THE EVOLUTIONARY INTERPRETATION OF TREATIES AND THE RIGHT TO MARRY: WHY ARTICLE 23(2) OF THE ICCPR SHOULD BE REINTERPRETED TO ENCOMPASS SAME-SEX MARRIAGE

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"The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."
—*Obergefell v. Hodges*[1]

INTRODUCTION

Article 23 of the International Covenant on Civil and Political Rights (ICCPR)[2] provides as follows: "(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2) The right of men and women of marriageable age to marry and found a family shall be recognised."[3]

In 2002, in *Joslin v. New Zealand*,[4] two lesbian couples, who had unsuccessfully applied to the local New Zealand Registrar of Births, Deaths, and Marriages for marriage licenses under New Zealand's

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1. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

2. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23 1976) [hereinafter ICCPR].

3. *Id.* at 179; *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, (Dec. 10, 1948) [hereinafter UDHR] (Article 16 contains a right to marry written in nearly identical terms to that in Article 23 of the International Covenant on Civil and Political Rights (ICCPR)).

4. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 215, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

Marriage Act 1955, submitted a communication to the U.N. Human Rights Committee (HRC) under the First Optional Protocol of the ICCPR.[5] The registrar rejected their applications on the basis that the Marriage Act applied only to marriage between a man and a woman. The full bench of the New Zealand Court of Appeal subsequently confirmed the registrar's interpretation of the act.[6] The communication of the four authors to the HRC claimed, inter alia, that the Marriage Act violated: first, Article 23(1) of the ICCPR, in conjunction with the right to nondiscrimination contained in Article 2(1); and second, Article 23(2) of the ICCPR, in conjunction with the rights to nondiscrimination contained in Articles 2(1) and 26.[7]

The HRC found against the authors. In its brief views on the merits, in relation to the right to marry under Article 23(2), the HRC stated the following:

> Use of the term "men and women" [in Article 23(2)], rather than the general terms used elsewhere in Part III of the [ICCPR] has been consistently and uniformly understood as indicating that the treaty obligation . . . is to recognise as marriage only the union between a man and a woman wishing to marry each other.[8]

The HRC then rejected the authors' other rights claims on the basis of the *generalia specialibus non derogant* principle.[9] The HRC's view was that because the specific right to marry did not encompass "same-sex marriage,"[10] the other more general rights in the ICCPR

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5. *Id.*; *see* First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302.

6. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 215, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

7. *Id.* at 217.

8. *Id.* at 223; *see also* Luca Paladini, *Same-Sex Couples Before Quasi-Jurisdictional Bodies: the Case of the UN Human Rights Committee*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions 533, 544–46 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014) [hereinafter Paladini] (summarizing the *Joslin* decision and arguing that the HRC adopted a textual approach to the interpretation of Art 23); Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 428 (where the European Court of Human Rights (ECtHR), interpreting the near-identical terms of Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms so as to exclude a right of same-sex couples to marry reasoned that, "[I]n contrast, all other substantive Articles of the [ICCPR] grant rights and freedoms to 'everyone' or state that 'no one' is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate.").

9. Aaron X. Fellmeth & Maurice Horwitz, Guide to Latin in International Law 115 (2009) (defining term as "[a] maxim meaning that specific or detailed provisions of a legal instrument should prevail over more general, conflicting provisions.").

10. The Authors acknowledge that the term "same-sex marriage" is imperfect, in that it suggests a contrast with "opposite-sex" or "heterosexual" marriage and thus may mislead-

could not be read so expansively as to provide same-sex couples with a right to marry,[11] notwithstanding that by 2002, the notion that the rights of nondiscrimination in the ICCPR encompassed discrimination on the grounds of sexual orientation, at least implicitly, was more or less settled.[12]

Somewhat surprisingly, the HRC has not been called upon to express views in response to any individual communications about same-sex marriage since 2002.[13] At the time *Joslin* was decided, only one country—the Netherlands—had legalized marriage between persons of the same sex (in 2001, by act of Parliament),[14] but this situation has since changed rapidly.[15] A range of countries

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ingly imply that *same-sex* marriage is in some way fundamentally different from *opposite-sex* marriage. As is apparent from this Article, the arguments in favor of same-sex marriage reject such a dichotomy and the concomitant notion that a specific "right to same-sex marriage" is being claimed, in contrast to a right to marriage which encompasses same-sex couples. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). Nevertheless, we use the term "same-sex marriage" throughout this Article as a convenient shorthand expression in common use in the literature to denote marriage between persons of the same sex. The term "marriage equality," which has found increasing favor, has not been used because it could be understood to refer to the eradication of a wider range of inequalities in relation to marriage, including, for example, gender inequality, which is not the subject matter of this Article.

11. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 223, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002); *see* Sarah Joseph & Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials and Commentary 689–90 (3d ed., Oxford Univ. Press, 2013); Paladini, *supra* note 8, at 544–45. The U.N. Human Rights Committee's (HRC) reasoning in *Joslin v. New Zealand* mirrors the reasoning of the ECtHR in *Schalk v. Austria.* The ECtHR determined that the right to marry under Article 12 of the European Convention on Human Rights should not be interpreted to encompass same-sex couples and then reasoned that the general rights to privacy and nondiscrimination in Articles 8 and 12 of the European Convention did not impose an obligation to grant same-sex couples access to marriage because it would be inconsistent with the specific right in Article 12. *See* Schalk, 2010-IV Eur. Ct. H.R. at 437.

12. *See* Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); Aleardo Zanghellini, *To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men*, 9 Melb. J. of Int'l Law 125, 131, 137, 142 (2008); Paladini, *supra* note 8, at 533, 541, 548; Paula Gerber et al., *Marriage: A Human Right for All?*, 36 Sydney L. Rev. 643, 645–46, 651 (2014).

13. *See* Paladini, *supra* note 8, at 556–57. The Authors recognize that there are hurdles to be overcome to bring an individual communication before the HRC, including the exhaustion of domestic remedies, as well as various admissibility criteria. *See* Joseph & Castan, *supra* note 11, Part II.

14. *Act on the Opening up of Marriage 2000* (Act of 21 December 2000 amending Book 1 of the Civil Code of the Netherlands); Sarah Joseph, *Human Rights Committee: Recent Cases,* 3 Hum. Rts. L. Rev. 91, 102 (2003); Zanghellini, *supra* note 12, at 130; Paladini, *supra* note 8, at 545.

15. *See* Gerber et al., *supra* note 12, at 644; *Fitzpatrick v. Sterling Housing Association Ltd* [1998] 4 All ER 991 (CA), cited by Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales,* 20 Int'l J. L., Pol'y & Fam. 249 (2006); Jamie

around the world (including New Zealand in 2013 and, most recently, the Republic of Ireland and the United States of America in 2015 and Colombia in 2016) now allow same-sex couples to marry,[16] and yet a large number of parties to the ICCPR[17] and the First Optional Protocol[18] still do not allow same-sex marriage.[19] Moreover, the United Nations has been increasingly prepared to affirm that human rights and the principle of nondiscrimination apply equally to every human being, regardless of sexual orientation—and to highlight instances where those rights and that principle have been breached[20]—and same-sex couples have been increasingly prepared to go to legal fora to claim that their rights are not protected.[21]

Several commentators have suggested that the outcome of any future individual communication brought before the HRC about

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Gardiner, *Same-Sex Marriage: A Worldwide Trend?*, 28 L. Context Socio-Legal J. 92, 103 (2010); *see infra* Appendix.

16. *See infra* Appendix. *See generally* Daniel Gallo et al., *Same-Sex Couples, Legislators and Judges. An Introduction to the Book*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 7 (noting the rising trend in the legalization of marriage between persons of the same sex).

17. As of July 11, 2017, there were 169 states parties to the ICCPR. *Status of Ratification Interaction Dashboard*, United Nations Human Rights, http://indicators.ohchr.org (last visited July 26, 2017) [https://perma.cc/2VAK-B5QZ].

18. First Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 5. As of July 11, 2017, there were 116 states parties to the First Optional Protocol. *Status of Ratification Interaction Dashboard*, *supra* note 17; *see also* Paladini, *supra* note 8, at 533, 536 (asserting that the "remarkable" number of states parties to the First Optional Protocol is likely to increase "in light of the growing attention for the respect of human rights at the international level").

19. Of the twenty-two countries listed in the Appendix, *infra*, that have legalized same-sex marriage, all are state parties to the ICCPR and twenty are state parties to the First Optional Protocol, with the exceptions of the United States and the United Kingdom. This leaves 147 state parties to the ICCPR that have not legalized same-sex marriage and ninety-six state parties to the First Optional Protocol that have not legalized same-sex marriage.

20. *See, e.g.*, Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); Communication No. 941/2000, Communication No. 941/2000, Young v. Australia, Hum. Rts. Committee, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003); Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007); *see also* Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 90 (Feb. 24, 2012) (referring, inter alia, to the United Nations General Assembly Adoption of the "Declaration on Human Rights, Sexual Orientation, and Gender Identity" on December 22, 2008, and the filing of the "Joint Statement on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation or Gender Identity" before the United Nations Human Rights Council on March 22 , 2011).

21. *See* Daniel Gallo et al., *Same-Sex Couples, Legislators and Judges. An Introduction to the Book*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 3.

same-sex marriage is unlikely to be decided in the same way, arguing that the *Joslin* case is "no longer good law,"[22] or that "at some point in the foreseeable future, the [HRC] will be sufficiently emboldened by positive indications from member states to hold that the ICCPR provides a right to same-sex marriage."[23] It has also been suggested (prior to the United States constitutionalizing the right of same-sex couples to marry) that support for same-sex marriage by "leading international powers such as the United States and United Kingdom will arguably count for more than support in a number of smaller, less influential states"[24] and that without such recognition domestically, the HRC is unlikely to "read a right of same-sex marriage into the [ICCPR]."[25]

Widespread domestic recognition of same-sex marriage would undoubtedly encourage the HRC to move from the position it adopted in *Joslin*.[26] Undoubtedly, too, "whether the human right to marry encompasses same-sex couples remains subject to debate and conjecture. The reasons for this are manifold, and have complex political and cultural origins; they are not grounded purely in

22. *See* Gerber et al., *supra* note 12, at 644, 646, 649, 653–54, 666; Zanghellini, *supra* note 12, at 130.

23. Nathan Crombie, *A Harmonious Union? The Relationship Between States and the Human Rights Committee on the Same-Sex Marriage Issue*, 51 COLOM. J. TRANSNAT'L L. 696, 697 (2013); *see also* Joseph, *supra* note 14, at 102 (explaining how the HRC's interpretation of the ICCPR has become increasingly broad); Gerber et al., *supra* note 12, at 648–49 (same); *cf.* Paladini, *supra* note 8, at 555–56 (stating "the unlikelihood of such jurisprudential development in the next few years in respect of a sensitive issue like marriage, which is closely connected to family as an institution as well as being deeply rooted in States' societies and traditions").

24. Crombie, *supra* note 23, at 727.

25. *Id.* In relation to the position in Europe under the European Convention of Human Rights (ECHR), see, for example, Macarena Saez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World Why "Same" is so Different*, 19(1) J. GENDER, SOC POL'Y & L. 1, 50 (2011) [hereinafter Saez, *Same-Sex Marriage*]; Schalk v. Austria, 2010-IV Eur. Ct. H.R. 425 (2010) (where the U.K. government, appearing as a third party intervener, argued that there needed to be a "convergence of standards as regards same-sex marriage" before there could be any departure from the established position that Article 12 of the ECHR referred only to marriage between different-sex couples); Schalk, 2010-IV Eur. Ct. H.R. 428 (where the ECtHR rejected an interpretation of Article 12 of the ECHR which would give same-sex couples the right to marry partly on the basis that "there is no European consensus regarding same-sex marriage"). It should be noted, however, in contrast to the interpretation of the ICCPR by the HRC, the ECtHR, in interpreting the ECHR, has found that the ECHR is a "living instrument which had to be interpreted in present-day conditions." Schalk, 2010-IV Eur. Ct. H.R. 425; *see* Pietro Pustorino, *Same-Sex Couples Before the ECtHR: The Right to Marriage, in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 403–04.

26. Crombie, *supra* note 23, at 726–28. The Authors note that since the publication of Crombie's article in 2013, both the United States and the United Kingdom, with the exception of Northern Ireland, now recognize same-sex marriage. *See infra* Appendix.

legal interpretation."[27] However, the position that the HRC will wait until a critical mass of states parties have recognized same-sex marriage to reconsider its views in *Joslin* may underestimate the persuasive value and influence of developments in domestic and supranational jurisprudence on the reasoning of the HRC,[28] particularly as: similar arguments both for and against same-sex marriage have been repeated in domestic, supranational, and international fora;[29] and judicial reasoning on this issue is typically influenced by developments in other jurisdictions.[30] This position may also underestimate the role of judicial leadership and the extent to which judicial interpretation and application of laws has contributed to the general trend of recognition of the rights of same-sex couples in numerous jurisdictions throughout the world.[31] The HRC, like a court, does not "operate by poll"[32]; rather it is obligated to provide the correct interpretation of the ICCPR and to develop "a coherent body of interpretation of the rights and obligations under a human rights treaty."[33]

Generally speaking, if the HRC were to adopt a practice of waiting for the emergence of some sort of consensus on human rights issues amongst a critical mass (however defined) of states parties, a host of rights-breaching domestic laws would not be held to violate specific human rights protections in the ICCPR. To invoke the words of the U.S. Supreme Court in its 2015 landmark decision, *Obergefell v. Hodges*, which found that the Due Process and Equal Protection Clauses of the U.S. Constitution provide a right to same-sex marriage, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued

27. Gerber et al., *supra* note 12, at 644.

28. *See generally* Gallo et al., *Same-Sex Couples, Legislators and Judges. An Introduction to the Book*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 7–9.

29. *See* Macarena Saez, *Transforming Family Law through Same-Sex Marriage: Lessons from (and to) the Western World*, 25 DUKE J. COMP. & INT'L L 125, 129–30, 133–66, 184–91 (2014) [hereinafter Saez, *Transforming Family Law through Same-Sex Marriage*].

