

# Explaining the Progression of the Rights of Same-Sex Couples in South America

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## I. INTRODUCTION

A trend of rights advocacy has recently developed in the international community. Organizations dedicated to the principle of advancing the rights of historically under-represented and oppressed social groups have proliferated around the globe. The growth of the gay rights movement in recent years has resulted in the expansion of civil liberties afforded to same-sex couples.<sup>1</sup> The movement has gained significant success in symbolic expression. Even without much knowledge of the movement, one typically associates a rainbow flag, the Greek letter lambda, and the word “pride” with the effort. Unfortunately, the movement has not achieved comparable substantive success.<sup>2</sup> Same-sex couples continue to be denied basic rights afforded to similarly-situated, opposite-sex couples.<sup>3</sup> Furthermore, a strong opposition movement has formed in response to the gay rights movement, dedicated to the continued social imbalance between heterosexual couples and their gay and lesbian counterparts.<sup>4</sup>

The limited substantive success achieved by gay rights groups has been documented. The explanation for this limited success is usually traced to religion and traditional values.<sup>5</sup> In many nations, however, the problem has stemmed from the absence of participation by gay rights groups in the legal arena. In some of these nations, these groups are unable to gain access to the court system to litigate the matter.<sup>6</sup> In others, particularly in South America, it may be a more complex issue of lobbying the legislature (and the public) to overturn a nearly

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1. See generally WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* (2006).

2. See Lynn D. Wardle, *A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 LIBERTY U. L. REV. 537, 588 (2010).

3. *Id.*

4. See Adrienne Rosenberg, *The Brazilian Paradox: The Lesbian, Gay, Bisexual, and Transgender Battle for Human Rights*, in REVISITING HUMAN RIGHTS IN LATIN AMERICA 17 (Arianna Nowakowski ed., 2009), available at <http://www.du.edu/korbel/hrhw/researchdigest/latinamerica2/digest-human%20rights%20in%20latin%20america%20vol%202-brazil.pdf>.

5. See YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* 29 (2002).

6. See John E. Bonine, *Broadening “Standing to Sue” for Citizen Enforcement*, in FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 249, 252 (1999), available at <http://www.inece.org/5thvol2/bonine.pdf>.

insurmountable constitutional amendment.<sup>7</sup> Regardless of the obstacles impeding the successes of gay rights groups, it is clear that the nations that have experienced the most success have seen a pronounced involvement of these groups in their legal systems.

This article will address the stark disparity in rights for same-sex couples throughout South America. Part II of this article will inquire into the prevalent homophobia currently existing in South America and its effects on those pushing for marriage reform. Part III of this article will examine the current state of same-sex marriage laws around the world and particularly in South America, focusing on the region's four largest nations. Part IV of this article will explain the deficiencies of some marriage alternatives that legislatures have offered to same-sex couples. Part V of this article will focus on the impediments facing the marriage reform movement, and Part VI will offer solutions to overcome those barriers.

## II. BACKGROUND

Around the world, human rights groups have pushed for international reform and increased protections for lesbians, gays, bisexuals, and transgender people ("LGBT"). A movement has sprung up in South America, seeking to advance continent-wide reform and pushing for expansive rights for the LGBT population specific to the region.<sup>8</sup> After an initial push, however, the campaign for reforms has stalled while its leaders acknowledge the difficulties in establishing continent-wide reform.<sup>9</sup> In response, the movement has sought to consolidate its efforts

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7. See Wardle, *supra* note 2.

8. Javier Corrales, *Gays in Latin America: Is the Closet Half Empty?*, FOREIGN POLICY (Feb. 18, 2009), [http://www.foreignpolicy.com/articles/2009/02/17/gaysin\\_latina\\_america\\_is\\_the\\_closet\\_half\\_empty](http://www.foreignpolicy.com/articles/2009/02/17/gaysin_latina_america_is_the_closet_half_empty).

9. Of course, speaking in generalized terms of "South America" itself imposes "homogeneity on an otherwise diverse continent." Deepak Lal, *The Political Economy of Reform in Latin America* 3 (Ctr. for Post-Collectivist Studies, Working Paper No. 784, 1998), available at <http://www.econ.ucla.edu/workingpapers/wp784.pdf> (enumerating colonial history, religious perseverance, and geographic location as some reasons for the ineffectiveness of broad reforms in the economic policy context). But the initial successes of the gay rights movement have shown that such a broad approach may not be entirely impossible.

and address the broader issues of homophobia as a precursor to achieving substantive rights.<sup>10</sup>

The issue of homophobia becomes increasingly relevant when one considers that South America has exhibited an historically homophobic public policy attitude throughout the past century.<sup>11</sup> Although gays and lesbians are no longer the outlawed class they were in the past, many South Americans still consider homosexuality immoral, diseased, or both.<sup>12</sup> The dominance of the “machismo” culture has played a major role in spreading negative stereotypes about gays and lesbians among the public.<sup>13</sup> These stereotypes have in turn facilitated a strong opposition to the fight for gay rights.<sup>14</sup> Because lawmakers and traditionalist judges share these stereotypical views, and because opponents of the movement have already attained a foothold in the political processes of South American nations, the movement is faced with an uphill battle at the outset.<sup>15</sup> Eliminating this imbalance among the nations’ elite is a necessary precursor to realizing success at the constituent level, as public support for innovative measures naturally falls from a nation’s decision-makers.<sup>16</sup> As such, an overarching goal of the reform movement has been to level the playing field—to permeate the political process and facilitate discussion on enactments to counterbalance the machismo culture.<sup>17</sup> On this point, the movement has thus far seen limited success, both in reaching formal equality and in engaging the public to take action.<sup>18</sup>

The outward presentation of the homosexual culture itself has not helped further the success of the reform movement. South American popular culture lacks prominent LGBT figures,<sup>19</sup> and the general public

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10. The movement has also become more geocentric, with many organizations spanning nationally and even locally to press for equal rights at the grassroots level. Some examples of these organizations are discussed in detail in Part V.B *infra*.

11. Corrales, *supra* note 8.

12. ESKRIDGE & SPEDALE, *supra* note 1, at 6.

13. *Gay Rights in Latin America: Out of the Closet and Into Politics*, ECONOMIST (Mar. 8, 2007), [http://www.economist.com/node/8819803?story\\_id=8819803](http://www.economist.com/node/8819803?story_id=8819803).

14. For a thorough discussion of the obstacles faced by the gay rights movement in South America, see *infra* Part V.A-B.

15. Indeed, many South American governments are controlled by political parties on the left. Corrales, *supra* note 8. The barriers of the gay rights movement have been exacerbated by the leftist governments’ refusal to support the movement. *Id.*

16. *See id.*

17. *See id.*

18. *See* Rosenberg, *supra* note 4.

19. *See* Francisco Valdes, *City and Citizen: Community-Making As Legal Theory and Social Struggle*, 52 CLEV. ST. L. REV. 1, 17, 35 n.120 (2005) (addressing the homophobia in Latin American literature and other media).

is therefore not exposed to the LGBT persona on a consistent basis.<sup>20</sup> This absence of representation in the media has led to social indifference toward gays and lesbians among the South American public, and this apathy has in turn maintained the conservative legal status quo.<sup>21</sup>

Some nations have reacted negatively—even violently—toward an increase in public displays of the LGBT lifestyle.<sup>22</sup> Brazil, for instance, where the Carnival Festival in Rio de Janeiro has become a staple of gay pride in South American culture, recently reported an increase in the number of murders of homosexuals per year.<sup>23</sup> While gay rights groups have taken notice of such statistics and pledged to raise public awareness of the on-going discrimination, national legislatures have been reluctant to follow suit.<sup>24</sup> The problem, therefore, has not just been the furtherance of negative stereotypes, but the lack of governmental action against—and at times the continual reinforcement of—those stereotypes in the public sphere. Discriminatory attitudes and accompanying treatment toward the LGBT population in everyday life has helped maintain and promote inequality in law and politics. The result has been the denial of protections for gays, lesbians, and same-sex couples through legislation and political action.

Achieving the right to marry would have dramatic consequences for the LGBT community, both as a matter of rights expansion and as a way of combatting perceived justifications for homophobia in South America. While anti-discrimination laws and hate crime legislation are undoubtedly helpful in preserving the rights of gays and lesbians on a day-to-day basis, formal legal recognition of same-sex marriage would solidify equal social freedoms between heterosexuals and gays and lesbians.<sup>25</sup> Such a measure would also eliminate feelings of inferiority among future

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20. See Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 368–69 (2009) (discussing the causes of homophobia and its effects on social and political policy).

21. See *id.*

22. *Gay Rights in Latin America: Out of the Closet and Into Politics*, *supra* note 13.

23. Kings Thiago, *Murders of Homosexuals Increased 26% in One Year, Says GGB*, FOLHA.COM (May 18, 2005), <http://www1.folha.uol.com.br/folha/cotidiano/ult95u109160.shtml>.

24. *Gay Rights in Latin America: Out of the Closet and Into Politics*, *supra* note 13.

25. Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 849 (2008).

generations and spark efforts by existing advocates to make a stronger push for equal treatment under the law.<sup>26</sup>

### III. WHAT PROGRESS FOR SAME-SEX MARRIAGE HAVE WE SEEN?

#### A. A Global Perspective

Currently, only eleven nations around the globe endorse same-sex marriage, either through legislation or litigation.<sup>27</sup> Of those, just one—Argentina—is located in South America. The earliest nation to recognize the right was the Netherlands in 2001,<sup>28</sup> but no nation has done so since June of 2012.<sup>29</sup>

On the other hand, as of January 1, 2010, thirty-seven nations have explicitly banned same-sex marriage in their constitutions;<sup>30</sup> fifteen of those nations have done so since 2001.<sup>31</sup> Furthermore, the debate in those nations that have endorsed same-sex marriage has not ceased. The right remains a hot-button issue in past and upcoming political elections, with many candidates seeking to re-impose the restriction of marriage to opposite-sex couples.<sup>32</sup> As such, while the debate has received a great deal more attention the past decade, the overall trajectory of change in South America remains unclear.

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26. In the United States, the Supreme Court's recognition of a legal marriage between citizens of different races in *Loving v. Virginia* fueled the Civil Rights Movement of the 1960s.

