternative couple status (*Chapin and Charpentier*).
[87] See above, pt. 2.4.
[88] See above, pt. 4.4.
[89] See above, pt. 3.4.
[90] On the virtues of a "balance" between the two approaches, see Orentlicher 2018, p. 412.
[91] Nevertheless, see Hervieu 2015, p. 13.

institutional rapprochements have in recent years been outlined with both Washington and San José.[92]

The European approach to interjurisdictional dialogue may thus be considered as the "missing link" between American insularism and inter-American universalism.[93] As alluring as the idea of a "global dialogue" on rights may be *a priori*, the objections to this approach deserve to be heard and considered.[94] In our view, this legitimate reluctance should lead to the development of methodologies (Tulkens *et al.* 2012, pp. 487–88) for universal dialogue among human rights judges, rather than to its outright disqualification. Indeed, well beyond the simple coquetry consisting of flaunting one's legal knowledge (the "window-dressing-approach") (Garlicki 2013, p. 56), the measured and distanced consideration by human rights judges of the interpretations adopted by "alter-egos" in other systems is likely to enrich its analyses: "intellectual" enrichment, on the one hand, as it is true that good arguments and good reasoning are easily transplanted from one system to another; "political" enrichment, on the other hand, since by borrowing from an esteemed jurisdiction, one appropriates (some) of its prestige. Seen this way, the transatlantic dialogue is based on "the recognition of the value of judicial arguments" and on the judges' "self-understanding as members of a hermeneutical community" (Ansuátegui Roig 2016, p. 33, Willems 2019, p. 214).

The case of same-sex marriage seems to us to be a significant example of this: one might think that the European Court's proportionalist analyses would benefit from being inspired by the richer and more refined elaborations of the Supreme Court and the Inter-American Court;[95] we can also think that the activism of (inter-)American judges would offer additional legitimacy to an intervention of the Strasbourg Court in favour of same-sex marriage.[96]

6. Conclusion

Strasbourg's approach to the question of same-sex marriage was defined just over ten years ago by the *Schalk and Kopf* judgment of 24 June 2010. These important decisions and the abundant case-law that has unfolded in its wake are undoubtedly imbued with a sense of *measurement* which manifests itself in all aspects of the process of interpreting the Convention. Ten years later, the international legal landscape has been enriched by less "orthodox" or more "dynamic" decisions delivered on the same issue by the United States Supreme Court and the Inter-American Court of Human Rights. It seems to us, then, that European case-law which relays – still today – the approach adopted in *Schalk*

[92] See above note 3.

[93] There is no doubt that the roots of these contrasting approaches can be found – at least in part – in the (partially shared) political and legal history of Europe, the United States, and Latin America.

[94] Thus some in Washington consider recourse to extra-U.S. sources a "distortion" of the constitutional requirement and the role of the federal judge (see above, pt. 3.5.); in the same way, some in San José believe that reckless recourse to external materials prevents the progressive constitution of a truly inter-American "common corpus" (see above, pt. 4.5.). Eminent specialists of the ECHR also point out "the danger that the dialogue between 'sources' and their interpreters, practiced universally and in high doses, will lead, in the protection of fundamental rights, to a form of consensual conservatism rather than a healthy and innovative emulation" (Tulkens *et al.* 2012, p. 481)

[95] See in particular above pt. 3.2. and 4.2.

[96] See in particular above pt. 3.3 and 4.3.

and Kopf could or should – in various respects – benefit from the (inter-) American experiences of 2015 and 2017.

First of all, it appears that the European Court should go beyond the ambiguity or hesitation characterising the inclusion of same-sex couples in *the scope* of article 12 in *Schalk and Kopf*. It does not seem appropriate, indeed, to determine the scope of a right by means of enigmatic double negations ("it cannot be said that article 12 is inapplicable") or by reference to mysterious circumstances which would lead to its (in)applicability ("the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex").[97] It does not seem consistent – moreover – to reiterate, in subsequent case-law, the assertion that "article 12 enshrines the traditional concept of marriage, namely the union of a man and a woman" (*Chapin*, 2016, § 37) which undermines the more open interpretation of the Austrian judgment. The Court could, in this regard, explain and justify the extension of the scope of application of article 12 by asserting – as did the Supreme Court – that the principles underlying the protection of the right to marriage of couples of different sex are fully transposable to same-sex couples[98] and/or by considering – in the manner of the Inter-American Court – that today marriage is only an aspect or a modality of the right to family life expressly recognised for same-sex couples.[99] In any case, the European interpretation of the right to marry could adopt the view – embraced in Washington and San José – that the evolutions of marriage and the family have enriched rather than weakened these institutions and find there another reason for more clearly and explicitly extending the scope of article 12.