30. *See generally* Edmundo Mostacci, *Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 73–75 (examining the relationship between the South African and Canadian case law).

31. *See* Gallo et al., *Same-Sex Couples, Legislators and Judges. An Introduction to the Book*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 7, 10.

32. *Rosenberg v. Canada (Att'y Gen.)* (1998), 38 O.R. 3d 577 (Can. Ont. C.A.).

33. Kerstin Mechlem, *Treaty Bodies and their Interpretation of Human Rights,* 42 VAND. J. TRANSNAT'L L. 905, 946 (2009); *see also* Gerber et al., *supra* note 12, at 649 (discussing the HRC's obligations in interpreting treaties); Paladini, *supra* note 8, at 535, 540 (explaining the four monitor functions of the HRC).

justification and new groups could not invoke rights once denied."[34]

There have been other instances when the HRC has moved in advance of any consensus amongst states parties in protecting the rights of sexual minorities.[35] For example, in 1994, the HRC found that an Australian state criminal code criminalizing sexual acts between males violated the right to privacy contained in Article 17 of the ICCPR and the right of nondiscrimination under Article 2;[36] and yet there are still seventy-five countries internationally that criminalize same-sex acts.[37] This accords with the ethos of human rights law, which is to counter majoritarianism and provide protection to minorities and the marginalized; the *political* consideration as to how many ICCPR states parties have legalized same-sex marriage should therefore be irrelevant to an assessment about whether excluding same-sex couples from marriage violates rights contained in the ICCPR.[38] Moreover, if the HRC does reinterpret Article 23(2) to encompass same-sex marriage, it will have to justify its new position with legal reasoning and employ the recognized grammar or structure of treaty interpretation for that decision to be seen as legitimate and authoritative.[39] This is particularly

34. *Obergefell*, 135 S. Ct. at 2602. For other countries' perspectives, see *Atala and Daughters v. Chile* (Case 12.502) (Feb. 24, 2012) (Inter-American Court of Human Rights), 33–4 [92], 40 [119]; *Minister for Home Affairs v Fourie* 2006 (1) SA 524 (CC), 47–8 [74] ("[T]he antiquity of a prejudice is no reason for its survival . . . . [T]he fact that a law today embodies conventional majoritarian views in no way mitigates its discriminatory impact."); *Hernandez v. Robles*, 855 N.E.2d 1, 23 ("Fundamental rights, once recognized, cannot be denied to particular groups on the ground that those groups have been historically denied those rights."); Zanghellini, *supra* note 12, at 136.

35. For a detailed analysis of the HRC's work in this area, see Paula Gerber & Joel Gory, *'The UN Human Rights Committee and LGBT Rights: What is it doing? What could it be doing?'* 14 Hum. Rts. L Rev. 403–439 (2014).

36. *See* Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee at 139, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); Paladini, *supra* note 8, at 541.

37. Aengus Carroll & Lucas Paoli Itaborahy, *State Sponsored Homophobia 2015: A World Survey of Laws: Criminalisation, Protection and Recognition of Same-sex Love*, ILGA 6 (10th ed. May 2015), http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf [https://perma.cc/7URV-ZWK9]. An analysis has not been conducted to assess how many of these countries are signatories to the ICCPR. *See* Paladini, *supra* note 8, at 535 n.9 (noting that the HRC recently invited Japan to "amend its legislation to include sexual orientation among the prohibited grounds of discrimination" and "Jamaica to decriminalize sexual relations between consenting adults of the same sex").

38. By contrast, as this Article explains in Section III.A, *infra*, the growing recognition that marriage can encompass a union of two persons of the same sex is *legally* relevant in applying the first "ordinary meaning" element of the general rule of interpretation contained in Article 31 of the Vienna Convention on the Interpretation of Treaties.

39. *See* Paladini, *supra* note 8, at 540–41 (arguing that "the strength of the HRC lies in its authoritativeness, which results in turn from many factors such as . . . the independence and seriousness of its case-law"); Eirik Bjorge, The Evolutionary Interpretation of

important because the decisions of the HRC are not backed by their own enforcement powers[40] and such interpretation is likely to arouse considerable hostility.

Consequently, this Article focuses on the legal interpretation of Article 23(2) of the ICCPR. This Article argues that it is not a matter of reading a right to same-sex marriage *into* the ICCPR, but *interpreting* the ICCPR in a manner consistent with the legal rules governing treaty interpretation.

Part I contains a brief exposition of the general rule of treaty interpretation in Article 31 of the Vienna Convention on the Interpretation of Treaties (Vienna Convention). Article 31 provides the widely accepted standard on how treaties are to be interpreted, which has been applied to the interpretation of the ICCPR by the HRC.[41] The Article then posits the two questions which need to be answered in the affirmative if Article 23(2) of the ICCPR is to be reinterpreted so as to encompass same-sex marriage. First, as Part II will address, should Article 23(2) be given an evolutionary, as opposed to static, interpretation? Second, if so, as discussed in Part III, should a contemporary evolutionary interpretation of Article 23(2) encompass same-sex marriage? The Article then concludes.

I. The General Rule of Interpretation in Article 31 of the Vienna Convention

Article 31 of the Vienna Convention sets out the "general rule"[42] of treaty interpretation in the first paragraph. It provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[43] The second paragraph then sets out the components of "context for the purposes of the

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Treaties 20 (Oxford Univ. Press, 2014) ("Whatever reasons or motivations underlie a suggested interpretation, the interpretation must be couched in the grammar of the rules of interpretation.").

40. Gerber et al., *supra* note 12, at 649, 655; Paladini, *supra* note 8, at 540.

41. *See, e.g.*, Communication No. 118/1982, J.B. v. Canada, Hum. Rts. Committee at 151, 158, U.N. Doc. CCPR/C/28/D/118/1982 (July 18, 1986); Communication No. 588/1994, Johnson v. Jamaica, Hum. Rts. Committee at 8, U.N. Doc. CCPR/C/56/D/588/1994 (Mar. 22, 1996); Communication No. 554/1993, LaVende v. Trinidad and Tobago, Hum. Rts. Committee at 6, U.N. Doc. CCPR/C/61/D/554/1993 (Nov. 17, 1997); Communication No. 555/1993, Bickaroo [represented by Interights, London] v. Trinidad and Tobago, Hum. Rts. Committee at 5, U.N. Doc. CCPR/C/61/D/555/1993 (Oct. 23, 1997); *see also* Paladini, *supra* note 8, at 540 ("[E]ver since *JB v. Canada* of 1982 the [HRC] stated it would apply Article 31 . . . [of the Vienna Convention] in interpreting the [ICCPR].").

42. Schalk v. Austria, 2010-IV Eur. Ct. H.R. 444 (Malinverni & Kovler, JJ., concurring).

43. Vienna Convention on the Law of Treaties, art. 31(1), Jan. 27, 1980, 1155 U.N.T.S., 340.

interpretation of a treaty."[44] The third paragraph sets out three factors which may be taken into account, "together with context."[45] Lastly, the fourth paragraph provides that "a special meaning shall be given to a term if it is established that the parties so intended."[46]

The Vienna Convention reflects pre-existing customary international law[47] such that it is applied to the interpretation of treaties, like the ICCPR, which were concluded before the Vienna Convention entered into force.[48] As Professor Oliver Dörr has observed, the emphasis on treaty terms in Article 31(1) means that the focus of interpretation is on the "*expressed* intention of the parties, that is, their intention *as expressed in the words used by them* in the light of the surrounding circumstances,"[49] or "the elucidation of the meaning of the text,"[50] "rather than the intention of the parties distinct

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44. The components "in addition to text" are: any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and any instrument which was made by one or more of the parties in connection with the conclusion of the treaty. *See id.* art. 31(2)(a)–(c).

45. The three factors are:

> (1) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (2) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (3) any relevant rules of international law applicable in the relations between the parties.

See id. This Article does not rely on the existence of any such subsequent practice or agreement between the parties to the ICCPR to advance its principal argument that Article 23 should be reinterpreted. *See* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 443 (Rozakis, J., Spielmann, J., & Jebens, J., dissenting).

46. This Article does not argue that Article 23(2) must be given a "special meaning" if it is to encompass same-sex marriage, and hence it does not rely on Article 31(4) of the Vienna Convention.

47. *See* Sondre T. Helmersen, *Evolutive Treaty Interpretation: Legality, Semantics and Distinctions*, 6(1) Eur. J. of Legal Stud. 161, 165 (2013). *But see* Richard K. Gardiner, Treaty Interpretation 202 (Oxford Univ. Press, 2008).

48. Oliver Dörr & Kirsten Schmalenbach, Vienna Convention on the Law of Treaties 522–25 (referencing Article 31); *see also* Gardiner, *supra* note 47, at 142; Helmersen, *supra* note 47, at 163–64; Bjorge, *supra* note 39, at 21; Gerber et al., *supra* note 12, at 649. The definition of "treaty" in Article 1(a) of the Vienna Convention is not temporally confined to treaties which are concluded or come into force after the conclusion of the Vienna Convention, and the definition clearly encompasses the ICCPR.

49. Dörr et al., *supra* note 48, at 522, 541 (emphasis added); *see also* Gardiner, *supra* note 47, at 145 ("[T]he text of the treaty is to be read as the authentic expression of the agreement of the parties."); Bjorge, *supra* note 39, at, 57, 86–92, 98–99; Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, 237 ¶ 48 (July 13); R. v. Special Adjudicator *ex parte* Hoxha [2005] UKHL 19, [8]–[9].

50. Dörr et al., *supra* note 48, at 541; *see* Gardiner, *supra* note 47, at 144–45, 190, 192, 197–98; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); R. H. Berglin, *Treaty Implementation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: the Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal*, 21

from [the treaty]"[51] or "the bargain struck by the parties."[52] This "principle of textuality"[53] applies to all treaties, including human rights treaties like the ICCPR,[54] notwithstanding that such treaties typically "do not regulate fine detail but set out broad principles intended to apply in a range of circumstances and over a period long enough to expect social changes."[55]

Article 31(1) contains three principles which are employed to interpret the text: first, interpretation using conventional language ("the ordinary meaning"); second, interpretation using context; and third, interpretation using the object and purpose of the treaty.[56] These three principles are combined in one "unitary process of interpretation"[57] "where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."[58] As summarized by international law academic Richard Gardiner, "It is the *treaty* which is to be interpreted; it is the *terms* whose ordinary meaning is to be the starting point, their context moderating selection of that meaning, and the process being further illuminated by the treaty's object and purpose."[59]

The critical question in terms of the interpretation of Article 23(2) is whether its interpretation is to be determined by reference to the time ICCPR was framed, that is, the period from the late 1940s to the early 1960s—a mode of interpretation referred to as "historical language," "static" interpretation,[60] or the "principle of

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Tex. Int'l L.J. 39, 43–44 (1986); R. v. Special Adjudicator *ex parte* Hoxha [2005] UKHL 19, [9].

51. Dörr et al., *supra* note 48, at 523, 541; *see* Gardiner, *supra* note 47, at 164.

52. Dörr et al., *supra* note 48, at 541; *see* Gardiner, *supra* note 47, at 144.

53. Gardiner, *supra* note 47, at 145–46; *see* Bjorge, *supra* note 39, at 21, 98.

54. Dörr et al., *supra* note 48, at 527, 541; *see* Gardiner, *supra* note 47, at 144.

55. Gardiner, *supra* note 47, at 146–47; *see also* Bjorge, *supra* note 39, at 5, 7, 10, 12–13, 23–36.

56. Ulf Linderfalk, On the Interpretation of Treaties 61 (Springer, 2007); *see* Dörr et al., *supra* note 48, at 541; Gardiner, *supra* note 47, at 141 (quoting *Aguas del Tunari v. Bolivia* (ICSID ARB/02/03), Award of Oct. 21, 2005, ¶ 91); Bjorge, *supra* note 39, at 113–15.

57. J. Crawford, *Chance, Order, Change: The Course of International Law* (2013) 365 Recueil des cours, Collected Courses 300; *see* Dörr, *supra* note 48, at 541; Gardiner, *supra* note 47, at 142, 161; Helmersen, *supra* note 47, at 163, 166 n.24; Bjorge, *supra* note 39, at 21, 58; Linderfalk, *supra* note 56, at 203–04.

58. WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 399, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009); *see also* Dörr et al., *supra* note 48, at 541; Gardiner, *supra* note 47, at 141–42.

59. Gardiner, *supra* note 47, at 144.

60. Dörr et al., *supra* note 48, at 533; Helmersen, *supra* note 47, at 169 n. 54.

contemporaneity"[61]—or by reference to the specific point in time at which ICCPR is interpreted—in contrast, "contemporary language,"[62] "evolutive interpretation," or "evolutionary interpretation."[63]

This Article concedes that if Article 23(2) is interpreted statically, it is implausible to suggest that it encompasses a right to same-sex marriage.[64] Even if one takes into account that the ordinary meaning "is not so much any layman's understanding, but what a person reasonably informed on the subject matter of the treaty would make of the terms used,"[65] same-sex marriage in the mid-twentieth century was limited to a few tribal and traditional communities, and there was no recognition of same-sex marriage within any extant legal system that was based primarily on the formulation of written rules, as opposed to custom.[66] Indeed, in 1966, when the ICCPR was concluded, it would be seven years before the American Psychiatric Association declassified homosexuality as a mental disorder and twenty-four years before the World Health Organization removed homosexuality from its list of mental illnesses.[67] The exclusively heterosexual static interpretation of Article 23(2) is consistent with the lack of any reference to same-sex marriage in its *travaux préparatoires* and the definitions of "marriage" and "marry" in authoritative dictionaries of the period.[68]

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61. Helmersen, *supra* note 47, at 185; Bjorge, *supra* note 39, at 123.

62. *See* Linderfalk, *supra* note 56, at 73.

63. *See* Linderfalk, *supra* note 56, at 73, 75, 79, 88–95; Helmersen, *supra* note 47, at 163; Bjorge, *supra* note 39.