27. Keith Wagstaff, *11 Countries Where Gay Marriage Is Legal*, WEEK (Apr. 23, 2013), <http://theweek.com/article/index/242703/11-countries-where-gay-marriage-is-legal>. A few nations perform same-sex marriages only in certain districts. *See, e.g.*, Ioan Grillo, *Mexico City's Revolutionary First: Gay Marriage*, TIME (Dec. 24, 2009), <http://www.time.com/time/world/article/0,8599,1949953,00.html>. For purposes of this article, same-sex marriage is not considered legalized in those nations, as couples married under such laws are not afforded rights under their respective federal constitutions. *See id.*

28. Stb. 2001, p. 9 (Neth.). Marriage equality in the Netherlands was part of an unprecedented legislative overhaul, seeking to ensure equality for same-sex couples in the public sphere. *See generally* Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141 (2001).

29. Wagstaff, *supra* note 27. Following the completion of this article but prior to publication, Uruguay's Congress voted to recognize marriage rights for same-sex couples. *Id.*; *Uruguay Legalises Same-Sex Marriage*, GUARDIAN (Apr. 10, 2013), <http://www.guardian.co.uk/world/2013/apr/11/uruguay-legalises-same-sex-marriage>. The legislatures of France and New Zealand have passed similar measures, and their respective presidents are expected to sign those bills into law. Wagstaff, *supra* note 27.

30. *See* Wardle, *supra* note 2.

31. In some instances, the adopted constitutional amendments have *rescinded* rights of same-sex couples. Bolivia, Venezuela, and the Dominican Republic, for instance, have since banned unregistered cohabitation between same-sex couples. *See, e.g.*, CONSTITUCIÓN POLÍTICA DEL ESTADO [C.P.E.] [CONSTITUTION] Jan. 2009, art. 63 (Bol.).

32. *See generally* Wardle, *supra* note 2.

*B. A Closer Look at South America*

In order to fully understand the dynamic state of the law in South America, an overview of a few South American countries is necessary. Among the four largest nations on the continent—Brazil, Argentina, Peru, and Colombia<sup>33</sup>—there is a noticeable disparity in recognition of same-sex couples' rights. Beyond these four countries, the landscape of rights afforded to same-sex couples is similarly disparate.<sup>34</sup> This article, however, will focus solely on the four largest nations.

The political structure of the state in question matters greatly when focusing on the extent of and scope for reforms.<sup>35</sup> Progress in recognizing minority rights comes more easily to states that historically have had a constitutionally republican government<sup>36</sup> rather than a military dictatorship.<sup>37</sup> Inadequate political structures may be to blame for the absence of marriage equality advocates in a nation's legislative and judicial arenas. Similarly, while each state's governmental structure may have contributed to its political<sup>38</sup> or socioeconomic<sup>39</sup> inadequacies, reformers

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33. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 21, 68, 110, 400 (2011).

34. Under the laws of Guyana, for instance, consensual homosexual activity remains illegal, with a potential punishment of life imprisonment. L.R.O. 3/1998, Cap. 8:01, §§ 352–354 (Guy.).

35. For an argument that countries in South America are still struggling to achieve true “democracy,” see generally Mark P. Jones, Democracy in Latin America, Challenges and Solutions: Political Party and Party System Institutionalization and Women's Legislative Representation (Sept. 16, 2007) (draft solution paper), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1186224>.

36. Brazil has one such government, though some historians argue that the early regime was little more than a military dictatorship. DANA GARDNER MUNRO, THE LATIN AMERICAN REPUBLICS: A HISTORY 280 (1942).

37. The Argentine military dictatorship during the 1970s and 1980s was extremely violative of human rights, kidnapping political opponents and citizens suspected of political subversion. Maria Soledad Catoggio, *The Last Military Dictatorship in Argentina (1976–1983): The Mechanism of State Terrorism*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE (July 5, 2010), <http://www.massviolence.org/The-Last-Military-Dictatorship-in-Argentina-1976-1983-the?cs=print>.

38. The Colombian government, a presidential republic, has seen heavy influence in recent years from paramilitary groups and the drug cartel. See Juan Forero, *Colombian Government Shaken by Lawmakers' Paramilitary Ties*, WASH. POST (Nov. 18, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/17/AR2006111701843.html>.

39. Although Peru has maintained a democracy since 1975, the country has faced considerable debt issues and rising inflation in recent history. PETER KLARÉN, PERU: SOCIETY AND NATIONHOOD IN THE ANDES 406–07 (2000).

may have focused on repairing these inadequacies at the expense of advocating for the advancement of minority rights.<sup>40</sup>

### 1. Brazil

The Brazilian Constitution affords certain rights to “families.”<sup>41</sup> For purposes of the protections guaranteed by the federal government, the Constitution notes that the “stable union between a man and a woman is recognized as a family entity.”<sup>42</sup> The legislature made this definition exhaustive in the Brazilian Civil Code, indicating that a “family” could *only* be created through the marriage of one man and one woman.<sup>43</sup>

The Brazilian Supreme Court recently ruled, in a unanimous decision, that the Civil Code’s narrow definition of “family” violated the Brazilian Constitution.<sup>44</sup> The Court, however, did not address the seemingly consistent applications of the Civil Code and the Constitution’s definition of marriage.<sup>45</sup> Instead, the Court relied on the Constitution’s anti-discrimination provision.<sup>46</sup> Although the Constitution only expressly prohibits discrimination based on sex, race, and color,<sup>47</sup> the Court reasoned that denying certain rights to citizens based solely on the sex of the person with whom they enter into a “stable, enduring and public” relationship falls under a broader reading of sex discrimination.<sup>48</sup> The effect of the Court’s decision was to treat all same-sex couples in a long-term relationship as a “family” under the Constitution.<sup>49</sup> As a result, same-sex couples in civil unions are now afforded most of the same rights as opposite-sex couples in a marriage.<sup>50</sup>

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40. See Cristina Baez, Michele Dearing, Margaret Delatour & Christine Dixon, *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT’L & COMP. L. REV. 183, 210 (2000) (indicating a focus on the development of political infrastructure may detract a nation from considering its human rights issues).

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

42. *Id.*

43. CÓDIGO CIVIL [C.C.] art. 1723 (Braz.).

44. S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.). One justice abstained from the vote. Bradley Brooks, *Brazil Approves Same Sex Civil Unions Despite Catholic Protests*, HUFFINGTON POST (May 6, 2011), [http://www.huffingtonpost.com/2011/05/06/brazil-same-sex-civil-union\\_n\\_858515.html](http://www.huffingtonpost.com/2011/05/06/brazil-same-sex-civil-union_n_858515.html).

45. S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.).

46. *Id.*

47. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 3, sec. 4 (Braz.).

48. S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.).

49. *See id.*

50. These rights include community property rights, alimony, Social Security, pension, health insurance and inheritance. Gustavo Gantois, *Casais Gays Conquistam 112 Direitos com Decisão do STF [Gay Couples Conquer 112 Rights with STF Decision]*, R7 NOTÍCIAS, (May 6, 2011), <http://noticias.r7.com/brasil/noticias/supremo-tribunal-federal-reconhece-uniao-estavel-gay-20110506.html>.

While reaching this landmark decision, the Brazilian Supreme Court was careful to note that same-sex couples may not enter into a legally-recognized marriage.<sup>51</sup> Indeed, any such ruling would be contrary to the express provisions of the Brazilian Constitution.<sup>52</sup> Despite this reservation, Brazil's top appeals court, just six months following the Supreme Court's decision, recognized the civil union of a lesbian couple as a full-fledged marriage under Brazilian law.<sup>53</sup> Although many same-sex couples have since petitioned to have their own civil unions recognized as full marriages, the appeals court's decision is not binding on lower state courts, and thus same-sex couples often continue to be denied full rights that married couples receive.<sup>54</sup>

The Brazilian Supreme Court, in its opinion, did find a way to supplant the heteronormative language in the Constitution without exceeding its role of constitutional interpretation.<sup>55</sup> Until Brazil's Civil Code provisions are repealed, however, most same-sex couples who wish to enforce their newly-acquired rights will be required to pursue their remedies through judicial action.<sup>56</sup>

## 2. Colombia

Colombia's Constitution defines marriage as a contract between a man and a woman.<sup>57</sup> The Congress of Colombia has made clear its view that the sole purpose of marriage is procreation.<sup>58</sup> This unequivocal provision within the Civil Code has left minimal room for courts to expand the interpretation of marriage to same-sex couples. Efforts to amend the code to eliminate this bright-line distinction have failed thus far.<sup>59</sup>

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51. S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.).

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

53. *Brazil's Top Appeals Court Upholds Gay Marriage*, HUFFINGTON POST (Oct. 25, 2011), [http://www.huffingtonpost.com/2011/10/26/brazils-top-appeals-court-upholds-gay-marriage\\_n\\_1032481.html](http://www.huffingtonpost.com/2011/10/26/brazils-top-appeals-court-upholds-gay-marriage_n_1032481.html).

54. *Id.*

55. Javier Corrales, *Brazil's Recognition of Same-Sex Unions*, AMERICAS Q. (May 16, 2011), <http://www.americasquarterly.org/node/2528>.

56. Gantois, *supra* note 50.

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

58. CÓDIGO CIVIL [C.C.] art. 113 (Colom.).

59. *Al Congreso, Matrimonio Gay [To Congress, Gay Marriage]*, EL ESPECTADOR.COM (July 26, 2011), <http://www.elespectador.com/impreso/judicial/articulo-287372-al-congreso-matrimonio-gay>.

Recently, same-sex couples have begun to petition Colombian courts for legal recognition of their relationships. The Constitutional Court of Colombia had previously avoided ruling on the substance of lawsuits advocating for equal rights, instead dismissing the cases on procedural grounds.<sup>60</sup> Recently, however, the Constitutional Court ordered Congress to pass gay marriage legislation within two years because of “a deficit in the protection of homosexual couples.”<sup>61</sup> Although the Court abstained from judicially recognizing the legality of same-sex marriage, it insisted that the legislature act to eradicate blatant, on-going discrimination against same-sex couples.<sup>62</sup>

The Colombian Court’s ruling employed a different reasoning from that of the Brazilian Supreme Court. While acknowledging prevalent discrimination, the Colombian Court refused to interpret the constitution’s anti-discrimination clause to encompass same-sex couples.<sup>63</sup> Instead, the Colombian Court maintained the applicability of the relevant constitutional provision, but directed Congress to modify the provision using its own methods.<sup>64</sup> The Court recognized that legalizing same-sex marriage was outside the bounds of judicial discretion and solely within the power of the legislature.<sup>65</sup> Such a ruling was undoubtedly meant to preserve positive relations between the branches of government.<sup>66</sup> The effect of the Colombian Court’s decision, however, has been to issue the Colombian Congress a time-sensitive blank check. Although the legislature must act before the specified deadline, the Court has not mandated that it approve same-sex marriage.<sup>67</sup> As a result, the legislature is free to draw its own conclusions and may instead choose to recognize the legality of a civil union or domestic partnership rather than a marriage.