It secondly appears that the Court should fully mobilise the now stifled potential of the *principle of non-discrimination* and examine – in its light – the governmental interests put forward to justify the exclusion of same-sex couples. Until now, Strasbourg's interpretation of article 12 "neutralises" the operation of article 14 and the test normally applied to differentiations based on sexual orientation which requires that they be justified by "particularly convincing and weighty reasons" (*X and others v Austria*, 2013, § 99). It is likely that the simple mention of "cultural and social connotations" associated with marriage would be considered insufficient with regard to this requirement: in fact, it has already been found that tradition (for which the famous "connotations" are an obvious avatar) is not sufficient to justify differentiation based on sex (*Cusan and Fazzo v Italy*, 2014, § 66) or sexual orientation (*X and others v Austria*, 2013, § 99). The Court could then embrace the perspective adopted by the Supreme Court[100] and the Inter-American Court[101] that substantive rights and the principle of non-discrimination are mutually reinforcing and thus require states to offer more elaborate justifications for their desire to retain the heterosexual character of marriage. Strasbourg could not in this case – any more than the (inter-)American courts – be satisfied with the arguments classically linked to the procreative dimension of marriage or its religious meanings; European

[97] In what "circumstances" is it limited? And in what circumstances would it apply to same-sex couples? See Hodson 2011.

[98] See above, pt. 3.1. Extension by extrapolation is not unknown to the European Court (see for example European Court of Human Rights, *Pretty v United Kingdom* (2002), § 61 et seq. and Willems 2019, pp. 207–8.

[99] See above, pt. 4.1.

[100] See above, pt. 3.2.

[101] See above, pt. 4.2.

governments would – doubtless – be hard pressed to put forward convincing arguments beyond the circular invocation of tradition (Lau 2013).

Finally, it appears that the Court could progressively emancipate itself from the consensual approach which has for ten years been the main lever of its case-law relating to same-sex marriage. With *Obergefell*, the Supreme Court of the United States allowed itself to extend to all fifty American states a solution already applied by a substantially majority (35/50) arguing that the discussion had been intense and that the time for harmonisation had come. The Inter-American Court, for its part, allowed itself – in opinion 24/17 – to impose an evolution that had been adopted only in a few member states (5/22) but took the precaution of organising a transition period during which states would move towards opening marriage while guaranteeing equality of economic and non-economic rights from the outset. At the crossroads of the two approaches, can we not imagine Strasbourg, when the European ratio has changed a little in favour of same-sex marriage (17/47), gradually increasing the pressure on the states by demanding constant attention on their part to the question of same-sex marriage and by simultaneously reinforcing the requirements relating to the availability and content of alternative statuses? In the case-law relating to gender identity, such a gradual intensification of European pressure finally led,[102] in *Goodwin*, to the consecration of the right of transsexual people to marry, which was then recognised by only 54% of member states (*Goodwin*, 2002, §§ 57 and 85; see also *A.P., Garçon and Nicot v France*, 2017, sp. §§ 122–125). In *Schalk and Kopf*, the Court expressly underlined that it was the absence of a "continuous international trend" which prevented of using a similar approach in favour of same-sex marriage: it is undeniable that the decisions of the American Supreme Court and the Inter-American Court contribute significantly to such an international trend.

It was from the main source of European Union law that ten years ago Strasbourg drew inspiration for a carefully revised reading of the right to marriage. In the wake of *Schalk and Kopf*, an intermittent dialogue has taken place between the courts in Strasbourg and Luxembourg which has gradually consolidated a "package" of rights benefiting same-sex couples without taking the step of a European consecration of the right to marriage. If this European collaboration deserves to remain in the foreground, the judges in Strasbourg cannot ignore the historic decisions delivered by their colleagues in Washington and San José. In our view, they can, both through the quality of their analyses and the increased legitimacy they convey, contribute today to a new "vivification" of European interpretation.

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[102] See in particular European Court of Human Rights (pl.) *Rees v United Kingdom*, 10 October 1986, § 47; European Court of Human Rights (pl), *Cossey v United Kingdom*, 27 September 1990, § 41, and European Court of Human Rights (pl.), *B. v France*, 25 March 1992, § 51 et seq.

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