64. *See* Paladini, *supra* note 8, at 545 (arguing that it is "surely true" that at the time of drafting the ICCPR the states parties intended that marriage was a heterosexual institution; the first ICCPR state party that legalized same-sex marriage was the Netherlands in 2000); *see also Obergefell*, 135 S. Ct. at 2614–15 (Roberts, C.J. dissenting) (demonstrating how a static interpretation of the U.S. Constitution would not produce a right to same-sex marriage); Gerber et al., *supra* note 12, at 647–48.

65. Dörr, *supra* note 48, at 542.

66. *See, e.g.*, *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 17 ¶ 30 (S. Afr.); Schalk v. Austria, 2010-IV Eur. Ct. H.R. 428 ("In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex."); *see also Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting) ("There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way."); *Layland v Ontario* (1993) 14 O.R. 3d 658; Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 116 (Can. B.C. C.A.).

67. *See* Obergefell, 135 S. Ct. at 2596.

68. *See, e.g.*, Layland v. Ontario (1993) 14 O.R. 3d 5 (quoting Webster's Third New International Dictionary (3d ed., 1961) to define "marriage" as the "state of being united to a person of the opposite sex as husband or wife; the mutual relation of husband and wife; wedlock; the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family"); *Marriage*, The Concise Oxford Dictionary of Current English (5th ed., 1964) (defining

Hence, the threshold question—should the right to marry be given a static or evolutionary interpretation?—needs to first be answered in favor of evolutionary interpretation before one can address the second question: whether an evolutionary interpretation of Article 23(2) should encompass same-sex marriage.

II. Why Article 23 Should Be Given an Evolutionary Interpretation

The Vienna Convention does not expressly deal with the question of evolutionary versus static interpretation.[69] However, consistent with the requirement to interpret a treaty in "good faith,"[70] evolutionary interpretation is almost inevitably justified[71] by reference to "the primary necessity of interpreting an instrument according to the intentions of the parties at the time of its conclusion."[72] The most prominent indicator of such an intention is the parties' use of "generic terms" in a treaty, that is, the use of terms

"marriage" as the "[r]elation between married persons, wedlock; *give, take, in* (as husband or wife)").

69. Linderfalk, *supra* note 56, at 73–74; Paolo Palchetti, *Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of Ordinary Meaning*, *in* International Courts and the Development of International Law 91–92 (Nerina Boschiero et al. eds., 2013); Helmersen, *supra* note 47, at 166–167; Bjorge, *supra* note 39, at 121.

70. Bjorge, *supra* note 39, at 64, 69–70, 74–76; *see* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 33 ¶ 63–¶ 66 (July 13); *cf.* Dörr et al., *supra* note 48, at 528, 533–534 (maintaining that the UN International Law Commission, when drafting the Vienna Convention, "thought that the correct application of the temporal element would normally be indicated by the interpretation in good faith", and that "the requirement to interpret a treaty basically by reference to the linguistic usage current at the time of its conclusion is one both of common sense and good faith").

71. *Cf.* Communication No. 829/1998, Judge v. Canada, 78th session at 20, ¶ 10.3, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 5, 2002) [10.3] (where the HRC departed from its previous jurisprudence on the interpretation of Article 6 of the ICCPR, referring, in part, to the "exceptional situations in which a review of the scope of the application of the rights protected in the [ICCPR] is required, such as where an alleged violation involves the most fundamental of rights—the right to life"). It is not argued in this Article that the current situation in relation to same-sex marriage is similarly "exceptional" so as to justify a reinterpretation of Article 23(2) without reference to the intentions of its framers.

72. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 19, ¶ 53 (June 21); *see* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 237, ¶ 48, 242–43 (July 13); Bjorge, *supra* note 39, at 2–5, 8–9, 59, 76, 80–83, 108–09, 123, 126, 128; *see also* Palchetti, *supra* note 69, at 92, 103–04 ("[T]here are situations in which it must be presumed that it was the parties' intention that a term or provision be interpreted according to the meaning *acquired* by that term or provision at the time when the treaty is to be applied."); Helmersen, *supra* note 47, at 170–71.

which refer "to the *class* of certain phenomena"[73] (e.g., sacred trust,[74] territorial status,[75] *maison convenable*,[76] natural resources,[77] sound recording,[78] flat panel display devices,[79] legal ties),[80] as opposed to precise and specific general or singular references which refer to "a specified group or individual" such that the referent (for example, a topographical denomination) will not change over time.[81] In particular, where a generic term appears in a treaty "of the most general kind and of continuing duration,"[82] "the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[83]

In accordance with the observation of Dr. Erik Bjorge, an academic and expert in public international law, that "all the elements referred to in Article 31 provide, by objective means, the basis for establishing the common intention of the parties,"[84] interpreters

73. LINDERFALK, *supra* note 56, at 78; *see* JOHN LYONS, SEMANTICS VOLUME 1, 193–97 (Cambridge Univ. Press, 1977); Helmersen, *supra* note 47, at 178–79.

74. Legal Consequences for States of the Continued Presence of South Africa in Namibia, *supra* note 72 at 19 ¶ 53; *see* BJORGE, *supra* note 39, at 129–30.

75. Aegean Sea Continental Shelf, Judgment, 1978 I.C.J. Rep. 62 ¶¶ 48–80; *see* BJORGE, *supra* note 39, at 136; *but see* LINDERFALK, *supra* note 56, at 85–86 (arguing that the Aegean Sea Continental Shelf Case has been incorrectly understood as a case where the relevant international instrument was interpreted in accordance with contemporary language, as opposed to historical language).

76. *See* BJORGE, supra note 39, at 10–11 (discussing *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 722; (1923–4) 2 *Annual Digest and Reports of Public International Law Cases* 19).

77. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); *see* BJORGE, *supra* note 39, at 126.

78. Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, ¶ 396, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009); *see* BJORGE, *supra* note 39, at 126.

79. Appellate Body Report, *European Communities and Its Member States — Tariff Treatment of Certain Information Technology Products*, ¶¶ 7.597–7.602, WTO Doc. WT/DS375, 376 and 377/R (Aug. 16, 2010). *But see* BJORGE, *supra* note 39, at 140–41.

80. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 32 ¶ 84—85 (Oct. 16); *see* BJORGE, *supra* note 39, at 127–28.

81. In relation to singular references, see, for example, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, 2002 I.C.J. Rep., 47, ¶ 59. Boundary Dispute Between Concerning the Frontier Line Between Boundary Post 62 and Mount Fitzroy (Arg. v. Chile), 22 R.I.A.A, Volume ¶ 123–30 (1994). In relation to general references, see, for example, The North Atlantic Coast Fisheries Case (U.K. v. U.S.) (1910) 11 R.I.A.A. 195; *see also* BJORGE, *supra* note 39, at 124–25, 127, 129; Helmersen, *supra* note 47, 141–42; LINDERFALK, *supra* note 56, at 77, 87.

82. Aegean Sea Continental Shelf, Judgment, 1978 I.C.J. Reports 1978, 32, ¶ 77.

83. Dispute Regarding Navigational and Related Rights (Costa Rica v Nicar.), 2009 I.C.J. 243, ¶ 66 (July 13).

84. BJORGE, *supra* note 39, at 5 (emphasis omitted).

also take into account the object and purpose of the treaty[85] and the context in which the term appears,[86] reflecting "the integrated operation envisaged by the general rule of interpretation set forth in Article [31(1)]."[87] Additionally, although they are not inevitably used,[88] the *travaux préparatoires* may be used in accordance with Article 32 of the Vienna Convention[89] as a supplementary means of interpretation to confirm the interpretative presumption arising from the use of generic terms, or, where there is "clear evidence that the parties did not intend to give to a term a meaning which changed over time, this evidence should generally lead to a rejection of the presumption in favor of evolutive interpretation."[90]

This Article contends that the expression "[t]he right of men and women to marry and to found a family" in Article 23(2) should be given an evolutionary interpretation because such an interpretation is consistent with the intentions of the parties as ascertained using the elements of treaty interpretation contained in Article 31 of the Vienna Convention.[91] The following five reasons support this contention.

First, "[the] concept . . . embodied in the treaty . . . is, from the outset, evolutionary," such that "some evolution in the [expression]'s meaning must have been more likely than not at the time of

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85. *See, e.g.*, *Dispute Concerning Filleting within the Gulf of St. Lawrence (Can./Fr.)* (1986) 82 I.L.R. 590–91, 612; Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 40 ¶ 84 (Oct. 16).

86. *See* Bjorge, *supra* note 39, at 125.

87. Palchetti, *supra* note 69, at 98; *see* Bjorge, *supra* note 39, at 6.

88. Helmersen, *supra* note 47, at 176.

89. Article 32 of the Vienna Convention provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of [A]rticle 31, or to determine the meaning when the interpretation according to [A]rticle 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, art. 32. Jan. 27, 1980, 1155 U.N.T.S., 340.

90. Palchetti, *supra* note 69, at 101; *see* Vienna Convention on the Law of Treaties, art. 32. Jan. 27, 1980, 1155 U.N.T.S., 340; Helmersen, *supra* note 47, at 170; Bjorge, *supra* note 39, at 122.

91. The state party argued that the "[ICCPR] itself understands" that "the family . . . [is] viewed as a unit composed of a heterosexual couple." Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 4.11, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007); *cf. id.* (Amor, J. & Khalil, J. dissenting) (without reference to the issue of contemporary versus historical meaning, maintaining that Article 23 can only ever refer to opposite-sex couples because to interpret Article 23 so as to refer to same-sex couples would be to "distort the text or attribute to the text an intent other than that of its authors").

the treaty's conclusion"[92] and to interpret Article 23 in a static manner would be inconsistent with this concept's history.[93]

Second, the ICCPR is a treaty of the most general kind and of continuing duration[94] and the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[95]

Third, the ICCPR is a human rights treaty and human rights treaties "represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principle and concepts which they employed should be understood and applied in the light of developing social attitudes."[96]

Fourth, there have been notable factual and legal developments and changes in international opinion in relation to sexual orientation, family formation, and marriage since the framing of Article 23.[97]

Fifth, no nongeneric term could have referred to the institution of marriage in all the heterogeneous jurisdictions of the framers to

92. Dörr et al., *supra* note 48, at 535; Helmersen, *supra* note 47, at 179.

93. Dörr et al., *supra* note 48, at 535; *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 53 ("[T]he court is bound to take into account the fact that the concepts embodied in Art[icle] 22 of the [ICCPR]—'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust.'").

94. Aegean Sea Continental Shelf, Judgment, 1978 I.C.J. Rep. 32 ¶ 77 (Dec. 19).

95. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, 243 ¶ 66 (July 13).

96. RosInvestCo UK Ltd. v. Russian Federation, Case No. Arb. V079/2005, Award on Jurisdiction, ¶ 39 (Stockholm Chamber of Commerce, 2007) (Sweden); *see, e.g.*, U.N. GAOR, 16th Sess., 1090th mtg. at 149 ¶ 35, U.N. Doc. A/C.3/SR. 1090 (Karapanza (Yugoslavia)); *see, e.g.*, U.N. GAOR, 16th Sess., 1090th mtg. at 163 ¶ 32, U.N. Doc. A/C.3/SR. 1090 (Avila (Mexico)); U.N. GAOR, 16th Sess., 1090th mtg. at 158 ¶ 50, U.N. Doc. A/C.3/SR. 1090 (Martin (Guinea)); U.N. GAOR, *Draft International Covenants on Human Rights*, U.N. Doc A/5000, 26 ¶ 82; Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 83 (Feb. 24, 2012); *cf.* U.N. GAOR, 16th Sess., 1090th mtg. at 150 ¶ 41, U.N. Doc. A/C.3/SR. 1090 (Baroody (Saudi Arabia)) (arguing that Treaty negotiations necessarily involve compromise and should therefore be "looked at as a whole and not scrutinized too closely in every detail"); U.N. GAOR, 16th Sess., 1094th mtg. at 172 ¶ 48, U.N. Doc. A/C.3/SR.1094 p 172 [48] (Kracht (Chile) (who did not agree with a 'progressive application' of the provisions); Bjorge, *supra* note 39, at 6, 10, 12–13, 23–36, 139 (arguing that there is only one method of treaty interpretation based on the "objectivized intentions" of the Parties, which does not vary according to the nature of the treaty to be interpreted, and that human rights treaties are interpreted in an evolutionary manner because that approach is consistent with the Parties' objectivized intentions).

97. *See* Communication No. 829/1998, Rodger Judge v. Canada, 78th session, Hum. Rts. Committee, ¶ 10.3, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 5, 2002); Joseph, *supra* note 23, at 102.

the ICCPR. There were vast legal differences in the institution amongst those jurisdictions[98] and many jurisdictions had made great changes to the institution both before and during the ICCPR drafting period. These changes related to, for example, polygamy; sexual relations within and outside marriage; the status of women within marriage; property rights; spousal support and rights to maintenance; inheritance; legitimacy and responsibility for children; the right to work; and the commencement and dissolution of marriage. The framers must, therefore, have intended that the expression be interpreted in a dynamic manner.[99]

The rest of this Part examines Article 23 of the ICCPR in light of the evolving concept of marriage, the treaty's drafting, and the emerging domestic jurisprudence related to same-sex marriage.