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60. Press Release, Corte Constitucional [C.C.] [Constitutional Court], *Discussing the Arguments For and Against the Legalization of Gay Marriage in Colombia* (July 26, 2011) (on file with author).

61. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, MP: Gabriel Eduardo Mendoza Martelo, Sentencia C-577/11 (Colom.); *see also* Corte Constitucional [C.C.] [Constitutional Court], enero 28, 2008, MP: Rodrigo Escobar Gil, Sentencia C-029/09 (Colom.) (outlining the rights already afforded to same-sex couples).

62. *Al Congreso, Matrimonio Gay*, *supra* note 59.

63. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, MP: Gabriel Eduardo Mendoza Martelo, Sentencia C-577/11 (Colom.)

64. *Id.*

65. *Al Congreso, Matrimonio Gay*, *supra* note 59.

66. *See infra* Part V.A.

67. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, MP: Gabriel Eduardo Mendoza Martelo, Sentencia C-577/11 (Colom.)

### 3. Peru

Peru has seen very limited progress in its expansion of same-sex couples' rights. As opposed to neighboring countries that have established a limited recognition in marriage alternatives for same-sex couples, Peruvian law prohibits such couples from entering into a civil union or domestic partnership.<sup>68</sup> As of August 2010, just 21.3% of the voting population approved of same-sex marriage, and the public has continuously shown outward hatred towards known LGBT citizens.<sup>69</sup> In 2006, for instance, hate crimes against sexual minorities in Peru resulted in one death every four days.<sup>70</sup>

Curiously, unlike those nations that have made strides towards gay marriage reform, the Peruvian Constitution defines marriage ambiguously.<sup>71</sup> The Constitution states simply that the “form of marriage and the grounds for separation and dissolution are regulated by law.”<sup>72</sup> The “law,” as the legislature has enacted, is that marriage may only be undertaken by one man and one woman.<sup>73</sup> Because of the flexibility noted in the language of the Peruvian Constitution, the Peruvian legislature and judiciary would have the most leeway to refine its laws to include same-sex couples in the constitutional meaning of “marriage.” Neither entity has opted to do so.<sup>74</sup>

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68. Although the law does not expressly prohibit same-sex civil unions, Peru's judiciary has not recognized such unions. See Luis Jaime Cisneros, *Gay Marriage Debate Inflames Peru Election*, CHINA POST (Mar. 15, 2011), <http://www.chinapost.com.tw/international/americas/2011/03/15/294621/Gay-marriage.htm>.

69. *Estudio de Opinión Pública a Nivel Perú Urbano*, COMPAÑIA PERUANA DE ESTUDIOS DE MERCADOS Y OPINION PÚBLICA S.A.C. (Aug. 5, 2010), available at <http://cpi.com.pe/descargas/OPNA20100809.pdf>. In a February 2011 poll, 74.4% of Peruvians opposed gay marriage. Cisneros, *supra* note 68.

70. CARLOS F. CÁCERES ET AL., REVIEW OF LEGAL FRAMEWORKS AND THE SITUATION OF HUMAN RIGHTS RELATED TO SEXUAL DIVERSITY IN LOW AND MIDDLE INCOME COUNTRIES 4 (2008), available at [http://www.clam.org.br/publicue/media/vozes\\_contra377.pdf](http://www.clam.org.br/publicue/media/vozes_contra377.pdf); see also *Gay Rights in Latin America: Out of the Closet and Into Politics*, *supra* note 13 (discussing a 2005 study that reported a gay man was killed every two days in Latin America solely because of his sexuality).

71. CONSTITUCIÓN POLÍTICA DEL PERÚ [C.P.] [Constitution] art. 4.

72. *Id.*

73. CÓDIGO CIVIL art. 234 (Peru).

74. In fact, a Peruvian legislator recently introduced a bill proposing civil unions for same-sex couples solely as a way to prevent a possible future marriage bill from passing. Isabel Guerra, *Debate on Legalizing Gay Civil Union Heats in Peru*, LIVING IN PERU (July 27, 2010), <http://archive.livinginperu.com/news/12767>. Nonetheless, the

#### 4. Argentina

Because Argentina recently legalized same-sex marriage throughout the nation,<sup>75</sup> an analysis of the right's path through the political and judicial systems is most relevant.

The Argentine Constitution does not purport to define what constitutes a marriage. Laws defining marriage as the celebration between individuals of different sex were instead enacted by the legislature through the Civil Code.<sup>76</sup>

In deciding a 2007 suit brought by two women demanding recognition of their relationship as a “marriage” under Argentine law, the National Civil Court of Appeals refused to issue an injunction to prevent enforcement of the Civil Code provisions.<sup>77</sup> The Court employed a novel analysis, recognizing that discrimination in this context might be unconstitutional, and applying a standard of judicial scrutiny in assessing the provisions. The Court reasoned that the distinction drawn in the statute was merely a sex-based classification, which under Argentine precedent received a variation of “rational basis scrutiny.”<sup>78</sup> Under this level of scrutiny, the state needed only an “objective and reasonable” justification for maintaining the provision.<sup>79</sup> The state's interest in supporting procreation and the institution of the family was sufficient, in the Court's view, to meet this low standard of scrutiny.<sup>80</sup> The Argentine Supreme Court refused to address the issue and declined to undertake an appeal of the case.<sup>81</sup>

A subsequent lawsuit was filed in 2010 after a same-sex marriage was performed in Buenos Aires.<sup>82</sup> A “concerned citizen”<sup>83</sup> was permitted to challenge the marriage as a violation of due process and of the substantial rights of the “family order.”<sup>84</sup> The Argentine Court of Appeals reiterated its prior ruling and held the laws constitutional because they adequately

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introduction of the bill has shown the potential for similar bills supported by local rights groups to reach the legislature. *See id.*

75. Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.).

76. CÓDIGO CIVIL [CÓD. CIV.] arts. 172, 188 (Arg.).

77. Martín Hevia & Ezequiel Spector, *Same Sex Marriage in Argentina*, COURT (Nov. 7, 2008), <http://www.thecourt.ca/2008/11/07/same-sex-marriage-in-argentina>.

78. *See id.* (arguing that the classification was actually based on sexual orientation and that such distinctions warrant heightened scrutiny).

79. *Id.*

80. *Id.*

81. *Id.*

82. Juzgado de Primera Instancia [1a Inst.], 08/03/2010, “B., D.A. c. Gobierno de la Ciudad de Buenos Aires / amparo” (Arg.).

83. Issues of standing are discussed further in Part V.B *infra*.

84. Juzgado de Primera Instancia [1a Inst.], 08/03/2010, “B., D.A. c. Gobierno de la Ciudad de Buenos Aires / amparo” (Arg.).

preserved the state's interest in marriage and procreation.<sup>85</sup> Before the Supreme Court could rule on the issue,<sup>86</sup> the laws were overturned through the legislative process.<sup>87</sup>

In legalizing same-sex marriage, the Argentine legislature undoubtedly completed the largest stride in the South American gay rights movement to date. By preemptively acting, however, the legislature did not allow the Supreme Court to decide the issue. Although the Court may have ultimately decided, like the Colombian Constitutional Court, to leave such a policy modification for the legislature, as the provision defining marriage was located in the Civil Code and not the nation's constitution, presumably the Court could have undertaken the task on its own.<sup>88</sup> The Argentine example, therefore, may be seen as a "what-could-have-been" in terms of an expansion of rights for gays, lesbians, and same-sex couples. Because the legislature denied the Court the right to rule on the issue, the Court was prevented from potentially broadening protections for homosexuals.<sup>89</sup> As a result of the legislative preemption, the Supreme Court has been left unable to define the standard of review for laws that discriminate on the basis of sexual orientation, and lower courts may be forced to apply "rational basis" review to such laws, in turn preserving some elements of public discrimination.<sup>90</sup> While the legislature's decision has not foreclosed the Supreme Court from expanding the possible

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85. *Id.*; see also Juzgado Nacional de Primera Instancia [1a Inst.], 22/06/2007, "Rachid Maria De La Cruz c. Registro Nacional de Estado y Capacidad de las Personas/medidas precautorias" (Arg.).

86. There is a debate as to whether the Supreme Court would have been receptive to legalizing gay marriage or whether the Court would have upheld the Civil Code provisions. Andrés Duque, *Argentina: Highest Court Ready to Back Same-Sex Marriages, Says Justice, But There's One Caveat...*, BLABBEANDO (Feb. 16, 2010, 5:59 PM), [http://blabbeando.blogspot.com/2010/02/argentina-highest-court-ready-toback.html#.TpuWG94g\\_IY](http://blabbeando.blogspot.com/2010/02/argentina-highest-court-ready-toback.html#.TpuWG94g_IY).

87. Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.).

88. Changing the definition of marriage, while not an important congressional role in itself, affects the nation's entire governmental system. The amount of benefits afforded exclusively to married couples, for instance, increases when the definition of marriage is broadened to encompass more couples. Congress has a marked interest in maintaining its role in distributing these benefits.

89. Although the recognition of same-sex marriage has become the measuring stick for absolute equality between heterosexual and homosexual couples, there remains the possibility that same-sex couples may continue to receive fewer rights than opposite-sex couples because of discriminatory policies.

90. See Hevia & Spector, *supra* note 77.

protections with broader constitutional rulings, additional litigation would result in further denial of rights while the Court sorts out the issue.<sup>91</sup>

#### IV. WHY DOES IT MATTER? THE DEFICIENCIES OF MARRIAGE ALTERNATIVES

As an alternative to same-sex marriage, several nations, including four from South America, have enacted legislation recognizing civil unions or domestic partnerships for same-sex couples.<sup>92</sup> Legislators have justified these alternatives by claiming the rights afforded to couples engaged in such unions are substantially similar to those provided to married couples.<sup>93</sup> The reality is, however, these alternatives fail to measure up to their counterpart for several reasons.<sup>94</sup>

First, the word “marriage” is the gateway to numerous governmental protections afforded exclusively to “married” couples.<sup>95</sup> Many nations that recognize civil unions or domestic partnerships routinely deny those couples important marital rights, such as joint taxation, inheritance, social security rights, and equal rights to child custody.<sup>96</sup> Brazil is the lone exception, as its Supreme Court has ruled that it is fundamentally discriminatory to deny these marital rights to couples in civil unions.<sup>97</sup>

Second, same-sex couples in legally recognized civil unions and domestic partnerships may experience a myriad of issues when changing residence or traveling interstate. Civil unions, for instance, are less likely to be recognized in other nations, or in other federated states, if the union is recognized exclusively at the federated-state level.<sup>98</sup>

Third, by confining same-sex couples to civil unions or domestic partnerships, legislatures have essentially codified a “separate-but-equal”

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91. *See id.*

92. These countries are Brazil, Uruguay, Ecuador, and Colombia. Germán Lodola & Margarita Corral, *Latin America's Support for Same-Sex Marriage*, AMERICAS Q. (July 22, 2010), <http://www.americasquarterly.org/latin-america-gay-marriage>.

93. Ian Ayres, Editorial, *Separate, Unequal: How Civil Unions Fall Short of Marriage*, HARTFORD COURANT, June 10, 2005, at A13, available at <http://www.law.yale.edu/news/2432.htm>.

94. *See id.*

95. *Id.*

96. Fellmeth, *supra* note 25, at 859.

97. Gantois, *supra* note 50.

98. *See* Colleen McNichols Ramais, *'Til Death Do You Part . . . And This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1038–39 (2010) (discussing the difficulties of enforcing civil unions of same-sex couples in the United States when those unions were entered into under Canadian law).

ideology.<sup>99</sup> The very creation of a separate “category” of relationships makes those relationships inherently inferior.<sup>100</sup>

For these reasons, while the recognition of marriage “alternatives” is deemed significant progress in the fight for equal rights, these designations continue to serve as inferior substitutes for same-sex marriage.<sup>101</sup>

## V. WHY IS THERE SUCH A DISPARITY?

Throughout South America, an imbalance remains between states in the enforcement of same-sex couples’ rights and the recognition of same-sex marriage.<sup>102</sup> Understanding this disparity, however, requires more than an overview of the existing state of the law and its historical contexts. Several previously identified factors have also been significant in forecasting the progression of same-sex marriage.

### *A. Basic Constitutional Precepts As Potential Barriers to Reform*

One of the most significant—and most surprising—barriers to recognition of same-sex marriage rights within South American states is each state’s own constitution. Following the demise of South American dictatorships in the 1980s, many nations adopted new or reformed constitutions in an effort to eliminate widespread human rights violations that many had experienced as a byproduct of political suppression.<sup>103</sup> Specifically, the nations undertook to guarantee their citizens fundamental political, civil, social, cultural, and even collective rights, as well as freedom from any arbitrary restrictions imposed by political bodies in the future.<sup>104</sup> The new enactments, however, effectively instilled an ideology that only those core principles were the sole rights warranting absolute protection.

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99. Ayres, *supra* note 93.

100. Andrew Sullivan, *Why the M Word Matters to Me*, TIME (Feb. 8, 2004), <http://www.time.com/time/magazine/article/0,9171,1101040216-588877,00.html> (arguing that the very creation of another “category” of gay relationships makes those relationships inherently inferior).

101. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1274 (2010).

102. Brazil, seen as one of the most progressive, liberal countries in South America, has nonetheless lagged in recognizing rights of same-sex couples.

103. Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1594 (2011).

104. *Id.* at 1591.

During its constitutional renovations, each South American country has employed its own method for designating certain human rights as “fundamental.” In Argentina, for instance, the framers of the new constitution explicitly designated as fundamental those rights specified by international human rights treaties to which Argentina is a signatory.<sup>105</sup> In contrast, Brazil’s new constitution specifically enumerated a list of fundamental rights that were not to be abridged.<sup>106</sup> These rights were separate from those already recognized through international treaties to which Brazil was a signatory. Colombia has taken a dualistic approach, creating constitutional protections for the rights in certain human rights treaties and establishing a separate list of constitutionally-protected rights.<sup>107</sup> The specific enumeration of “fundamental” rights, however, has led to a multitude of issues for the future of same-sex marriage recognition.

First, marriage is not considered a fundamental right in most constitutions.<sup>108</sup> A key argument for proponents of same-sex marriage is that the LGBT population is routinely denied a generalized right of equality under the constitution because they are not allowed to marry.<sup>109</sup> The absence of an explicit fundamental right to marry, however, diminishes the force of this argument significantly. Such is the case in Brazil, where marriage is not included on the constitutional list of fundamental rights.<sup>110</sup> Because the constitution does recognize freedom from discrimination as a fundamental right, the Supreme Court ushered same-sex unions into a broader reading of this provision.<sup>111</sup>

Second, it is unclear whether the new South American constitutions recognized additional fundamental rights beyond the explicit definitions within the constitution. South American judiciaries may find that their respective national constitutions do not call for extra-constitutional rights.<sup>112</sup> In such cases, the right to marry may never be deemed fundamental, presenting a greater barrier for advocates arguing for equal fundamental

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105. *Id.*; *see, e.g.*, Art. 75(22), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

106. Uprimny, *supra* note 103, at 1591; *see, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 5, 8 (Braz.).

107. Uprimny, *supra* note 103, at 1591; *see, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 11.

108. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

109. Ayres, *supra* note 93.

110. *See generally* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.).

111. S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.).

112. *See* Octavio L.M. Ferraz, *Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa* 3 (Aug. 20, 2009) (unpublished manuscript, University of Warwick School of Law), *available at* [www.conectas.org/IBSA/OctavioFerrazAbdication.doc](http://www.conectas.org/IBSA/OctavioFerrazAbdication.doc) (discussing the methods employed by some judiciaries in adjudicating social rights).

rights. If such extra-constitutional rights do exist, there is added uncertainty as to whether legislatures or courts have the ultimate authority to decide what these rights entail.<sup>113</sup>

Third, the inconsistent recognition of fundamental rights has all but eliminated the possibility that South American countries can uniformly recognize the right of same-sex couples to marry.<sup>114</sup> Indeed, in practice, many of the fundamental rights that *are* enumerated in the nations' constitutions have not been readily given to individuals.<sup>115</sup> Until recently, citizens denied these rights had no way to force the state to recognize them.<sup>116</sup> Today, many (but not all) South American constitutions provide a form of direct judicial protection of rights, known as an “acción de tutela”<sup>117</sup> or a “mandado de segurança.”<sup>118</sup> However, the infrequent enforcement of judicial protections raises the possibility that same-sex couples will be denied the right to marriage even if it is implemented as a fundamental right. The notable absence of any express constitutional provision prohibiting discrimination on the basis of sexual orientation permits further speculation that nations may continue to deny same-sex couples the right to marry, even if that right is deemed in the future to be fundamental.

### *B. Judicial Review and the Bounds of the Courts As Barriers to Reform*

Another reason for the disparity in same-sex marriage recognition stems from the location of the particular ban in the nation's lawbooks. South American nations' constitutions recognize the principle of separation of powers between the several branches of government.<sup>119</sup> Each branch is said to be restricted to certain functions and the branches are forbidden from traversing those restrictions.<sup>120</sup> Courts and legislatures have attempted to respect the bounds of each branch in an effort to preserve institutional

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113. *See id.* at 3–5, 16–18 (noting the caution that some courts have employed to ensure preservation of the judicial-legislative dichotomy).

114. *See generally* Lal, *supra* note 9.

115. Uprimny, *supra* note 103, at 1608.

116. *Id.* at 1593.

117. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

118. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, cl. LXXI (Braz.).

119. *See* Nathan Gibbs, *Getting Constitutional Theory into Proportion: A Matter of Interpretation?*, 27 OXFORD J. LEGAL STUD. 175, 188–89 (2007) (“[H]olders of political power should not be able to determine unilaterally the scope of their powers.”).

120. *See id.*

legitimacy.<sup>121</sup> Courts have thus been reluctant to involve themselves in redefining the concept of marriage and have instead deferred that authority to the legislature.<sup>122</sup> The legislature, however, has either not acknowledged the authority or has purposefully chosen to ignore it.<sup>123</sup>

In states where the gay marriage ban is found in the Constitution, the judiciary has no authority to modify the principles set forth in the law.<sup>124</sup> The provision must therefore be overturned by constitutional amendment. In the case of Colombia, the Constitutional Court was created for the sole purpose of judicially reviewing the laws and acts of the Colombian government.<sup>125</sup> In its decisions, the Court has recognized the bounds of its authority and opted to abstain from invading the exclusive realm of the legislature.<sup>126</sup> Instead, in the gay marriage case discussed above, the Court insisted the legislature act of its own accord in rectifying the discriminatory policies established in the constitution.<sup>127</sup> While the Court issued the Colombian Congress an ultimatum to conform to the Court's ideology, the Congress is not required to legalize same-sex marriage outright, and instead may opt to emulate Brazil by affording same-sex couples the same rights as married couples without the "marriage" label.<sup>128</sup> Such a measure would simply stall recognition of full-fledged marriage.

When the marriage ban is located both in the nation's civil code and in its constitution, courts are presented with a limited opportunity to redefine its scope.<sup>129</sup> Because courts may not unilaterally modify constitutional provisions, courts are limited to exercising judicial review over the Civil Code portions of the marriage ban.<sup>130</sup> As the Brazilian Supreme Court has demonstrated, such a restriction is not insurmountable.<sup>131</sup> The Court,

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121. *See id.*

122. *But see* Mario Wainfield, *Haciéndole la Corte al Congreso* [Making the Court to Congress], PÁGINA 12 (Feb. 15, 2010), <http://www.pagina12.com.ar/diario/elpais/1-140312-2010-02-15.html> (arguing that, because values of society change over time, courts should have greater leeway in interpreting a constitution to adapt to the times).

123. *See id.*

124. *See* Luc B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 OXFORD J. LEGAL STUD. 525, 534–35 (2003) (explaining that, in order to maintain the legitimacy of judicial review, courts must uphold the "democratically superior constitution").

125. *See* I ENCYCLOPEDIA OF WORLD CONSTITUTIONS 203–08 (Gerhard Robbers ed., 2007).