A. *The Evolving Concept of Marriage*

The institution of marriage in most, if not all, of the jurisdictions of the framers of the ICCPR, had changed greatly over the several centuries prior to the period from the late 1940s to the early 1960s when the ICCPR was drafted.[100] The institution continued to adjust and develop in most jurisdictions during the drafting period, and that evolution has continued thereafter.[101] In short, marriage was an institution "whose content the parties expected would change through time."[102] In addition, by the time the

98. *See, e.g.*, U.N. GAOR, 16th Sess., 1093rd mtg. at 165 ¶ 67, U.N. Doc. A/C.3/SR.1093 (Casselman (Canada)); U.N. GAOR, 16th Sess., 1093rd mtg. at 165 ¶ 67, U.N. Doc. A/C.3/SR.1093 (Hampton (New Zealand)); U.N. GAOR, 16th Sess., 1095th mtg. at 176 ¶ 53, U.N. Doc. A/C.3/SR.1095 (Morrissey (Ireland)); *see* U.N. GAOR, 16th Sess., 1092nd mtg. at 158 ¶ 48, U.N. Doc. A/C.3/SR.1092 (Cappa (Dominican Republic)); U.N. SCOR, 16th Sess., 241th mtg. at 9–10, U.N. Doc. E/AC.7/SR.241 (Aug. 10, 1953) (Rivas (Venezuela)); U.N. SCOR, 16th Sess., 241th mtg. at 12, U.N. Doc. E/AC.7/SR.241 (Aug. 10, 1953) (Ciselet (Belgium)); U.N. SCOR, 16th Sess., 241th mtg. at 15, U.N. Doc. E/AC.7/SR.241 (Aug. 10, 1953) (Orlovsky (USSR)).

99. Dörr et al., *supra* note 48, at 535. The need to interpret the right to marry in a dynamic manner was, arguably, implicitly conceded by New Zealand in *Joslin*, given that it cited a 1993 edition of the Shorter Oxford Dictionary in its submission on the "ordinary meaning" of the words "to marry," not an edition from the 1960s. *See* Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 218 ¶ 4.3, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

100. In relation to the common law world, with a particular focus on Australia, see Margaret Brock & Dan Meagher, *The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis*, 22 Pub. L. Rev. 266, 267–68, 270 (2011); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

101. *See* Saez, *Transforming Family Law Through Same-Sex Marriage*, *supra* note 29, at 166–74, 180; Saez, *Same-Sex Marriage*, *supra* note 25, at 2. In relation to the United States, *see Obergefell*, 135 S. Ct. at 2584.

102. Kasikili/Sedudu Island (Botswana v. Namibia), Declaration, 1999 I.C.J. 1113 (Dec. 13) (Higgins, J.); *see, e.g.*, U.N. GAOR, 16th Sess., 1093rd mtg. at 161 ¶¶ 1–8, U.N. Doc. A/

ICCPR was framed, it was well-established that marriage was constituted by law, although in many jurisdictions, marriage laws were influenced by customs and religious beliefs and practices.[103] The framers were not "baptismal speakers"[104] who sought to define marriage for the purposes of the ICCPR, let alone define it as an exclusively heterosexual institution. While the framers certainly *assumed* that marriage was only a heterosexual institution and did not contemplate the application of Article 23 to same-sex couples,[105] there is no evidence that they intended to fix the legal definition of marriage in the ICCPR, let alone to fix its definition as exclusively heterosexual.[106] To the extent that the HRC in *Joslin* suggested otherwise by placing emphasis on the use of the words "men and women" in Article 23(2),[107] its reasoning was insuffi-

C.3/SR.1093 (Nov. 6, 1961) (Tweedsmuir (U.K.)) (endorsing view that marriage should be examined delicately); U.N. GAOR, 16th Sess., 1092nd mtg. at 156, 164, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961) (discussing views of Bengston (Sweden), Mya Sein (Burma), and Capotorti (Italy)); U.N. GAOR, *Draft International Covenants on Human Rights*, U.N. Doc. A/5000, 26 ¶ 82; Halpern v. Canada (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 53 (Can. Ont C.A.).

103. *See, e.g.*, U.N. SCOR, 9th Sess., at 9, ¶ 84, U.N. Doc. E/CN.4/689 (June 6, 1953); U.N. GAOR, 16th Sess., 1095th mtg. at 174–175, ¶ 28, U.N. Doc. A/C.3/SR.1095 (Nov. 7, 1961) (Munguia Novoa (Nicaragaua)); U.N. GAOR, 16th Sess., 1092th mtg. at 157, ¶ 37, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961) (Maharoof (Ceylon)); U.N. GAOR, 16th Sess., 1093rd mtg. at 161, ¶ 2, 6, U.N. Doc. A/C.3/SR. 1093 (Nov. 6, 1961) (Tweedsmuir (U.K.)); *but see* U.N. GAOR, 16th Sess., 1092nd mtg. at 155, ¶ 8, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961) (Lima (Cameroun)) ("[T]radition always overshadowed legislation in such matters."); United Nations Economic and Social Council, Commission on Human Rights, 8th sess., *Draft International Covenants on Human Rights and Measures of Implementation, Memorandum by the Secretary-General* at 11, U.N. Doc. E/CN.4/528/Add.1 (Mar. 20, 1952) ("The Government of the Philippines has invited attention to the fact that the Universal Declaration of Human Rights contains provisions on the right to marry, the right to found a family, and the importance of family. In its view the right to marry is a natural right; one among the first given to man without which there could be no family. Without the family there could be no state and society, and without the state and society there could be no need for the [ICCPR] itself.") (emphasis added).

104. Patrick Emerton, *Political Freedoms and Entitlements in the Australian Constitution – An Example of Referential Intentions Yielding Unintended Legal Consequences*, 38 FED. L. REV. 169, 180 (2010) (defining a "baptismal speaker" as a speaker who, "confronted with a new kind of thing to which she wishes to refer, and having no word ready-to-hand in the public language (or not wanting to use an existing word) coins a new word . . . with the referential intention that it refer to things of this new kind").

105. *See* Gerber et al., *supra* note 12, at 648.

106. This is based on the Authors' extensive review of the debates that occurred when the ICCPR was being drafted. *See supra* note 102, *infra* note 128.

107. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 223 ¶ 8.2, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002) (stating that Article 23 contained "the only substantive provision in the [ICCPR] which defines a right by using the term 'men and women"').

cient, as will be discussed below in relation to the *travaux préparatoires*.

Because the framers were not "baptismal speakers," the reference to marriage in Article 23(2) is located within a "referential chain" which, critically, refers to a "social kind"[108] that is "not constituted by nature but by human practices, including linguistic practices"[109] and law;[110] hence, the debate as to whether same-sex marriage is a referent of the expression "marriage."[111] The contemporary interpreter must look for "cultural salience"[112]—that is, she must determine whether same-sex marriage resembles those things that she already judges to be marriage in various salient ways[113]—because "there is no canonically accepted criteria of kindhood in relation to social and political kinds," as opposed to "natural kinds."[114]

Moreover, the characterization of marriage as a social kind means that the conventions that governed the expression's usage at the time the ICCPR was drafted may have rested upon false assumptions about the properties of the kind to which the drafters intended to refer.[115] This further militates in favor of an evolutionary interpretation: if the contemporary interpreter remains confined to historical language and engages in static interpretation of Article 23, she risks compounding the framers' mistaken "beliefs concerning what is salient about the very social and political insti-

108. Sally Haslanger, *What are We Talking About? The Semantics and Politics of Social Kinds*, 20(4) Hypatia 10 (2005); *see also* Emerton, *supra* note 104, at 181 ("[w]hat we might call *social* or *political* kinds, such as parliament, are not constituted by nature but by human practices, including linguistic practices."); *United States v. Windsor*, 699 F. 3d 169 (2013) (Alito, J. dissenting) ("Family structure reflects the characteristics of a civilization.").

109. Emerton, *supra* note 104, at 181, 195–96, 200.

110. *See generally* Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29.

111. *Id.*; Saez, *Same-Sex Marriage*, *supra* note 25, at 2, 5–6, 41.

112. *See* Lyons, *supra* note 73, at 248; *see also* Saez, *Same-Sex Marriage*, *supra* note 25, at 3, 40 (discussing how legal difference and cultural perspectives inform one another).

113. Emerton, *supra* note 104, at 181–83; *see also* Reference re Same-Sex Marriage [2004] 3 S.C.R. 713 (Can.) ("The natural limits argument can succeed only if its proponents can identify an objective core of meaning which defines what is natural in relation to marriage . . . . The only objective core which the interveners before us agree is 'natural' to marriage is the voluntary union of two people to the exclusion of all others. Beyond this, views diverge. We are faced with competing opinions on what the natural limits might be."); Haslanger, *supra* note 108, at 24–25; Lyons, *supra* note 73, at 248.

114. *See* Haslanger, *supra* note 108, at 11, 16–18, 24–25 n.8.

115. Emerton, *supra* note 104, at 187, 190; *cf.* Helmersen, *supra* note 47, at 152–53 (discussing the effect of evolutive interpretation on the meaning of certain terms over time).

tutions that we, through our collective practices, constitute."[116] Specifically, in relation to sexuality and marriage, the changes since the time of the drafting of Article 23 have been immense and appear to be accelerating.[117] As previously noted, at the time Article 23 was framed, homosexuality was authoritatively regarded as a psychiatric disease,[118] a majority of nations criminalized at least some forms of consensual homosexual sex between adults, and no state party formally recognized same-sex marriage.[119] By contrast, at the time of writing this Article, the categorization of same-sex

116. Emerton, *supra* note 104, at 183; *see also* U.N. GAOR, 16th Sess., 1092nd mtg. at 155, ¶ 1, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961) (Martin (Guinea) stating, "There were still some practices relating to marriage and women's status in the home which should be swept away . . . . Equality for women must, of course, entail many mutual compromises and concessions, *and the husband must remain head of the family, since no ship could have two captains.*") (emphasis added); U.N. GAOR, 16th Sess., 1092nd mtg. at 156, ¶ 21, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961) (Alcivar (Ecuador) stating, "But to say that men and women should have equal rights and obligations in marriage . . . was totally unrealistic, because the family obligations of men in all societies were necessarily somewhat different from those of women."); U.N. SCOR, 16th Sess., 241st mtg. at 8, U.N. Doc. E/AC.7/SR.241 (Aug. 10, 1953) (Azmi (Egypt) stating, "Equality of rights for men and women as to marriage was another question that raised complicated difficulties for certain countries. The Egyptian delegation would not wish to see such equality given to Moslem women . . . . [H]e believed that Egyptian women would be the first to refuse equal rights when they were not matched by equal obligations."); U.N. SCOR, 16th Sess., 244th mtg. at 9 (July 14, 1953), U.N. Doc. E/AC.7/SR.244 (Aug. 12, 1953) (Heffelfinger (USA) stating, "Equality in marriage was not, however, regarded . . . as entailing identity of treatment . . . being based on the partners' different functions in the marriage union. The husband was in general responsible for the material support of the household, and the wife for the care of the children and home."); Haslanger, *supra* note 108, at 11, 13, 15, 17–20, 23 (providing general overview); *Obergefell*, 135 S. Ct. at 2602 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."); Donald H. J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 Ind. L. Rev. 367, 376 (2016) (noting that the traditional definition of marriage as that between a man and a woman, alone, is an insufficient basis to exclude same-sex marriages).

117. *See* Zanghellini, *supra* note 12, at 130; *Obergefell*, 135 S. Ct. at 2615 (Roberts, C.J. dissenting). In relation to South Africa, see, for example, *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 19, 31 ¶ 52, 35 ¶ 57, 37 ¶ 59, 43 ¶ 66, 73 ¶ 115–116. In relation to the situation in the member states of the Council of Europe, see Schalk v. Austria, 2010-IV Eur. Ct. H.R. 422–23 (for a summary of the position in the member states of the Council of Europe in 2010, with most changes made in the decade between 2000 and 2010); *see also* Layland v. Ontario (1993) 14 O.R. 3d, [71] (Greer, J., dissenting); Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 178 (Can. B.C. C.A.); Saez, *Transforming Family Law Through Same-Sex Marriage*, *supra* note 29, at 172–73; Saez, *Same-Sex Marriage*, *supra* note 25, at 2; Sasha Roseneil et al., *Changing Landscapes of Heteronormativity: The Regulation and Normalization of Same-Sex Sexualities in Europe*, 20(2) Social Politics 165, 165 (Summer, 2013).

118. Knodel v. British Colombia, 1991 CanLII 3960, 11 (Can. B.C. S.C.).

119. In relation to the United States, see, for example, *Obergefell*, 135 S. Ct. at 2596; *see also* Hermann, *supra* note 116, at 373.

attraction as a form of mental illness has been entirely discredited,[120] many states parties have reformed their laws to decriminalize homosexual sexual activity, twenty-two nations recognize same-sex marriage,[121] and many other nations provide some form of legal recognition of same-sex relationships.[122] Some of these latter states are likely to introduce laws recognizing same-sex marriage in the near future.[123]

B. *The Drafting of the Text and the Travaux Préparatoires*

Given the vast differences in the institution of marriage in the various jurisdictions of the parties to the ICCPR and the continuing evolution of the institution, the validity of the assumption that the framers understood that Article 23(2) would be interpreted in a dynamic manner is confirmed by the text of Article 23(2) and the *travaux préparatoires*.[124]

First, as correctly submitted in *Joslin*,[125] Article 23 is largely derived from Article 16 of the Universal Declaration on Human Rights (UDHR) which provides:

> (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

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120. *See, e.g.*, Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 44–45 (Feb. 24, 2012); Knodel, 1991 CanLII at 11.

121. *See infra* Appendix. In 2014, it was estimated that ten percent of the world's population lives in countries where same-sex couples can marry. *See* Gerber et al., *supra* note 12, at 666.

122. *See* Saez, *Same-Sex Marriage*, *supra* note 25, at 31–32, 47; Schalk v. Austria, 2010-IV Eur. Ct. H.R. 422–423; *see also* Schalk, 2010-IV Eur. Ct. H.R. 436, 438 (providing summary of the position in the member states of the Council of Europe in 2010, with most changes made in the decade between 2000 and 2010); Vallianatos v. Greece 2013-VI Eur. Ct. H.R. 125, 136, 146 (for a summary of the position in the member states of the Council of Europe in 2013).

123. *See* Saez, *Same-Sex Marriage*, *supra* note 25, at 14–15.

124. U.N. Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ¶ 163, U.N. Doc. A/2929 (July 1, 1955); U.N. SCOR, 16th Sess. 241st mtg. at 15, U.N. Doc. E/AC.7/SR.241 (Aug. 10, 1953) (Orlovsky (USSR)); U.N. SCOR, 16th Sess. 242nd mtg. at 5, U.N. Doc. E/AC.7/SR.242 (Aug. 10, 1953) (Ingles (Philippines)); U.N. SCOR, 16th Sess. 244th mtg. at 8, U.N. Doc. E/AC.7/SR.244 (Aug. 12, 1953) (Azmi (Egypt)); U.N. SCOR, 16th Sess. 244th mtg. at 10, U.N. Doc. E/AC.7/SR.244 (Aug. 12, 1953) (Lissac (France)).

125. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 218 ¶ 4.4, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[126]

However, the framers of the ICCPR objected to the second sentence of Article 16(1) because

> many inequalities arose from ancient traditions and religious beliefs and practices which could not be changed overnight . . . . Any attempt to put into effect immediately the principle of equal rights for spouses would require radical changes to the civil laws and customs of most countries. Equality could only be acquired over a period of time.[127]

Hence, the first sentence of Article 16(4)—"[s]tates parties to the [ICCPR] *shall take appropriate steps to ensure* equality of rights"—was ultimately inserted into Article 23 on the basis that marriage had evolved and would continue to evolve,[128] and that the implementa-

126. UDHR, *supra* note 3, art. 15.

127. U.N. Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ¶ 156, U.N. Doc. A/2929 (July 1, 1955); U.N. GAOR, 16th Sess., 1090th mtg., at 150 ¶ 46, U.N. Doc. A/C.3/SR. 1090 (Nov. 1, 1961) (Sita (Congo)); U.N. GAOR, 16th Sess., 1092nd mtg., at 157 ¶ 36, U.N. Doc. A/C.3/SR. 1092 (Nov. 2, 1961) (Tsimboukis (Greece)); U.N. GAOR, 16th Sess., 1092nd mtg., at 158 ¶ 42–43, U.N. Doc. A/C.3/SR. 1092 (Nov. 2, 1961) (Sita/Congo)); U.N. GAOR, 16th Sess., 1092nd mtg., at 157 ¶ 36, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961); U.N. GAOR, 16th Sess., 1092nd mtg., at 158 ¶ 49, U.N. Doc. A/C.3/SR. 1092 (Nov. 2, 1961) (Baroody (Saudi Arabia)); U.N. GAOR, 16th Sess., 1093rd mtg., at 161 ¶ 5, U.N. Doc. A/C.3/SR.1093 (Nov. 6, 1961) (Tweedsmuir (U.K.)); U.N. GAOR, 16th Sess., 1093rd mtg., at 162 ¶ 17, U.N. Doc. A/C.3/SR. 1093 (Nov. 6, 1961) (Fekini (Libya)); U.N. GAOR, 16th Sess., 1093rd mtg., at 163 ¶ 36, U.N. Doc. A/C.3/SR. 1093 (Nov. 6, 1961) (Cappa (Dominican Republic)); U.N. GAOR, 16th Sess., 1093rd mtg., at 164 ¶ 44–51, U.N. Doc. A/C.3/SR. 1093 (Nov. 6, 1961) (Capotorti (Italy)); U.N. GAOR, 16th Sess., 1093rd mtg., at 165 ¶ 67, U.N. Doc. A/C.3/SR. 1093 (Nov. 6, 1961) (Casselman (Canada)); U.N. GAOR, 16th Sess., 1093rd mtg., at 165 ¶ 72–74, U.N. Doc. A/C.3/SR.1093 (Nov. 6, 1961 (Beaufort (Netherlands)); U.N. GAOR, 16th Sess., 1093rd mtg., at 166 ¶ 79, U.N. Doc. A/C.3/SR. 1093 (Nov. 6, 1961) (Hampton (New Zealand)); U.N. GAOR, 16th Sess., 1094th mtg., at 169 ¶ 4, U.N. Doc. A/C.3/SR.1094 (Nov. 7, 1961) (Bouquin (France)).

128. U.N. GAOR, 16th Sess. 1092nd mtg., at 157 ¶ 36, U.N. Doc. A/C.3/SR.1092 (Nov. 3, 1961) (Tsimboukis (Greece)); *see also id.* at 157 ¶ 37 (Maharoof (Ceylon)); *id.* at 158 ¶ 43 (Sita (Congo)); *id.* at 158 ¶ 49 (Baroody (Saudi Arabia)); *id.* at 158 ¶ 50 (Martin (Guinea)); U.N. GAOR, 16th Sess. 1094th mtg., at 170 ¶ 25, U.N. Doc. A/C.3/SR.1094 (Nov. 7, 1961) (Tekle (Ethiopia)); *id.* at 171 ¶ 40–41 (Darai (Iran)); *see also* U.N. SCOR, 16th Sess. 242nd mtg., at 5–6, U.N. Doc. E/AC.7/SR.242 (Aug. 10, 1953) (Ingles (Philippines)); U.N. SCOR, 16th Sess. 244th mtg., at 11, U.N. Doc. E/AC.7/SR.244 (Aug. 12, 1953) (Ingles (Philippines)).

tion of Article 23 was "expected to be progressive"[129] to encompass vast differences in the institution of marriage in states parties.[130]

Second, the text of Article 16 of the UDHR—from which Article 23 is directly derived—was altered from its original "everyone" to "men and women," by the U.N. Economic and Social Council Commission on Human Rights Drafting Committee (based on the suggestion of the Commission on the Status of Women[131]) to

129. U.N. SCOR, 16th Sess. 241th mtg., at 7, U.N. Doc. E/AC.7/SR.241 (Aug. 10, 1953) (Azmi (Egypt)); *see also* U.N. GAOR, 16th Sess. 1090th mtg., at 148 ¶ 16–17, U.N. Doc. A/C.3/SR.1090 (Nov. 1, 1961) (Hendraningrat (Indonesia)); *id.* at 149 ¶ 35 (Karapanza (Yugoslavia)); *id.* at 150 ¶ 46 (Sita (Congo)); U.N. GAOR, 16th Sess. 1092nd mtg., at 157 ¶ 36, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961) (Tsimboukis (Greece)); *id.* at 158 ¶ 42–43 (Sita (Congo)); *id.* at 158 ¶ 49 (Baroody (Saudi Arabia) stating, "[A]s a number of representatives had said, certain age-old customs could not be abolished overnight."); *see also* U.N. GAOR, 16th Sess., 1093rd mtg., at 162 ¶ 7–8, U.N. Doc. A/C.3/SR. 1093 (Nov. 6, 1961) (Tweedsmuir (U.K.)); *id.* at 162 ¶ 12 (Ciselet (Belgium)); *id.* at 162 ¶ 25 (Cox (Peru)); *id.* at 163 ¶ 32 (Avila (Mexico)); *id.* at 164 ¶¶ 44, 49, 51–52 (Capotorti (Italy)); *id.* at 165 ¶ 72–74 (Beaufort (Netherlands)); *id.* at 166 ¶ 78–79 (Hampton (New Zealand)); *id.* at 166 ¶ 85 (Bouquin (France)); *id.* at 168 ¶ 104 (Boumahdi (Morocco)); *see also* U.N. GAOR, 16th Sess., 1095th mtg., at 174 ¶ 17, U.N. Doc. A/C.3/SR.1095 (Nov. 7, 1961) (Asiroglu (Turkey)); *id.* at 174 ¶ 26 (Tsimboukis (Greece)); *see also* U.N. GAOR, 16th Sess. 1094th mtg., at 170 ¶ 25, U.N. Doc. A/C.3/SR.1094 (Nov. 7, 1961) (Tekle (Ethiopia)); *id.* at 170 ¶ 28 (Cocea-Brediceanu (Romania)); U.N. SCOR, 16th Sess. 242nd mtg., at 5–6, U.N. Doc. E/AC.7/SR.241 (Aug. 10, 1953) (Ingles (Philippines)); JOSEPH & CASTAN, *supra* note 11, at 693.

130. U.N. Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ¶ 168, U.N. Doc. A /2929 (July 1, 1955) (referring to "marriageable age"); U.N. SCOR, *Report of the Ninth Session of the Commission on Human Rights: Supplement No. 8*, at 9 ¶ 83, U.N. Doc. E/CN.4/689 (referring to consent); U.N. GAOR, 16th Sess., 1093rd mtg., at 164 ¶ 47, U.N. Doc A/C.3/SR. 1093 (Nov. 6, 1961) (Capotorti (Italy)) (referring to "marriageable age"); U.N. SCOR, 16th Sess., 244th mtg., at 8, U.N. Doc. E/AC.7/SR.244 (Aug. 12, 1953) (Azmi (Egypt)) (referring to differences in "personal status" between countries); *cf.* United Nations Economic and Social Council, 16th session, Social Committee, Summary Record of 244th Meeting, July 14, 1953, E/AC.7/SR.244 (Aug. 12, 1953) at 8 (Tuncel (Turkey)) (arguing there should be a stronger stand); United Nations Economic and Social Council, 16th session, Social Committee, Summary Record of 244th Meeting, July 14, 1953, E/AC.7/SR.244 (Aug. 12, 1953) at 10 (Orlovsky (USSR)) (arguing that "strong recommendations" should be made regarding sex equality); United Nations Economic and Social Council, Commission on Human Rights, 10th session, Observations of non-governmental organisations received by the Secretary-General in pursuance of resolution 501B(XVI) of the Economic and Social Council, E/CN.4/702 (Feb. 2,1954), III (International Federation of Friends of Young Women), IV (Open Door International), VIII, at 9–10 (arguing that nothing should be done to impact the "principle of equality under private law" (World Alliance of Young Women's Christian Associations), XVII at 35 (International Council of Women) (arguing in favor of "a clear, unequivocal declaration"), XXI at 48 (Liaison Committee of Women's International Organisations) (arguing "legislation should provide for equality").

131. *See* Commission on Human Rights, Rep. of the Drafting Committee to the Commission on Human Rights on the Work of Its Second Session, U.N. Doc. E/CN.4/95 (May 21, 1948), at 3, 8; Commission on Human Rights, Drafting Committee on an International Bill of Human Rights on the Work of Its First Session, Rep. of the Drafting Committee to the Commission on Human Rights, U.N. Doc. E/CN.4/21 (July 1, 1947), at 13, 55, 76;

emphasize that both men and women enjoyed equal rights in relation to marriage.[132] Thus, the words "men and women," which appear only in Article 23(2), in contrast to the less gender specific "spouse,"[133] which appears in Article 23(3) and (4), were inserted to emphasize gender equality between men and women in marriage, *not* to fix marriage as an exclusively heterosexual institution (as was incorrectly suggested in *Joslin*).[134] Similarly, the emphasis in *Joslin* that New Zealand placed on the so-described "repeated references"[135] to "husband and wife" in the *travaux préparatoires* is also misplaced. First, the words "husband and wife" did not find their way into the text of Article 23, and second, in the *travaux préparatoires* they were used in the context of a debate about inequalities between husband and wife and the need for an express provision "concerning equal rights for men and women relating to marriage."[136] Of course, these concerns relating to gender inequalities in heterosexual marriage remain whether or not the institution of marriage also incorporates same-sex couples.[137]

In short, as observed by Justice Sachs in *Minister for Home Affairs v. Fourie*,[138] concerning the reference to "men and women" in Article 16 of the UDHR, "the reference to 'men and women' is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time."[139]

Commission on Human Rights, *Drafting Committee, International Bill of Rights*, U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 11, 1947), at 98–99; Commission on Human Rights, *Drafting Committee, Draft Outline of International Bill of Rights*, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947), at 6.

132. *See generally* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 121–22 (Univ. of Pa. Press, 1999) (setting forth arguments and counterarguments in discussions leading to the universal declaration); *see* Glenda Sluga, *"Spectacular Feminism": The International History of Women, World Citizenship and Human Rights*, *in* WOMEN'S ACTIVISM: GLOBAL PERSPECTIVES FROM THE 1890S TO THE PRESENT 44–57 (Francisa de Haan et al., 2013); *see also* Gerber et al., *supra* note 12, at 646–47.

133. *See* Gerber et al., *supra* note 12, at 647.

134. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 218 ¶ 8.2, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

135. *Id.* at ¶ 4.4. The "repeated references" comprised three references.

136. U.N. Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ¶ 155, U.N. Doc. A /2929 (July 1, 1955); U.N. GAOR, *Draft International Covenants on Human Rights*, U.N. Doc A/5000, at 25 ¶ 81; *see also* Gerber et al., *supra* note 12, at 646–47.

137. *But see* CHESIRE CALHOUN, FEMINISM, THE FAMILY AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT 115–23 (Oxford Univ. Press, 2000) (discussing the proposition that removing the bar on same-sex marriage may challenge male dominance within the institution of marriage and thereby assist in eradicating gender inequality).

138. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

139. *Id.* at 63 ¶ 100.

C. *Emerging Domestic Jurisprudence*

That marriage was, and is, "an evolving, not static"[140] "social and legal institution"[141] which can be extended[142]—as opposed to the "ontological claim that marriage is what it is and cannot be a different thing,"[143] or an immutable concept where "the boundaries of the class are fixed by external nature,"[144] or "a supra-legal construct subject to legal incidents"[145]—has been increasingly recognized by domestic courts around the world, including the Australian High Court,[146] the Supreme Court of Canada,[147] the South African Constitutional Court,[148] the Mexican Supreme Court,[149] the Constitutional Court of Portugal,[150] and most recently the U.S. Supreme Court.[151]

For example, in 2013, the Australian High Court had to decide, in *Commonwealth v. Australian Capital Territory*,[152] whether the Commonwealth Parliament's powers to make laws with respect to marriage under Section 51(xxi) of the Australian Constitution included a power to make laws with respect to marriage between

140. Brock & Meagher, *supra* note 100, at 268; *see also* Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 157–61 (discussing legal institutions and the concept of family and marriage are able to evolve).

141. *Att'y Gen. v Kevin* (2003) 30 Fam CA 94, ¶ 71; *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass.) (stating that in Massachusetts, civil marriage is a secular institution).