126. *See supra* Part III.B.2.

127. Corte Constitucional [C.C.] [Constitutional Court], julio 26, 2011, MP: Gabriel Eduardo Mendoza Martelo, Sentencia C-577/11 (Colom.).

128. *See id.*

129. *See* Tremblay, *supra* note 124, at 530–31.

130. *See id.*; Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 414 (2008) (noting that, in most developed legal systems, courts have the power to negate the acts of other governmental entities).

131. *See supra* Part III.B.1.

after finding that the heteronormative language of the Civil Code provisions restricting marriage to couples of the opposite sex conformed to the Constitution's text, broadened the protections of a *different* constitutional provision in order to achieve its intended goal.<sup>132</sup> In doing so, the Court successfully effected an end-run around the traditional limits of the court system.<sup>133</sup> Such a ruling may have a “ripple effect,” inspiring other South American judiciaries to circumvent their own legislative processes by similarly interpreting heteronormative language in their respective constitutions.<sup>134</sup>

When definitions of marriage are contained wholly within a nation's civil code, reform is at its simplest and yet most paradoxical. In such instances, both the courts and the legislature may act to strike down any offending provisions.<sup>135</sup> Yet most discriminatory code provisions remain untouched. In some instances, as was the case in Argentina before reform, a stalemate emerges between the two entities.<sup>136</sup> In others, as is the current case in Peru, both entities voluntarily choose inaction.<sup>137</sup> In either case, legislation restricting the rights of same-sex couples remains largely intact.<sup>138</sup>

The bounds of court authority and the limits of judicial review have allowed South Americans in positions of power to ignore underlying social realities and evade the constitutional question of same-sex marriage.<sup>139</sup> In the absence of specific legislation approving same-sex marriage, South American courts have been forced to combat prevalent social biases against

132. S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.).

133. See Tremblay, *supra* note 124.

134. Corrales, *supra* note 55.

135. See Tremblay, *supra* note 124, at 533 (arguing that, under one theory, when laws conflict, “courts should uphold the law that best represents the will or judgment of the contemporary body of citizens”).

136. See Marcelo Dealtry Turra, *Brazil's Proposed “Civil Unions Between Persons of the Same Sex”*: *Legislative Inaction and Judicial Reactions*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS* 337, 342 (Robert Wintemute & Mads Andenæs eds., 2001).

137. See *id.*

138. Chile's definition of marriage, for instance, is defined wholly in its Civil Code. CÓDIGO CIVIL [CÓD. CIV.] art. 112 (Chile). Venezuela, on the other hand, has expressly defined instances of marriage as “one man and one woman” within its Constitution. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 77. This is not to say that the definition of marriage in Venezuela cannot be expanded to encompass couples of the same sex. However, when comparing two nations with similar political processes, it seems a much greater hurdle to expand a constitutional provision than to repeal an enactment of the Civil Code. The same holds true for the fundamental rights analyses discussed in Part V.A *supra*.

139. Turra, *supra* note 136.

gays and lesbians while maintaining the status quo.<sup>140</sup> While the Brazilian judiciary has found a way to circumvent this conflict, other regional courts have not been successful.<sup>141</sup> Much of the power to develop marriage equality has therefore been left to the legislature and the public at large—neither of which has been eager to implement change.

### *C. The Influence and Obstacles of Rights Groups*

The rise of human rights groups over the past decade has contributed to the progress of same-sex couples' rights. The differing goals of each nation's many groups, however, has stunted rather than advanced this progress.<sup>142</sup> Moreover, the presence of these groups in the court systems of some nations and their absence in others has accounted for the imbalance in rights progress among different nations.<sup>143</sup>

#### *1. The Inability of International Human Rights Groups to Advocate for Change*

Many human rights groups have modified their official goals to include advancing LGBT rights worldwide. The United Nations Commission on Human Rights, for example, recently began advocating anti-discriminatory policies toward gays and lesbians at the international level.<sup>144</sup> The Commission's failures, however, have overshadowed its successes in recent years. In 2003, Brazil filed a joint resolution with the European Union entitled "Human Rights and Sexual Orientation," calling for "all States to promote and protect the human rights of all persons regardless of their sexual orientation."<sup>145</sup> While initially praised as a landmark initiative, the proposal sputtered.<sup>146</sup> Met with staunch opposition from representatives of the organization's African nations, Brazil wavered in its support of the resolution and eventually opted to abandon further efforts

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140. *Id.*

141. Even in Brazil's case, the high court only recognized a right to civil unions, an inferior substitute to marriage. *See supra* Part IV.

142. Turra, *supra* note 136.

143. *See Uprimny, supra* note 103, at 1605 (commenting on the weakness of the South American judiciary).

144. The United Nations Commission on Human Rights has since been replaced by the United Nations Human Rights Council. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

145. Comm'n on Human Rights Draft Res., Human Rights and Sexual Orientation, 59th Sess., U.N. Doc. E/CN.4/2003/L.92 (Apr. 16, 2003).

146. Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN* 4–5, 12 (Sexuality Policy Watch, Working Paper No. 2, 2005), available at <http://sxpolitics.org/wpcontent/uploads/2009/03/workingpaper2.pdf>.

to adopt the measure.<sup>147</sup> Such pressure from the international community, especially from those states most opposed to same-sex marriage recognition, have made it difficult to achieve success through international human rights organizations. Furthermore, while many international rights groups have begun to recognize the importance of equality for gays and lesbians, most continue to be unreceptive to specific claims regarding same-sex marriage.<sup>148</sup>

Many other rights groups have formed at the international level with a primary focus on fighting for equality for gays and lesbians. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) was formed in 1978 to campaign for the rights of members of the LGBT community.<sup>149</sup> Today, the organization focuses its attention on eliminating discrimination against gays and lesbians.<sup>150</sup> Noticeably absent from its mission statement, however, is the organization's advocacy for marriage equality.<sup>151</sup> Similarly, the International Gay and Lesbian Human Rights Commission (IGLHRC) advocates on behalf of people who experience discrimination or abuse on the basis of sexual orientation but makes no commitment to reforming the international landscape of marriage equality.<sup>152</sup> While the abstention of these international groups in delving into the realm of same-sex marriage may be for sound reasons,<sup>153</sup> it has reinforced the notion that marriage reform will not come from the international level.

Following the creation of international groups, many regional groups have formed, dedicated to promoting equality measures specifically in South America.<sup>154</sup> While the international groups have focused on ending discrimination, regional groups have taken the initiative in seeking to

147. *Id.*

148. Fellmeth, *supra* note 25.

149. Stephen Barris, *About ILGA*, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS'N (Dec. 16, 2009), [http://ilga.org/ilga/en/article/about\\_ilga](http://ilga.org/ilga/en/article/about_ilga).

150. *Id.*

151. *Id.*

152. Specifically, the organization seeks to promote economic, social, and cultural rights, "such as those related to employment, housing, education and health." *About Our Work*, INT'L GAY AND LESBIAN HUMAN RIGHTS COMM'N, <http://www.iglhc.org/cgi-bin/iowa/content/about/ourwork/index.html> (last visited Apr. 3, 2013).

153. As discussed, preserving the legitimacy of the decision-making institution is one reason. Another reason, discussed below, is that these organizations simply do not have access to the legislative or judicial processes.

154. *See, e.g., What is the GGB?*, GRUPO GAY DA BAHIA, <http://www.ggb.org.br/ggb-ingles.html> (last visited Mar. 23, 2013).

establish equal rights for the South American LGBT community.<sup>155</sup> Inherent in this goal is establishing equal marriage rights for same-sex couples, and many of the region's LGBT rights groups have explicitly undertaken to advocate for this right.<sup>156</sup>

## 2. *The Inability of Local Rights Groups to Advocate for Change*

In recent years, the number of local rights groups dedicated to advancing gay rights and the rights of same-sex couples has grown exponentially.<sup>157</sup> In Brazil, for instance, there were fewer than twenty LGBT rights organizations in the early 1990s; today, there are over three hundred nationwide.<sup>158</sup> In many instances, these groups have achieved radical success.<sup>159</sup> A noticeable impediment, however, has been the sheer number of organizations and their failure to combine resources to further the common goal of achieving marriage equality.<sup>160</sup> In other nations, local LGBT rights groups have met similar hurdles in achieving success.

Before discussing the successes and failures of the gay rights groups in South America, it is important to address a preliminary issue: standing to sue. Certainly, the most effective way for a gay rights group to participate in the legal system is to bring lawsuits to enforce the rights of its LGBT constituents. In many countries, however, the right of these organizations to sue in the nation's courts is unclear.<sup>161</sup> The pervading ideology in South America has been a broad interpretation of legal standing to sue.<sup>162</sup> As such, it is unnecessary for a citizen to show personal injury, as long as the citizen asserts that he or she is seeking to protect a "public interest."<sup>163</sup> The question then becomes: what constitutes a public interest in the marriage context? As the Argentine court made clear, preserving the institution of marriage is sufficient justification for

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155. *See id.*

156. *See id.*

157. *See* Toni Reis, *Where Next for Brazil's Gay Rights?*, GUARDIAN (May 11, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/may/11/brazil-gayrights-same-sex-unions-legalised>.

158. *Id.*

159. In 2004, the Brazilian government proposed several policies to combat discrimination against gays and lesbians, stemming largely from the lobbying of these rights groups. Sergio Carrara, *Discrimination, Policies, and Sexual Rights in Brazil*, SCIELO (Aug. 4, 2011), [http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S0102-311X2012000100020](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-311X2012000100020).

160. *See* J. Lester Feder, *Could A Win On Marriage Weaken LGBT Organizations?*, BUZZFEED (Mar. 29, 2013), <http://www.buzzfeed.com/lesterfeder/could-a-win-on-marriage-weaken-lgbt-organizations> (arguing that rights groups could waver in their advocacy after achieving significant victories).

161. *See* Bonine, *supra* note 6.