142. *Att'y Gen. (NSW) v Brewery Emps. Union of NSW* (1908) 6 CLR 469, 611 (Higgins, J. dissenting); *see also Att'y Gen. (Vic) v Commonwealth* (1962) 107 CLR 529, 577 (Windeyer, J.); *Commonwealth v Australian Capital Territory* [2013] HCA 55, ¶¶ 33–38; *cf.* Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 151–52 (referring to the Colombia Constitutional Court's opinion regarding how the constitutional concept of "family" should not be confined to married family only).

143. Saez, *Same-Sex Marriage*, *supra* note 25, at 37–40; *see* Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 66 (Can. Ont. C.A.); Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 169 (Can. B.C. C.A.).

144. *Att'y Gen. (NSW) v Brewery Emps. Union of NSW* (1908) 6 CLR 469, 611 (Higgins, J. dissenting).

145. Reference re Same-Sex Marriage [2004] 3 S.C.R. 713, ¶ 25 (Can.).

146. *See, e.g.*, *Re Wakim; ex parte McNally* [1999] HCA 27, ¶ 42 (Austl.) (McHugh, J.). For an earlier recognition by the Australian High Court that "marriage" is legally constructed, see *Att'y Gen. (NSW) v Brewery Emps. Union of NSW* (1908) 6 CLR 469, 610 (Austl.) (Higgins, J. dissenting).

147. *See* Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 709–13; *cf.* Egan v. Can. [1995] 2 S.C.R. 513, 536, ¶ 21 (Can.) ("[M]arriage is by nature heterosexual.").

148. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

149. Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 164.

150. *Id.* at 166.

151. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

152. *Commonwealth v Australian Capital Territory* [2013] HCA 55.

persons of the same sex.[153] Even though the Australian Constitution was drafted in the 1890s, the court unanimously rejected the argument that the Australian Constitution's use of the expression "marriage" was "fixed according to its usage at the time of federation,"[154] and therefore found that Section 51(xxi) did empower the Australian Parliament to make laws concerning marriage between persons of the same sex, including laws which would allow same-sex couples to marry.[155] However, as is typical of the court's constitutional jurisprudence, it did not arrive at its conclusion by embracing a "living tree" approach to constitutional interpretation;[156] rather, it reached its conclusion by reference to the intentions of the framers—analogous to the justification for evolutionary treaty interpretation employed in this Article—notwithstanding that the assumptions of those framers and the law in 1900[157] indubitably confined marriage to opposite-sex couples.

In its reasoning, the Australian High Court observed that "marriage, as it stood at federation, was the result of a long and tangled development"[158] and noted that one of the features of marriage, which at the time of federation were described to be of its "essence"—that marriage was a voluntary union *for life*[159]—had been altered by statute.[160] It also noted:

> The social institution of marriage differs from country to country. It is not now possible (if it ever was) to confine attention to jurisdictions whose law of marriage provides only for unions

153. The issue in the case was whether the Marriage Equality (Same Sex) Act 2013 (ACT), which was enacted by the legislature of the Australian Capital Territory, was inconsistent with Commonwealth Marriage Act 1961 (Cth). *Id.* The former defined marriage to mean "the union of two people of the same-sex to the exclusion of all others, voluntarily entered into for life," *Marriage Equality (Same Sex) Act 2013*, s 3 (Austl.), whereas the latter defined marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life," Marriage Act 1961 (Cth) s 5 (Austl.). The High Court had to determine whether the Commonwealth Parliament had the power to enact laws concerning same-sex marriage because, if it did not, the two laws would "probably operate concurrently," rather than inconsistently. *Commonwealth v Australian Capital Territory* [2013] HCA 55, ¶ 9.

154. *Commonwealth v Australian Capital Territory* [2013] HCA 55 ¶ 11.

155. *Id.* ¶¶ 17–19.

156. *See* Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25(1) Fed. L. Rev. 1, 29 (1997); *cf.* Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 710–14.

157. *Commonwealth v Australian Capital Territory* [2013] HCA 55, ¶¶ 20–21 (Austl.).

158. *Id.* ¶ 18.

159. *See Hyde v. Hyde and Woodmansee* [1866] 1 LRP & D 130, 133 (Eng.) ("I conceive that marriage, as understood in Christendom, may for this purpose be defined as a voluntary union for life of one man and one woman to the exclusion of all others.").

160. *Commonwealth v. Australian Capital Territory* [2013] HCA 55 ¶ 17 (Austl.).

> between a man and a woman . . . . Some jurisdictions . . . now permit marriage between same[-]sex couples.[161]

Accordingly, the court found that the word "marriage" is a "topic of juristic classification"[162] and not "a matter of precise demarcation,"[163] and that it refers to a social institutional status "to which legal consequences attach and from which legal consequences follow"[164] that "never [has] been, and [is] not now immutable,"[165] despite authoritative assertions of its "essential elements and invariable features."[166]

It is conceded that the Australian case of *Commonwealth v. Australian Capital Territory* concerned the interpretation of a legislative head of power in a written constitution;[167] therefore, one might expect that the interpreter would lean towards a broader, rather than narrower, interpretation of the words that describe the head of power.[168] However, the same expansive approach to interpretation is generally taken for human rights instruments. Additionally, the same characterization of marriage as an evolving legal and social institution is also evident in the recent U.S. Supreme Court decision *Obergefell v. Hodges*—a case, pertinently, concerning the interpretation of rights (namely the Fourteenth Amendment to the U.S. Constitution). In *Obergefell*, the U.S. Supreme Court conceded that the historical understanding of marriage was a union between two persons of opposite sexes, but rejected the argument that

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161. *Id.* ¶ 35.

162. *Id.* ¶ 20 (quoting *Att'y Gen. (Vic) v Commonwealth* (1962) 107 CLR 529, 578 (Austl.) (Windeyer, J.)).

163. *Id.*

164. *Id.* ¶ 15.

165. *Id.* ¶ 16; *Att'y Gen. v Kevin* (2003) 30 Fam CA 94, ¶ 87 (Austl.) ("The concept of marriage therefore cannot . . . be correctly said to be one that is or ever was frozen in time.").

166. *Hyde v. Hyde and Woodmansee*, *supra* note 159.

167. *Commonwealth v. Australian Capital Territory*, *supra* note 160 ¶¶ 2, 6, 37.

168. *See, e.g.*, *Jumbunna Coal Mine v Victorian Coal Miners' Ass'n* (1908) 6 CLR 309, 367–68 (Austl.); Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 713, ¶ 30. It should be noted, however, that if the Australian High Court had interpreted Section 51(xxi) so as to limit the powers of the Commonwealth Parliament to legislate in relation to same-sex marriage, it would not have created a legislative lacuna within Australia. The Australian states enjoy the "unexpressed residual" of legislative power, such that, if Section 51(xxi) of the Australian Constitution was interpreted so as *not* to encompass same-sex marriage, the Australian states would still have the capacity to legislate on the subject of same-sex marriage as each state saw fit. By contrast, in Canada, the capacity to marry is exclusively the province of the federal legislature under Section 91 of the Canadian Constitution, such that an interpretation of Section 91(26) which prevented the federal legislature from legislating to allow for same-sex marriage would have prevented *any* Canadian legislature, federal or provincial, from giving persons the capacity to marry a person of the same sex. *See* Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 177 (Can. B.C. C.A.).

"[m]arriage . . . is by its nature a gender-differentiated union of man and woman."[169] Instead, it "inquired about the right to marry in its comprehensive sense"[170] and found that "marriage . . . has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution . . . has evolved over time."[171] Furthermore, the Court stated that "developments in the institution of marriage over the past centuries were not merely superficial changes. Rather, they work deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."[172]

Having demonstrated why Article 23 should be given an evolutionary, rather than static, interpretation, Part III next demonstrates why an evolutionary interpretation of Article 23 should encompass same-sex marriage.

III. Why an Evolutionary Intepretation of Article 23(2) Should Encompass Same-Sex Marriage

To begin, this Part considers the first principle of interpretation under Article 31 of the Vienna Convention, that is, "ordinary meaning," in isolation from the second and third principles—"context" and "object and purpose"—discussions of which follow.[173] Admittedly, the principles overlap in "a process of progressive encirclement"[174] of interpretation mandated by Article 31, but the following analysis makes the exposition clearer. In short, the argument presented here is based on the premise that "finding the ordinary meaning typically requires making a choice from a range of possible meanings."[175] It contains two contentions: first, that the

169. *Obergefell*, 135 S. Ct. at 2594; *see also* Hermann, *supra* note 116, at 375 ("The Court viewed the analysis of the history and tradition of marriage as significant for establishing the value of marriage, but not the identity of those who should have access to the institution.").

170. *Obergefell*, 135 S. Ct. at 2602.

171. *Id.* at 2595; *see also* Hermann, *supra* note 116, at 395 ("While recognizing that traditional marriage involved a man and a woman, the [U.S. Supreme] Court identified this as an aspect which is open to change as society has come to accept the validity of same-sex couple relationships.").

172. *Obergefell*, 135 S. Ct. at 2595.

173. Vienna Convention on the Law of Treaties, art. 31. Jan. 27, 1980, 1155 U.N.T.S., 340.

174. *E.g.*, Gardiner, *supra* note 47, at 142; Bjorge, *supra* note 39, at 6; Linderfalk, *supra* note 56, at 203.

175. Gardiner, *supra* note 47, at 202. *See* Dörr et al., *supra* note 48, at 541; Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties*, 9 Va. J. Int'l L. 1, 13 (1968); Linderfalk, *supra* note 56, at 203, 227.

contemporary ordinary meaning of the expression "[t]he right of men and women to marry and found a family," considered in isolation from "context" and "object and purpose," does not necessarily exclude same-sex marriage; and second, that once the contemporary interpreter interprets the expression "in accordance with its ordinary meaning" *in its context*—specifically the nondiscrimination principles contained in Articles 2(1) and 26 of the ICCPR—and *"in the light of its object and purpose,"* she must adopt an interpretation which encompasses same-sex marriage.[176]

A. *Ordinary Meaning*

Ordinary meaning is the "regular, normal, or customary" meaning.[177] If the ordinary meaning of the expression "[t]he right of men and women to marry and to found a family" is determined by contemporary language, then it opens the door to argue that its ordinary meaning now—in contrast to its meaning in 2002, when *Joslin* was decided[178]—does not exclude the possibility of marriage between persons of the same sex.[179] Although Article 23(2) refers to the right of "men and women" to marry and found a family,[180] it does not expressly limit that right to the right of men to marry women, and women to marry men.[181] It is well-established that

176. *Cf.* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 444–46 (where Judges Malinverni and Kovler of the ECtHR, writing a separate concurring opinion, found that an evolutionary interpretation of the right to marry under Article 12 of the ECHR could not encompass a right to marriage for same-sex couples, stating: "[T]he Court cannot, by means of an evolutive interpretation, 'derive from [the ECHR] a right that was not included in the outset.'"); Pustorino, *Same-Sex Couples Before the ECtHR*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 404–05 (arguing that, given the lack of "European consensus" on same-sex marriage in 2010, an interpretation of Article 12 of the ECHR which recognized the right of same-sex couples to marry would have been a "'creative' interpretation" of Article 12, not an "evolutive interpretation").

177. Gardiner, *supra* note 47, at 164 (citing the *Oxford English Dictionary* (1989)).

178. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 218 ¶ 4.3, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002); *see also* Paladini, *supra* note 8, at 544–45 (maintaining that the HRC in *Joslin* "focused on the ordinary meaning of the wording of [Article 23 of] the ICCPR").

179. *Cf.* Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee at 13, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007). Separate opinions were written by Judges Amor and Khalil, who, without reference to the issue of contemporary versus historical meaning, appear to assume that Article 23 can only ever refer to opposite-sex couples. *See id.*

180. *Cf.* Charter of the Fundamental Rights of the European Union art. 9, Dec. 18, 2000, 2000 O.J. (C 364) 10 ("The right to marry and found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.").

181. Zanghellini, *supra* note 12, at 130; *see also* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 428 (where the ECtHR, interpreting the near-identical terms of Article 12 of the Euro-

generic terms may be interpreted in a way not contemplated by their framers.[182] As the Permanent Court of International Justice noted in 1932:

> The mere fact that . . . certain facts or situations, which the terms of [a treaty] in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms.[183]

Moreover, ordinary meaning includes both everyday language and technical—including legal—language taken together.[184] And, as Gardiner warns:

> [T]he first impression as to what is the ordinary meaning of a term [is not] anything other than a very fleeting starting point. For the ordinary meaning of a treaty is immediately and intimately linked with context, and then to be taken in conjunction with all the other relevant elements of the Vienna rules.[185]

The shift in the "regular, normal, or customary" meaning of marriage from one in which "the union of a man and a woman" is "an

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pean Convention for the Protection of Human Rights and Fundamental Freedoms observed that, "looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women"). The commentary to the Charter appears to assume that the explicit reference to "men and women" in the ICCPR precludes the recognition of a right to marry a person of the same sex, in contrast to Article 9 of the European Charter. *See* European Union Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Right of the European Union (June 2006), http://ec.europa.eu/justice/fundamental-rights/files/network commentaryfinal_en.pdf ("[Article 9] is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to 'men and women' as in the case of other human rights instruments, it may be argued that there is no obstacle to recognise same-sex relationships in the context of marriage.") [https://perma.cc/2YQX-PE3G]; Schalk, [2010] 2010-IV Eur. Ct. H.R. at 424–25 (where the state party argued that the "clear wording" of Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms "indicated that the right to marry was by its very nature limited to different-sex couples").

182. Helmersen, *supra* note 47, at 161.

183. Interpretation of Convention of 1919 Concerning Employment of Women During Night, Advisory Opinion, 1932, P.C.I.J. (ser. A/B) No. 50, ¶ 49 (Nov. 15); *see also* Panel Report, *European Communities and Its Member States — Tariff Treatment of Certain Information Technology Products*, ¶ 7.600–01, WTO Docs. WT/DS375/R, WT/DS376/R, WT/DS377/R (Aug. 16, 2010) (where the Panel found that a duty-free concession in a Free Trade Agreement in relation to "Flat Panel Display Devices" (FPDs) made in 1997 incorporated a "wide range of characteristics and technologies" such that the fact that Digital Video Interface ('DVI') was developed after the conclusion of the Free Trade Agreement did not operate "to exclude FPDs with DVIs from the scope of the concession"); Bjorge, *supra* note 39, at 125, 140 (arguing that the Permanent Court in the Convention Concerning Employment of Women During Night Case found that the ordinary meaning interpretation of the generic expression in the Convention, which referred to women employed during the night, was relatively unrestricted by the intentions of the framers of the Convention).

184. *See* Linderfalk, *supra* note 56, at 62–73.

185. Gardiner, *supra* note 47, at 161–62.

essential determinant of the relationship called marriage"[186] to one which can encompass marriage between persons of the same sex reflects the large and growing number of domestic jurisdictions that allow same-sex couples to marry.[187] This shift is evidenced by: (1) contemporary judicial decisions concerning same-sex marriage[188] (including decisions that incorporated same-sex marriage into a right to marry that previously applied only to heterosexual couples[189] and decisions that rejected the essentialist proposition that marriage is "inherently and uniquely heterosexual" and propounded a judicial definition of marriage encompassing same-sex marriage);[190] (2) contemporary legislative definitions of mar-

186. Corbett v. Corbett (Ashely) (No 2) [1970] 2 All ER at 33, 48 (Eng.).

187. *See infra* Appendix.

188. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2589 (marriage as a "two-person union unlike any other in its importance to the committed individuals"); Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 87 (Can. B.C. C.A.); Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 712, ¶ 25 (Can.). ("Several centuries ago it would have been understood that marriage should be available only to opposite-sex couples. The recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that the same is true today."); Hermann, *supra* note 116, at 368–70; Saez, *Transforming Family Law Through Same-Sex Marriage*, *supra* note 29, at 164 (where, in writing about legal developments in Mexico, the author states, "At the same time, they have led to legal changes with regard to the institution of marriage, *which has resulted in the redefinition of the traditional concept.*") (emphasis added); Paladini, *supra* note 8, at 555. *But see* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 425, 429. The ECtHR, in rejecting a claim that the right to marry in Article 12 of the ECHR encompassed a right to marry for same-sex couples, overturned its 1986 interpretation of Article 12 that referred exclusively to "the traditional marriage between persons of opposite biological sex," and instead found that "it cannot be said that Article 12 is inapplicable to the applicants' complaint." *Id.* However, the Court declined to interpret Article 12 so to give same-sex couples a right to marry, due to a lack of "European consensus . . . on same-sex marriage." *Id.* at 424; *see also* Saez, *Same-Sex Marriage*, *supra* note 25, at 402, 405–06; *Obergefell*, 135 S. Ct. at 2613–15 (2015) (Roberts, C.J. dissenting); Schalk, 2010-IV Eur. Ct. H.R. at 444 (where Judges Malinverni and Kolver, writing a separate concurring opinion, applied Article 31(1) of the *Vienna Convention on the Interpretation of Treaties* and refused to accept the majority judgment's opinion that the right to marry in Article 12 of the European Convention "might be interpreted so as not to exclude the marriage between two men or two women". (?[T]he ordinary meaning to be given to the terms of the treaty" in the case of Article 12 cannot be anything other than that of recognizing that a man and woman, that is, persons of the opposite sex, have a right to marry.")).

189. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2584 (holding that the right to marry, which the Court had previously held was implied by the right to liberty in the Fourteenth Amendment of the U.S. Constitution, now encompassed same-sex couples).

190. *See, e.g.*, Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 712, 724 (Can.) (noting that "the common law definition of marriage in five provinces and one territory no longer imports an opposite-sex requirement"); Barbeau, [2003] B.C.C.A. 251, ¶ 159 (reformulating the common law definition of marriage in the province of British Columbia to mean "the lawful union of two person to the exclusion of all others").

riage;[191] (3) contemporary dictionary definitions of marriage;[192] and (4) the attempts of "traditional" marriage advocates to shore up and secure the now "traditional" or "ordinary" heterosexual meaning of marriage as an exclusively heterosexual institution (prophylactically, from the perspective of those proponents) to make explicit what was previously simply assumed, that is, that marriage is an exclusively heterosexual institution.[193] Although the 1993 *Shorter Oxford English Dictionary*, relied upon by the state in *Joslin*,[194] defined marriage as a "legally recognized personal union entered into by a man and a woman,"[195] "marriage" is currently defined in the *Oxford Dictionaries* as "the legally or formally recognized union of two people as partners in a personal relationship (historically and in some jurisdictions specifically a union between a man and a woman)."[196] It is noteworthy that the *Oxford Dictionaries* "focuses on current English and includes modern meanings and uses of words" "derived from the 2.3 billion word Oxford English Corpus."[197]

Certainly, any attempt to characterize same-sex marriage as not "ordinary" (or *extra*ordinary, versus "ordinary" heterosexual marriage) would likely be rejected by a large cross-section of civil society in many signatory nations to the ICCPR, as well as by a strong body of expert opinion in the areas of medicine and the natural

191. *E.g.*, Marriage Act 1955, s 2(1) (N.Z.), *amended by* Marriage (Definition of Marriage) Amendment Act 2013 (N.Z.) (defining "marriage" as "the union of [two] people, regardless of their sex, sexual orientation, or gender identity").

192. *See* Marriage, Oxford Dictionaries, http://www.oxforddictionaries.com/definition/english/marriage (last visited July 26, 2017) [https://perma.cc/5RN5-F8VL]; *see Marriage,* Merriam Webster Online Dictionary, http://www.merriam-webster.com/dictionary/marriage (last visited July 26, 2017) (defining marriage as "(1): the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law; (2): the state of being united to a person of the same sex in a relationship like that of a traditional marriage") [https://perma.cc/GH9A-RA2A]; *cf.* Paladini, *supra* note 8, at 533 ("[I]n the case of marriage the literal interpretation of the ICCPR [Article 23] does not support the right to marry between same-sex partners.").

193. *See, e.g.*, Hermann, *supra* note 116, at 375 (for discussion in the United States).

194. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 218 ¶ 4.3 n. 11, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

195. *Id.*

196. *Marriage*, Oxford Dictionaries, http://www.oxforddictionaries.com/definition/english/marriage (last visited July 26, 2017) [https://perma.cc/BQZ3-JBBY].

197. *The OED and Oxford Dictionaries*, Oxford English Dictionary, http://public.oed.com/about/the-oed-and-oxford-dictionaries/, (last visited July 26, 2017) [https://perma.cc/YW3S-QXJF]. The Oxford Corpus has been developed and maintained by Oxford University Press and contains almost 2.5 billion words. *The Oxford English Corpus*, Oxford Dictionaries, http://www.oxforddictionaries.com/words/oxford-english-corpus (last visited July 26, 2017) [https://perma.cc/LDP4-AMR8].

and social sciences, on the basis that such a characterization of same-sex marriage would be redolent of the prejudice that homosexual behavior is abnormal. Moreover, recognition that same-sex couples can constitute a family is wider and more established than recognition of same-sex marriage per se.[198] There is authority for the proposition in both domestic[199] and supranational law[200] that same-sex couples *with* children constitute a family, and increasing recognition that same-sex couples *without* children also constitute a family, "just as the relationship of a different-sex couple in the same situation would."[201]

B. *Context*

Article 31 of the Vienna Convention requires the interpreter to consider context, and as Article 31(2) makes explicit, the text of a treaty is itself part of the context for the purposes of interpretation. The text includes rights of nondiscrimination. Specifically, Article 2(1) of the ICCPR provides:

> Each State Party to the [ICCPR] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the [ICCPR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[202]

And Article 26 of the ICCPR provides:

> All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this

198. *See, e.g.*, Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 219 ¶ 4.8, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002); Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 433–36 ("[For the purposes of Article 8 of the ECHR,] a co-habiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."); Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶¶ 142–144,169, 174, 177–178 (Feb. 24, 2012); Pustorino, Same-Sex Couples before the ECtHR, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 403; Zanghellini, *supra* note 12, at 128; Knodel v. British Colombia, 1991 CanLII 3960, 11–12 (B.C. S.C.); Saez, *Transforming Family Law Through Same-Sex Marriage*, *supra* note 29.

199. Including Brazil's Federal Supreme Tribunal, the Mexican Supreme Court, the Constitutional Tribunal of Portugal, the South African Constitutional Court, and the U.S. Supreme Court. Saez, *Transforming Family Law Through Same-Sex Marriage*, *supra* note 29, at 151, 163, 165–66; Saez, *Same-Sex Marriage*, *supra* note 25, at 13, 43, 49–50; Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 32–33 ¶ 53 (S. Afr.).

200. *See* Atala, Inter-Am. Ct. H.R. No. 12.502 ¶ 178; Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 189, 195.

201. Schalk, 2010-IV Eur. Ct. H.R. at 436; *Fourie*, 2006 (1) SA 524 (CC) at 33 ¶ 54; *see* Gerber et al., *supra* note 12, at 650, 663; Zanghellini, *supra* note 12, at 127.

202. ICCPR, art. 2(1), *supra* note 2.

> respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[203]

These rights of nondiscrimination "constitute a basic and general principle relating to the protection of human rights."[204] As noted in this Article's Introduction, the HRC in *Joslin* did not apply these rights in arriving at its interpretation of the right to marry[205] on the basis that the ordinary meaning precluded such an approach.[206] But the premises of this Section are twofold. First, that the expression "[t]he right of men and women of marriage age to marry and to found a family" should be interpreted in an evolutionary manner. Second, that the contemporary ordinary meaning of that expression does not necessarily exclude same-sex couples. Consequently, in compliance with the general rule of interpretation, the rights of nondiscrimination in the ICCPR should now be applied to the interpretation of Article 23(2) as part of the context within which it is to be interpreted. Furthermore, there is strong support in the *travaux préparatoires* for the contention that Article 23 of the ICCPR was intended to be read in conjunction with the rights of nondiscrimination when it was framed.

This Section first briefly explains this claim in relation to the framers' intentions and the *travaux préparatoires*. It then considers the concept of discrimination generally, and concludes that, in the absence of a legitimate justification for differential treatment, an interpretation of Article 23(2) that encompasses same-sex marriage is consistent with the rights of nondiscrimination contained in Articles 2(1) and 26, whereas an interpretation that excludes same-sex marriage is not. Next, the Section analyzes the common argument that civil registration schemes—which are open to same-sex couples and which carry with them many, if not all, the legal rights, responsibilities, and incidents of marriage—may be an adequate substitute for same-sex marriage. Finally, this Section discusses a number of possible justifications for the differential treatment of

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203. *Id.* art 26.

204. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 18: Non-discrimination*, 37th session, at 26, ¶¶ 1, 3 U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994) (providing that the rights of nondiscrimination "constitute a basic and general principle relating to the protection of human rights").

205. *See* Zanghellini, *supra* note 12, at 146–47, 149.

206. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 223 ¶ 8.2–8.3, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

same- and opposite-sex couples in relation to marriage that have been raised in domestic, supranational, and international fora, and concludes that there is no legitimate justification for such differential treatment.

1. The Travaux Préparatoires, Discrimination, and Article 23(2)

During the period that Article 23 was drafted (spanning from 1954 to 1961) there was considerable discussion as to whether Article 23 should incorporate a nondiscrimination clause in terms similar or identical to the words emphasized below in its progenitor, Article 16(1) of the UDHR: "Men and women of full age, *without any limitation due to race, nationality or religion*, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."[207]

Some contributors argued that these words should be repeated in Article 23(2) of the ICCPR,[208] some suggested that Article 23 should repeat all the grounds contained in the right of nondiscrimination in Article 2(1),[209] and some argued that any specification of the grounds of prohibited discrimination was unnecessary in light of Article 2(1),[210] or even "dangerous" because of the risk that "important elements may be omitted."[211]

It seems clear that even those who argued in favor of the inclusion of the protection from discrimination recognized that an

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207. UDHR, *supra* note 3, art. 16(1).

208. *See, e.g.*, U.N. GAOR, 16th Sess., 1092nd mtg. at 155, ¶ 9, U.N. Doc. A/C.3/SR.1092 (Nov. 2, 1961) (Lima (Cameroun)); U.N. GAOR, 16th Sess. 1093rd mtg. at 164, ¶ 47, U.N. Doc. A/C.3/SR.1092 (Nov. 6, 1961) (Capotorti (Italy)); U.N. GAOR, 16th Sess., 1090th mtg. at 149, ¶ 26, U.N. Doc. A/C.3/SR.1090 (Nov. 1, 1961) (Kasliwal (India)). The records of the 1954 U.N. Economic and Social Council Commission on Human Rights record:

> Ten organizations (International Alliance of Women, International Co-operative Women's Guild, International Council of Women, International Federation of Business and Professional Women, International Federation of Friends of Young Women, International Federation of University Women, International Federation of Women Magistrates and Members of the Legal Profession, St. Joan's International Social and Political Alliance, World Women's Christian Temperance Union, World Union of Women for International Concord) consider that it would be desirable to reintroduce in [A]rticle 22 the words: without any limitation due to race, nationality or religion.

U.N. SCOR, 10th Sess., at 48, ¶ 5, U.N. Doc. E/CN.4/702, (Feb. 2, 1954).

209. U.N. Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ¶ 166, U.N. Doc. A /2929 (July 1, 1955).

210. U.N. GAOR, 16th Sess., 1095th mtg. at 174, ¶ 16, U.N. Doc. A/C.3/SR.1095 (Nov. 7, 1961) (Asiroglu (Turkey)).

211. U.N. Secretary-General, *Draft International Covenants on Human Rights: Annotation*, ¶ 167, U.N. Doc A/2929 (July 1, 1955); *see also* Rep. of the Third Comm., *Draft International Covenants on Human Rights*, 16th Sess., at 27, ¶ 86, U.N. Doc. A/5000 (Dec. 5, 1961).

express reference to nondiscrimination in Article 23 was almost certainly unnecessary because the general right of nondiscrimination in the ICCPR in Article 2(1) would apply to Article 23. Since an express nondiscrimination clause was *not* included in the final form of Article 23(2), and there is no evidence pointing to any other reason for this omission in the framers' discussions—a lack of evidence rendered more significant by the prominence of nondiscrimination as a topic of discussion—it can be strongly inferred that the framers intended Article 23(2) to be read in conjunction with the general rights of nondiscrimination.