162. *Id.*

163. *Id.*

standing.<sup>164</sup> In that case, however, the court granted standing to a “concerned citizen” seeking to *prevent* a same-sex couple from getting married.<sup>165</sup> Would the inverse argument suffice, then, to *enforce* a same-sex marriage? The current answer, as interpreted by most South American courts, is “no.”<sup>166</sup> Courts have been unwilling to accept the argument that regional gay rights groups require standing in order to protect the human rights of South Americans—the same argument advanced by international rights groups.<sup>167</sup> As such, gay rights groups are not given the same leeway provided to “concerned citizens” in utilizing the judiciary to recognize rights. This bias has further hindered rights groups’ ability to advocate for marriage reform.<sup>168</sup> Such groups have therefore resorted to secondary participation in the fight for marriage equality, such as financially sponsoring litigation for same-sex couples with the requisite standing to sue and serving as *amici curiae* in suits undertaken by ordinary citizens.<sup>169</sup> While many gay rights groups have been actively engaged in South America’s legal systems in this capacity, these restrictions have nonetheless inhibited the efforts of such groups to exert influence and directly advocate their positions in the judiciary.

In Brazil, gay rights groups have been active despite their limited capacity. The largest of the nation’s groups, the Grupo Gay da Bahia (GGB), has sought legislative reform for the LGBT community at the state and national levels.<sup>170</sup> As a member of the umbrella organizations of ILGA and IGLHRC, however, its motivations have been similarly limited to preventing discrimination and pushing for other protective policies such as AIDS awareness and hate crime prevention.<sup>171</sup> In Brazil’s landmark court case legalizing civil unions for same-sex couples with nearly all the same rights as those granted to married couples, just twenty-five of the nation’s three hundred gay rights groups filed *amici*

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164. Juzgado de Primera Instancia [1a Inst.] 08/03/2010, “B.D.A. c. Gobierno de la Ciudad de Buenos Aires / amparo” (Arg.).

165. *Id.*

166. See Bryant G. Garth, *Access to Justice, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN: PROCEEDINGS OF A WORLD BANK CONFERENCE 91* (Malcolm Rowat et al. eds., 1995) (noting that, because of the proliferation of human rights organizations and their need to access the court system, the standing to sue must be broadened).

167. *See id.*

168. *See generally* Rosenberg, *supra* note 4.

169. The rights groups in Brazil utilized both of these methods. *See* Reis, *supra* note 157.

170. *What is the GGB?*, *supra* note 154.

171. *Id.*

*curiae* briefs.<sup>172</sup> The relatively low percentage of groups participating in such an important case for advancing gay rights shows the potential weaknesses of a system in which so many groups are working to combat societal inequality. Furthermore, because the large number of groups in Brazil expend diffuse resources to promote each group's individual goals, overall the groups have been only relatively successful in protecting the fundamental rights of LGBT citizens.<sup>173</sup> As such, Brazil has achieved a paradoxical success: while it has become a regional leader in the push for LGBT rights, it still experiences an extraordinarily high record of hate crimes and discrimination.<sup>174</sup> This reinforces the proposition that a smaller number of rights groups pooling resources may be more effective in guaranteeing that the organizations' common goals are achieved.

Unlike the other three nations analyzed, gay rights groups in Colombia have had full, uninhibited access to the nation's judicial system. Many members of the LGBT community have sought to enforce their rights through Colombia Diversa, the nation's leading LGBT rights organization.<sup>175</sup> Although the organization only came into existence in 2004, it has already progressed further than most other gay rights groups in South America.<sup>176</sup> Notably, its mission statement includes the express provision that advocacy and the capacity for political action of the LGBT community are among the goals of the organization.<sup>177</sup>

Several other groups, devoted to legal advocacy for LGBT citizens and same-sex couples, have begun to take advantage of the judicial access granted to rights organizations in Colombia.<sup>178</sup> Colombia Diversa has enlisted one such group, DeJusticia, to take the lead in litigating claims of same-sex couples.<sup>179</sup> Indeed, in the ground-breaking Constitutional Court case previously discussed, the plaintiffs—couples seeking to repeal

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172. *Supreme Court Unanimously Recognizes Same-Sex Union*, CONECTAS (Feb. 5, 2011), <http://www.conectas.org/en/artigo-1/supreme-court-unanimously-recognizes-homosexual-union>. The lawsuit challenging the gay marriage ban was filed by the Attorney General's Office. *Brazilian Supreme Court Gives Unanimous Judgment in Favour of the Legal Recognition of Same Sex Partnerships*, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS'N (May 6, 2011), <http://ilga.org/ilga/en/article/mY6HaRZ1Az>.

173. See Rosenberg, *supra* note 4.

174. *Id.*

175. Press Release, International Gay & Lesbian Human Rights Commission, Colombia Diversa, Sidibé and Frank Honored for Advancement of LGBT Rights (Mar. 11, 2010), *available at* <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1101.html>.

176. The GGB (Brazil) was formed in 1980 and the MHOL (Peru) in 1982.

177. *Quiénes Somos [Who We Are]*, COLOMBIA DIVERSA, <http://www.colombiadiversa-blog.org/p/que-hacemos.html> (last visited Mar. 23, 2013).

178. *Nosotros [Us]*, DEJUSTICIA, <http://dejusticia.org/index.php?modo=nosotros> (last visited Mar. 23, 2013).

179. *Id.*

Colombia's discriminatory law—were represented by DeJusticia and Colombia Diversa.<sup>180</sup> Due largely to the combination of (permitted) judicial intervention and political pressure at the national level, many of Colombia's gay rights groups have successfully implemented their goals.<sup>181</sup>

In Peru, where rights for same-sex couples are extremely limited, gay rights groups have yet to enter into the legal and political sphere. A leading, nation-wide organization has yet to emerge, and much of the advocacy has been advanced at the local level.<sup>182</sup> The Movimiento Homosexual de Lima (MHOL), the leading LGBT rights organization in the nation's capital, was recently established to push for equality in Peru.<sup>183</sup> But because of the slow progress of accepted LGBT rights in the nation, advocacy for marriage equality has taken a back seat to more pressing issues of discrimination.<sup>184</sup> Unlike the rights organizations of its neighbors, the numerous local groups in Peru became deeply entrenched in the 2012 presidential elections.<sup>185</sup> This is likely because these organizations realize that a candidate more sympathetic to the goals of expanding LGBT rights will create the necessary political foothold to further advocate for legislative and judicial reform.<sup>186</sup> The attempt to develop a sufficient “starting point,” indicates the extent of Peru's lag in advancing its rights for same-sex couples. Furthermore, the absence of a unified national movement has plagued the progress of rights recognition in Peru, both for same-sex couples and for gays and lesbians generally.<sup>187</sup>

180. Diana Esther Guzmán Rodríguez, *Al Congreso, ¡Por el Matrimonio Igualitario!* [To Congress, For Equal Marriage!], DEJUSTICIA (July 27, 2011), <http://dejusticia.org/index.php?modo=interna&tema=antidiscriminacion&publicacion=997>.

181. As noted, marriage equality in Colombia has not been achieved. Through successful litigation, however, all that remains is a formal recognition of same-sex marriage by the Colombian legislature.

182. See Carlos A. Quiroz, *Gay LGBT Organizations and Activists in Peru Support Ollanta Humala in Presidential Elections*, PERUANISTA (May, 17, 2011), <http://peruanista.wordpress.com/2011/05/17/gay-and-lgbt-organizations-and-activists-of-peru-support-ollanta-humala-in-presidential-elections> (listing thirty six local LGBT rights organizations in Peru).

183. *Historia*, MOVIMIENTO HOMOSEXUAL DE LIMA [GAY MOVEMENT OF LIMA], <http://www.mhol.org.pe/historia.htm> (last visited Mar. 23, 2013).

184. *Id.*

185. Quiroz, *supra* note 182.

186. The Peruvian rights groups believe that, under a model of economic growth with social inclusion and equity, gay rights may be successfully advanced. *Id.*

187. Interestingly, on the political front, candidates from all major parties have insisted that some form of legal union for same-sex couples should be recognized, and each has vowed to reform Peru's current laws to incorporate such a measure. Isabel Guerra, *Perú: Matrimonios Homosexuales Entran en Agenda Electoral*, GLOBAL VOICES

Surprisingly, in Argentina, where same-sex marriage is now fully recognized, gay rights groups have not been as deeply involved in the political process. In the 1990s and at the turn of the century, many of Argentina's local grassroots rights groups saw their efforts for legislative advocacy and reform repeatedly quashed.<sup>188</sup> In response to growing concerns of futility, several of these groups united to form the Federación Argentina de Lesbianas, Gay, Bisexuales y Trans (FALGBT) in 2006.<sup>189</sup> Rather than advocating for radical reform, FALGBT instead insisted on more conservative methods.<sup>190</sup> FALGBT encouraged same-sex couples to apply for marriage licenses in bunches, and then when they were refused, to challenge the decisions on constitutional grounds.<sup>191</sup> The scheme worked in an unexpected way: many judges who thought the marriage ban was unconstitutional authorized the marriage licenses, resulting in several legal yet constitutionally-impermissible marriages.<sup>192</sup> The tactic served a second strategic function: although support for same-sex marriage had grown in the Argentine legislature, public support remained low.<sup>193</sup> Rather than prematurely push for a constitutional referendum, which may have had the adverse effect of cementing the gay-marriage ban in the nation's constitution, FALGBT put pressure on the Argentine legislature to act of its own accord in amending the law.<sup>194</sup> Although the success of the strategy cannot be measured, it stands as a resourceful alternative to judicial intervention and direct legislative advocacy, especially when those outlets of government may be reluctant to provide the relief sought.

Whether South American rights groups have voluntarily stalled in advocating for marriage equality or whether the organizations have been

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(Jan. 31, 2011), <http://es.globalvoicesonline.org/2011/01/31/peru-matrimonioshomosexuales-entran-en-agenda-electoral>.

188. These groups included El Asociación de Travestis Transgéneros y Transexuales de Argentina (Association of Transgender and Transsexual Transvestites), La Fulana (The Jane Doe), El Nexo Asociación Civil, VOX Asociación Civil, and La Fundación Buenos Aires Sida (Buenos Aires AIDS Foundation).

189. *Objetivos y Propuestas de la Federación Argentina de Lesbianas, Gay, Bisexuales y Trans* [Objectives and Proposals of the Argentine Federation of Gays, Lesbians, Bisexuals, and Trans], FEDERACIÓN ARGENTINA DE LESBIANAS, GAY, BISEXUALES Y TRANS (2011), <http://www.lgbt.org.ar/02-objetivos.php>.

190. Javier Corrales & Mario Pecheny, *Six Reasons Why Argentina Legalized Gay Marriage First*, AMERICAS Q. (July 30, 2010), <http://americasquarterly.org/node/1753>.

191. *Id.*

192. *Id.*

193. See Uprimny, *supra* note 103, at 1609 (noting the disconnect between the development of progressive constitutional thought in South America and the constituent debates).

194. See Corrales & Pecheny, *supra* note 190 (insisting that issuing a constitutional referendum to the voters would have cemented the discriminatory law because of voters' biases towards gays and lesbians).

precluded from advocacy due to the basic structure of the nations' judiciaries, equal marriage rights for same-sex couples continue to be out of the reach of existing rights groups.

#### *D. The Opposition*

In response to the fight for marriage equality in South America, opponents of the movement have either become more vocal in local politics or have formally created counter-rights groups to halt the progress of LGBT rights groups. While advocates of the movement continue to grow in number and support, the movement's opponents have equally expanded and in some instances have defeated efforts of gay rights groups to achieve reform.<sup>195</sup>

##### *1. The Traditional Purpose of Marriage*

Marriage has taken on various identities in the international community. In other regions of the world, marriage has traditionally served as a way to define the roles and rights between men and women.<sup>196</sup> In South America, as discussed, the cultural and political consensus is that the primary purpose of marriage is to facilitate procreation among citizens.<sup>197</sup> The difficulty in redefining this purpose has acted as an additional barrier to achieving marriage equality.

Many of those opposed to granting marriage to same-sex couples premise their argument on "preserving" the institution of marriage. Where the purpose of marriage has been to define the roles of men and women, however, states have been more receptive to same-sex marriage

195. In Peru in 2013, for example, the mayor of Lima, Susana Villarán, faced a recall election after she supported an ordinance that would ban discrimination on the basis of sexual orientation. J. Lester Feder, *Rainbow Coalition*, FOREIGN POLICY (Jan. 24, 2013), [http://www.foreignpolicy.com/articles/2013/01/24/rainbow\\_coalition\\_gay\\_rights\\_latina\\_merica\\_united\\_states](http://www.foreignpolicy.com/articles/2013/01/24/rainbow_coalition_gay_rights_latina_merica_united_states). Although she survived removal from office after the result of the election showed 53% of voters opposed removal, the election itself showed the power of opposition groups in Peru. *Exit Polls: Lima's Mayor Survives Recall Election*, ASSOCIATED PRESS (Mar. 17, 2013), <http://bigstory.ap.org/article/exit-polls-limas-mayor-survives-recall-election>. Guyana, Suriname, and Paraguay do not have any protections for LGBT citizens. Rachel Glickhouse & Mark Keller, *Explainer: LGBT Rights in Latin America and the Caribbean*, AMERICA'S SOCIETY/COUNCIL OF THE AMERICAS (May 24, 2012), <http://www.as-coa.org/articles/explainer-lgbt-rights-latin-america-and-caribbean>.

196. MERIN, *supra* note 5.

197. *See, e.g.*, CÓDIGO CIVIL [C.C.] art. 113 (Colom.).

legislation.<sup>198</sup> So-called “traditional gender roles,” once necessary to distinguish the supporting and serving partners in a relationship, have since eroded.<sup>199</sup> Same-sex couples have benefited from the collapse of this norm, as courts and legislatures have had more difficulty denying gays and lesbians the opportunity to marry without a role-defining justification.<sup>200</sup> As a result, those nations have been more amenable to pro-gay marriage legislation.

In South America, however, the traditional purpose of marriage has not given way so easily. Legislatures continue to press procreation as the dominant reason for marriage, and courts maintain that encouraging procreation is a sufficient state interest.<sup>201</sup> This logic contradicts the developing ideology that marriage and procreation are not so closely linked. South American courts have found a general, constitutional right to engage in sexual relations without the goal of procreation.<sup>202</sup> In the modern age, couples may marry without procreating (or even having sex), and contraception has been legalized and is widely available.<sup>203</sup> South America has fallen behind other nations in the Western world in recognizing marriage as a relational, unitive, and companionate institution rather than one to promote the production of offspring.<sup>204</sup> Same-sex couples obviously have the most to lose under this categorization of marriage and have had difficulty obtaining equal marriage rights as a result.

## 2. *Religious Opposition to Same-Sex Marriage*

The most significant obstacle in achieving recognition of same-sex marriage has been the prevalence of religious influence in South American legislative and judicial processes. Historically, South American governments have been dominated by religious entities, whether by direct rule or through integration of religious officials in the political system.<sup>205</sup> Unlike the United States, many South American countries have rejected an explicit separation of church from state, instead adopting systems of government heavily influenced by the Roman Catholic

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198. See Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.).

199. MERIN, *supra* note 5.

200. ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* 154 (1992).

201. See, e.g., CÓDIGO CIVIL [C.C.] art. 113 (Colom.).

202. See generally DAVID A. J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* (1998).

203. *Id.* at 444.

204. MERIN, *supra* note 5, at 30.

205. See James D. Wilets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*, 21 DUKE J. COMP. & INT'L L. 631, 664 (2011).

Church.<sup>206</sup> In fact, until the constitutional reforms of the 1980s and 1990s, South American constitutions contained express provisions granting exclusive privileges to the Catholic Church.<sup>207</sup>

The Church has taken an unwavering position against marriage equality. Catholicism considers homosexual conduct a “grave depravity . . . contrary to the natural law.”<sup>208</sup> This opposition to unconventional sexuality has developed into an opposition to all rights afforded to gays and lesbians, including the right to marry.<sup>209</sup> Adherents of Catholicism maintain that the purpose of marriage is procreation.<sup>210</sup> Because this ideology is in line with the traditional ideology shared by the South American public, the Catholic Church has easily influenced a large audience in protesting same-sex marriage reform.<sup>211</sup>

The Catholic Church affects every aspect of government in South America.<sup>212</sup> Heads of state continue to appeal to religious precepts, legislators publicly express their religious views, and courts often defer to the Church in reaching decisions.<sup>213</sup> This integration of religion into national politics has further obstructed the passage of pro-gay legislation and the recognition of rights for LGBT citizens.<sup>214</sup> In Argentina, for instance, the legislature once refused to officially register a gay rights organization.<sup>215</sup> Citing “Catholic ethics,” the Argentine Supreme Court upheld the refusal, essentially allowing such a justification for governmental decisions.<sup>216</sup> Additionally, unlike gay rights groups, which must show that a “public interest” is at stake in order to participate in the judicial

206. Thomas C. Bruneau, *Power and Influence: Analysis of the Church in Latin America and the Case of Brazil*, 8 *LATIN AM. RES. REV.* 25, 25 (1973) (“[M]uch of the culture of Latin America derives from within the Church and has evolved in relationship to it; social fields such as education and charity have always been heavily influenced by Church doctrine and organizations . . . . [I]n all countries Catholic groups have been politically active and in some cases assumed the form of Christian Democratic parties . . . which have held power.”).

207. Uprimny, *supra* note 103, at 1589.

208. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2352–53, 2357 (2d ed. 1997).

209. See Fellmeth, *supra* note 25, at 912–14 (explaining the success of “intergenerational transmission of parental religious ideology” to pass on religious prejudices).

210. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 208, at ¶¶ 2363, 2366.

211. See *supra* Part VI.D.1.

212. See Bruneau, *supra* note 206.

213. See Wilets, *supra* note 205, at 663.

214. See *id.* at 664.

215. Eugene Robinson, *Argentina’s Gays Battle Intolerance*, *WASH. POST*, Dec. 12, 1991, at A43.

216. *Id.*

process, the Catholic Church has been given full access to national courts notwithstanding the restrictions of judicial standing.<sup>217</sup> Indeed, in nearly all South American court cases litigating the marriage right, the Catholic Church has in some form represented the party opposing the action.<sup>218</sup> In the case of Brazil, the Supreme Court has been less influenced by the ideologies of the Church due to a slow decline in Roman Catholicism and a gradual rise in governmental secularism.<sup>219</sup> As a result, the judicial system has been slightly more willing to stray from its traditional rulings.<sup>220</sup> Similarly, rights groups in Argentina have been successful in obtaining marriage equality, despite the grip of religious dominance over its government, by avoiding the inherently skewed religious favoritism of the judiciary and appealing instead to the multi-partisan legislature.<sup>221</sup>

## VI. HOW CAN WE CONTINUE THE PROGRESS?

### A. *Following the Leader: Spain As a Guide to Reform*

In 2005, Spain became one of the first nations to grant formal marriage rights to same-sex couples. As a guide to achieving similar success in South America, regional proponents of marriage equality must explore the progress of the Spanish reform as well as the fundamental principles recognized by Spanish society prior to its implementation.<sup>222</sup>

#### 1. *Spain—An Overview*

The Spanish Constitution incorporates as fundamental rights those contained in human rights treaties ratified by Spain and expressly enumerates several others.<sup>223</sup> Marriage is not considered a fundamental right.<sup>224</sup> The text of the constitution states simply that men and women “have the right to marry with full legal equality” and leaves to the legislature the task of defining marriage.<sup>225</sup> The constitution also fails to define “family,” even

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217. See Wilets, *supra* note 205, at 663.

218. See, e.g., *Nosotros*, *supra* note 178.

219. Although Brazil has seen an increase in evangelical and fundamentalist Protestant adherents—religions even less supportive of same-sex marriage—the judiciary has seen a marked ideological movement away from all religious influences. Wilets, *supra* note 205, at 676.

220. *Id.*

221. Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.).

222. See Wilets, *supra* note 205, at 669 (arguing that, because the political elites in Latin America identify closely with those in Europe, lawmakers may be more receptive to legislation expanding LGBT rights).

223. CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 311, Dec. 29, 1978 (Spain).

224. *Id.*

225. *Id.*

though family is an institution valued highly by most Spanish citizens.<sup>226</sup>

Prior to the passage of the same-sex marriage law, LGBT rights activists and policymakers took an expansive approach to advocacy. Rather than litigate for civil rights of individual couples, gay rights groups lobbied the legislature for change based on constitutional ambiguity.<sup>227</sup> Throughout the 1990s, LGBT activists became increasingly involved in party politics.<sup>228</sup> As a result, political parties became increasingly sympathetic to the protection of rights for gays and lesbians.<sup>229</sup> In response to growing support for pro-gay legislation, many local gay rights groups sprang up around the country.<sup>230</sup> Until 2002, these organizations lobbied heavily for same-sex partnership rights.<sup>231</sup> The large number of rights groups, however, impeded their success as there was a lack of consensus among the groups as to which rights they should demand of the legislature.<sup>232</sup>

Fifty of the organizations later combined to form the Federación Estatal de Lesbianas, Gais, Transexuales y Bisexuales (FELGTB), which quickly became the national voice for LGBT rights advocacy.<sup>233</sup> Among the organization's express goals was recognition of same-sex marriage, rather than any inferior substitute.<sup>234</sup> FELGTB attained overwhelming political influence, leading to a proposal for same-sex marriage that was admitted to the Spanish legislature in 2005.<sup>235</sup>

As expected, the Catholic Church vehemently opposed the measure, reverting to its argument that "true marriage" is reserved for those with procreative purposes.<sup>236</sup> In the past, the Catholic Church had signed

226. CENTRE FOR SOCIOLOGICAL RESEARCH, STUDY NO. 2579 (Oct.-Nov. 2004).

227. Raquel Platero, *Love and the State: Gay Marriage in Spain*, 15 FEM. LEG. STUD. 329, 330 (2007), available at [http://www.ciudademujeres.com/articulos/IMG/pdf\\_2\\_Platero\\_2007\\_love\\_and\\_the\\_state\\_gay\\_marriage\\_in\\_Spain.pdf](http://www.ciudademujeres.com/articulos/IMG/pdf_2_Platero_2007_love_and_the_state_gay_marriage_in_Spain.pdf).

228. Manuel Cuéllar, José María Mendiluce, *Candidato Verde y Gay* [José María Mendiluce, *Green and Gay Candidate*], EL PAÍS (Jan. 2, 2003), available at [http://www.elpais.com/articulo/espana/Jose\\_Maria\\_Mendiluce/Jose/Maria/Mendiluce/candidato/verde/gay/elpepiesp/20030102elpepinac\\_17/Tes](http://www.elpais.com/articulo/espana/Jose_Maria_Mendiluce/Jose/Maria/Mendiluce/candidato/verde/gay/elpepiesp/20030102elpepinac_17/Tes).

229. Platero, *supra* note 227, at 334.

230. *¿Quiénes Somos?* [Who Are We?], FEDERACIÓN ESTATAL DE LESBIANAS, GAIS, TRANSEXUALES Y BISEXUALES (2011), <http://www.felgtb.org/quienes-somos>.

231. Platero, *supra* note 227, at 334.

232. *Id.*

233. *¿Quiénes Somos?*, *supra* note 230.

234. *Id.*

235. *Id.*

236. *En Favor del Verdadero Matrimonio* [In Favor of True Marriage], CONFERENCIA EPISCOPAL ESPAÑOLA [SPANISH BISHOPS], (July 15, 2004), available at <http://www.conferenciaepiscopal.es/documentos/Conferencia/VerdaderoMatrimonio.htm>.

several agreements with the Spanish government, proclaiming marriage to be an inherently religious institution under the explicit domain of the Church.<sup>237</sup> Additionally, many city halls attacked the measure, claiming a “conscientious objection” to performing same-sex marriages in order to gain standing in the nation’s courts to contest the issue formally.<sup>238</sup> Many conservative judges vowed not to enforce the measure if it passed.<sup>239</sup> Nevertheless, many of Spain’s autonomous regions began enacting same-sex partnership laws between 1998 and 2005 over opponents’ objections.<sup>240</sup> By the time the national legislature voted on the issue, twelve of Spain’s nineteen regions had already accepted some form of same-sex partnership law.<sup>241</sup>

In 2005, the Spanish Legislature passed Ley 13/2005, amending its Civil Code regarding the right to contract marriage.<sup>242</sup> The enactment explicitly added marriage to the list of constitutional fundamental rights by deeming it an extension of the right to develop freely one’s personality, a right already deemed fundamental.<sup>243</sup> All heteronormative language regarding marriage contained in the Civil Code was subsequently altered to reflect non-gendered expressions.<sup>244</sup> The legislature deliberately noted Spain’s long history of discrimination based on sexual orientation, and its intent for the new law to bring Spain in line with more modern models of coexistence and diversity: “[T]he legislature may, indeed must, act accordingly to avoid bankruptcy between law and society values.”<sup>245</sup> By interpreting the right to marriage as fundamental under the constitution, the Spanish government ensured that the right could not be abridged by governmental bodies.<sup>246</sup>

## 2. *Spanish Influence on Progress in South America*

The limited successes of the gay rights movement in South America parallel those of the corresponding movement in Spain. Argentina, which has seen rights for its LGBT citizens reach their peak, has followed Spain’s

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237. See, e.g., *La Regulación del Matrimonio* (B.O.E. 1981, 172) (Spain).

238. Although courts recognized the “conscientious objection” as sufficient to gain standing, courts ultimately denied the city halls’ requests for injunction. Platero, *supra* note 227, at 335.

239. *Id.*

240. *Id.* at 331.

241. *Id.*

242. *Materia de Derecho a Contraer Matrimonio* [Matter of the Right to Marry] (B.O.E. 2005, 157) (Spain).

243. *Id.*; CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 311, Dec. 29, 1978 (Spain).

244. The ambiguous term “spouse” was used in place of “husband” and “wife.” *Materia de Derecho a Contraer Matrimonio* (B.O.E. 2005, 157) (Spain).

245. *Id.*

246. See Uprimny, *supra* note 103, at 1592.

example by explicitly incorporating legal references to international human rights law in its own directives.<sup>247</sup> The Argentine legislature drew heavily from the Spanish legislation in legalizing same-sex marriage.<sup>248</sup> A draft of the Argentine bill expressly cited international and Spanish law as legal foundations for the law.<sup>249</sup> Other South American nations have also made reference to the Spanish law in their own enactments providing additional rights to LGBT citizens.<sup>250</sup> These explicit citations have significantly opened the door to legally endorsing same-sex marriage in the future.<sup>251</sup>

On the other hand, the successes of Spain's movement have highlighted the failures of the movements in Brazil and Peru. Significant progress in Spain was not achieved until the various rights groups combined to form a prominent, national entity.<sup>252</sup> Similarly, in Brazil, the many rights groups have failed to achieve progress due to their lack of a centralized, leading group.<sup>253</sup> The differing goals of each rights group has resulted in a vast amount of diffuse spending and a failure to accomplish objectives on the marriage front.<sup>254</sup> In Peru, a national political entity is absent, as rights groups have instead been focused on local advocacy.<sup>255</sup> These factors have prevented the recognition of same-sex marriage, and Peru in particular has been left far behind as a result.

### *B. Solution: Continuing Progress Across the Continent*

In order to continue progress of same-sex marriage recognition across South America, proponents of the movement should focus on four specific goals. First, the gay rights movement must gain national representation. Rights groups must consolidate at the federal level and place a greater

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247. Wilets, *supra* note 205, at 670.

248. *Id.*

249. Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.).

250. In enacting its national civil union law, Uruguay's legislature made explicit reference to the Spanish law in its Explanation of Rationales. Law No. 18.246, Jan. 10, 2008 [10 ene/008] D.O. 27402 (Uru.). Bolivia cited the Spanish law when it incorporated an anti-discrimination provision based on sexual orientation and gender identity into its constitution. CONSTITUCIÓN POLÍTICA DEL ESTADO [C.P.E.] [CONSTITUTION] Jan. 2009, art. 14 (Bol.).

251. Wilets, *supra* note 205, at 671.

252. See Platero, *supra* note 227, at 334.

253. See Rosenberg, *supra* note 4.

254. See *id.*

255. Quiroz, *supra* note 182.

emphasis on political lobbying, rather than judicial intervention. By forming allies in the executive branch, the groups may circumvent the weaknesses and uncertainties of the judiciary and advocate for direct change.<sup>256</sup>

Second, litigators and legislators must push governments to interpret gender-neutral laws to encompass both opposite-sex and same-sex couples. Because nations with open-ended constitutional language have progressed furthest in recognizing gay rights, proponents must focus their attention on achieving marriage rights in those nations before tackling constitutions with heteronormative language.<sup>257</sup> This is especially true if the nation either recognizes same-sex married couples or performs civil unions for same-sex couples, as the government has already shown it is receptive to reform.<sup>258</sup> There should be no difference, however, between the benefits of civil unions and those of marriage if such a distinction exists.<sup>259</sup>

Third, any advancement in progress must be unequivocal. The uncertainties of progress have been highlighted by the court rulings in Colombia and Brazil.<sup>260</sup> By contrast, in Argentina, the new legislation states specifically that sexual minorities are entitled to all protections afforded other citizens, and that those protections may not be abridged in the future.<sup>261</sup> This unambiguous allocation of liberties solidifies the government's stance on the issue and makes it less susceptible to rescission.

Finally, Brazil must take the initiative in recognizing equal rights going forward. In the hierarchy of South American states, Brazil serves as a role model for its neighbors.<sup>262</sup> Because of its population and its status as a world power, Brazil carries a great deal of influence in Latin America.<sup>263</sup> The role of its progressive human rights organizations in the Supreme Court case discussed is a prime example of the involvement necessary to influence a court's decision and consequently change public opinion. Brazil must ultimately become the role model in South America for gay rights legislation, and continent-wide recognition of same-sex marriage will likely begin there.

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256. The Socialist party in Spain advocates heavily for the LGBT population and the Socialist party in Argentina has done the same.

257. See Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.).

258. See S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.).

259. See *supra* Part IV.

260. See, e.g., S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011 (Braz.).

261. Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.) (“Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. . . . No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”).

262. Willets, *supra* note 205, at 676.

263. *Id.*

## VII. CONCLUSION

Same-sex marriage reform continues to spark intense debate around the world. In the past, religious influence and traditionalist values within South American governments have silenced gay rights groups and fellow supporters and stifled the debate. Since the implementation of new constitutions, however, advocates for marriage equality have witnessed slow progress, culminating in legal recognition of same-sex relationships short of marriage. Although these marriage alternatives remain a mere stepping stone to the desired goal, the measures themselves suggest that South America is ripe for reform. A subsequent shift to more liberal constitutional interpretations and the rise of governmental secularism will facilitate recognition of a full marriage right for same-sex couples. The most important catalyst, however, will stem from gay rights groups' pervasion in government and popular culture to increase public support for marriage equality. An electorate amenable to reform will eventually breed a political elite amenable to reform. Through the continued efforts of gay rights groups, South America will undoubtedly, albeit slowly, achieve continent-wide marriage equality with Brazil at the helm.