2. Discrimination Generally

The concept of discrimination in the ICCPR is broad. The HRC has stated:

> [T]he term "discrimination," as used in the [ICCPR], should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground . . . which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[212]

This broad conception of discrimination encompasses indirect discrimination—that is, "when the 'effect' of a law is to discriminate, rather than when discrimination is a law's ostensible 'purpose'"[213]—as well as direct discrimination—or, "less [favorable] treatment of the complainant than that of someone else on prohibited grounds in comparable circumstances."[214] It is also well-established, based on the HRC's 1994 views in *Toonen v. Australia*,[215] confirmed in both its 2003 *Young v. Australia*[216] and 2007 *X v. Colombia* opinions, that discrimination on the ground of "sex" incorporates discrimination on the ground of sexual orientation[217]

212. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 18: Non-discrimination*, 37th session, at 26, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994) (emphasis added).

213. Joseph & Castan, *supra* note 11, at 777; *see* Communication No. 998/2001, Althammer v. Austria, Hum. Rts. Committee, ¶ 10.2, U.N. Doc. CCPR/C/78/D/998/2001 (Sept. 22, 2003); Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.1–7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007); Gerber et al., *supra* note 12, at 652; Zanghellini, *supra* note 12, at 138.

214. Joseph & Castan, *supra* note 11, at 777; *see* Gerber et al., *supra* note 12, at 652.

215. Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee at 139, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); *see* Sarah Joseph, *Toonen v. Australia: Gay Rights under the ICCPR*, 13(2) U. Tasmania L. Rev. 392 (1994).

216. Communication No. 941/2000, Young v. Australia, Hum. Rts. Committee, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003).

217. Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); Communication No. 941/2000,

(although "other status" is arguably a more appropriate classification for discrimination on the grounds of sexual orientation than the class of sex[218]). Consequently, the premise that the ordinary meaning of the expression "[t]he right of men and women to marry and found a family" plausibly encompasses same-sex marriage, an interpretation of Article 23(2) "in accordance with the ordinary meaning"[219] is consistent with its textual context, specifically the rights of nondiscrimination contained in Articles 2(1) and 26. By contrast, an exclusively heterosexual interpretation of Article 23(2) is *in*consistent with the context provided by the rights of nondiscrimination *unless* those rights can accommodate such differential treatment in relation to marriage.

Achieving this contextual consistency, where it is possible to do so, is important because the rights of nondiscrimination are central to the ICCPR.[220] More specifically, the application of those rights related to sexual orientation to the interpretation of the right to marry is consistent with: first, the text of Articles 2(1) and 26, in that the rights of nondiscrimination belong to "*all* persons" and "*all* individuals"; second, the principle that discrimination is an evolving concept;[221] third, the rejection of the "separate but equal" doctrine as a justification for differential treatment;[222] fourth, the interpretation of other gender-specific human rights articles so as

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Young v. Australia, Hum. Rts. Committee, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003); Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007); *see also* Zanghellini, *supra* note 12, at 131, 137.

218. Gerber et al. have argued that it may have been more appropriate for sexual orientation to be classified as falling under "other status" in the wording of Articles 2 and 26, in the same way that the Committee on Economic, Social and Cultural Rights has interpreted the equivalent provision in the International Covenant on Economic, Social, Cultural Rights. *See* Gerber et al., *supra* note 12, at 652. O'Flaherty and Fisher have also highlighted concerns with reliance on "sex" as the category for discrimination. *See* Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Conceptualising the Yogyakarta Principles*, 8(2) Hum. Rts. L. Rev. 207, 217 (2008); *see* Knodel v. British Colombia, 1991 CanLII 3960, 24–25 (B.C. S.C.) (where the Supreme Court of British Columbia determined that discrimination on the grounds of sexual orientation was not discrimination on the grounds of "sex" under Section 15(1) of the Canadian Charter because "[s]exual orientation is not gender specific nor is it a characteristic that affects one gender primarily").

219. *See* ICCPR, *supra* note 2, art. 23(2).

220. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 18: Non-discrimination*, 37th session, at 26, ¶¶ 1, 3 U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994) (providing that the rights of nondiscrimination "constitute a basic and general principle relating to the protection of human rights").

221. Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 160.

222. *See infra* pages 141–43 of this Article.

to protect the rights of nondiscrimination of transgender persons;[223] and finally, the HRC's own General Comment 19 on Article 23, which assumes that the other rights under the ICCPR apply to Article 23 in relation to domestic laws concerning "marriageable age" and "the right to found a family."[224]

Furthermore, an interpretation of Article 23(2) that is consistent with the rights of nondiscrimination contained in Articles 2(1) and 26 also accords with developments in domestic, supranational, and HRC jurisprudence concerning rights of nondiscrimination and sexual orientation. These developments have recognized that "[s]exual orientation is 'a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs"'[225] and that "the capacity to form conjugal relationships characterized by emotional and economic interdependence has nothing to do with sexual orientation."[226] Consequently, "the scope of the right to [nondiscrimination] due to sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the ensuing consequences in a person's life project."[227] These developments have also recognized that "whether or not discrimination exists must be assessed in a larger social, political and legal context,"[228] and that same-sex attracted people and couples "have experienced historical discrimination and disadvantages"[229] as a discrete and stigmatized group.[230]

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223. Gerber et al., *supra* note 12, at 667.

224. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No. 19: Article 23 (The Family)*, 39th session, at 29–30, ¶¶ 4, 5 U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994). In relation to "the right to found a family," the General Comment states, "When States parties adopt family planning policies, they should be compatible with the provisions of the [ICCPR] and should, in particular, not be discriminatory or compulsory." *Id.*

225. Egan v. Can. [1995] 2 S.C.R. 513, 528, 567(Can.) (La Forest, J.); Knodel v. British Colombia, 1991 CanLII 3960 (B.C. S.C.) 29–30; *cf.* Layland v. Ontario (1993) 14 O.R. 3d 658.

226. Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 154 (Can. B.C. C.A.) (quoting the 2001 report of the Law Commission of Canada entitled *Beyond Conjugality, Recognizing and Supporting Close Personal Adult Relationships*); *see also* Knodel, 1991 CanLII 3960, 10–11; Egan, [1995] 2 S.C.R. at 568-69 (L'Heureux-Dubé).

227. Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶¶ 133–34, 139, 174, 177–178 (Feb. 24, 2012).

228. Egan, [1995] 2 S.C.R. at 585–86 (Cory & Iacobucci. J.J.).

229. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 82–86, 98 (Can. Ont. C.A.); Egan, [1995] 2 S.C.R. at 566–67 (L'Heureux-Dubé).

230. *See, e.g.*, Knodel, 1991 CanLII 3960 (BC SC) 12–13, 38–39, 46, 52–53; Rosenberg v. Canada (Att'y Gen.) (1998) 38 O.R. 3d 577, ¶ 49; Egan, [1995] 2 S.C.R. at 566–67 (L'Heureux-Dubé).

Importantly, at the time the individual communication in *Joslin* was considered, the HRC had only applied the auxiliary right of nondiscrimination in Article 2, in conjunction with the right to privacy in Article 17, to domestic laws that criminalized homosexual sexual *acts*.[231] The HRC has since recognized that the freestanding right to nondiscrimination in Article 26 can be breached by laws that single out homosexuality and homosexual *relationships* for differential treatment.[232]

In both *Young v. Australia*[233] and *X v. Colombia*,[234] the authors, surviving partners of the deceased, had been denied pension benefits by the states parties on the basis that domestic law only allowed the payment of such benefits to members of an opposite-sex relationship.[235] In considering the authors' claims that the states parties had violated Article 26, the HRC compared the treatment of same-sex couples under domestic legislation with the treatment of married and unmarried opposite-sex couples. The authors could not have married their partners under domestic law[236] (because

231. Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994). In *Toonen*, the HRC only applied the Article 2 right to nondiscrimination in conjunction with the right to privacy under Article 17, and did not consider the independent application of the right to nondiscrimination in Article 26. *Id.* ¶ 9, 11.

232. Communication No. 1932/2010, Fedotova v. Russian Federation, Hum. Rts. Committee, U.N. Doc. CCPR/C/106/D/1932/2010 (Oct. 2012); *see also* Paladini, *supra* note 8, at 542–43.

233. Communication No. 941/2000, Young v. Australia, Hum. Rts. Committee, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003).

234. Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007).

235. In relation to *Young v. Australia*, Section 5E(2) of the Veterans' Entitlement Act 1986 provided that "a person is a member of a couple" if either "the person is legally married to another person" or the person meets a number of conditions, including that "the person is living with a person of the opposite sex" and "the person and the partner are, in the Commissioner's opinion . . . in a marriage-like relationship." *Veterans' Entitlement Act 1986 (Cth)* ss 5E(2)(a), (b)(i), (b)(iii). In relation to *X v. Colombia*, Act No. 113 of 1985 extended the right to a pension transfer to a permanent partner, Regulatory Degree No. 1160 of 1989, provided that a "person *who shared married life* with the deceased . . . shall be recognised as the permanent partner of the deceased"; and Article 1 of Act No. 54 of 1990 provided that "for all civil law purposes the man and the woman who form part of a de facto marital union shall be termed permanent partners." While these domestic laws did not expressly specify that pension benefits could only be transferred to a surviving partner of a heterosexual couple, they were interpreted as such by the pension fund, the Colombian Ombudsman, and by the Colombian courts. Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 2.1–2.7, 4.2, 5.1, 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007).

236. Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007) (accepting that the differential treatment of married and unmarried opposite-sex couples in relation to an entitlement to benefits may be justified as reasonable and objective because "the couples in question had

marriage was confined to opposite-sex couples[237]), and could not, unlike the partners of cohabiting, unmarried, heterosexual couples, establish that they had been in a "marriage-like" relationship with the deceased (in the case of Australia), or "a person who shared married life with the deceased" (in the case of Colombia).[238] Therefore, the HRC concluded that Article 26 was breached in each instance by the denial of pension benefits in the absence of further reasonable and objective criteria for such differential treatment.[239]

There is a clear contrast between the "liberal and forward-looking interpretation"[240] of Article 26 in *Young* and *X v. Colombia*, and the HRC's failure to consider its application in *Joslin*. By comparing the domestic legal treatment of opposite-sex and same-sex couples in *Young* and *X v. Colombia*, the HRC recognized "that lesbians' and gay men's interest in founding and cultivating sexually intimate adult relationships is fully relevant under the ICCPR," and "no less valuable than that in founding and cultivating sexually inti-

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the choice to marry or not, with all the ensuing consequences"); *cf.* Communication No. 180/1984, *L. G. Danning v. Netherlands*, U.N. Doc. CCPR/C/OP/2 (Apr. 9, 1987); Communication No. 976/2001, *Derksen & Bakker v. Netherlands*, ¶ 9.2, U.N. Doc. CCPR/C/80/D/976/2001 (Apr. 2, 2004).

237. Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007).

238. Communication No. 941/2000, Young v. Australia, Hum. Rts. Committee, ¶ 2.1, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003).

239. In both *Young v. Australia* and *X v. Colombia*, the states parties did not proffer any argument as to how the differentiation in treatment of opposite-sex and same-sex couples was reasonable and objective. *See* Communication No. 941/2000, Young v. Australia, Hum. Rts. Committee , U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003); Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007). Consequently, the HRC found the states parties in breach of Article 26. Young v. Australia, Hum. Rts. Committee, ¶ 10.4, 11, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003) (Individual Opinion by Committee Members Wedgwood and DePasquale); X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007) (Separate Opinions by Amor and Khalil (dissenting)). The reasoning in *Young* and *X v. Colombia* was anticipated by HRC members Mr. Lallah and Mr. Scheinin (concurring) in their individual opinion in *Joslin*: "[A] denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under Article 26, unless otherwise justified on reasonable and objective criteria." Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 226, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002). Lallah and Scheinin, however, did not have the opportunity in *Joslin* to determine whether such discrimination had occurred, as the authors had not "demonstrate[d] that they were personally affected . . . by any such distinction between married and unmarried persons that would amount to discrimination under [A]rticle 26." *Id.*; *see also* Paladini, *supra* note 8, at 547, 556.

240. Paladini, *supra* note 8, at 554.

mate different-sex relationships."[241] Decisions such as *Halpern v. Attorney-General of Canada*[242] in the Canadian Court of Appeal for Ontario and *Minister of Home Affairs v. Fourie*[243] in the South African Constitutional Court indicate that once same-sex and opposite-sex relationships are afforded equal status, the irresistible conclusion that follows is that the exclusion of same-sex couples from the institution of marriage is discriminatory.

a. The *Halpern* Case

In 2003, in *Halpern v. Attorney-General of Canada*,[244] the Canadian Court of Appeal for Ontario had to determine whether the Canadian common law definition of marriage (which defined marriage as "the voluntary union for life of one man and one woman to the exclusion of all others") violated Section 15(1) of the Canadian Charter of Rights and Freedoms.[245] This section, in terms analogous to Article 26 of the ICCPR, states that "every individual is equal before and under the law and has the right to the equal pro-

241. Zanghellini, *supra* note 12, at 145. This point was also picked up and disputed by the dissenting members of the HRC in *X v. Colombia*. Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007) (Amor and Khalil dissenting) ("The line of argument adopted by the [HRC majority] . . . starts from the premise that all couples, regardless of sex are the same and are entitled to the same protection in respect of positive benefits.").

242. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 8 (Can. Ont. C.A.) ("Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships."). It should be noted that the legal decisions that led to the legalization of same-sex marriage in Canada were by the provincial and territory courts, rather than the Canadian Supreme Court, and that the *Halpern* decision by the Court of Appeal for Ontario in 2003 was particularly significant because it was the first to reformulate the exclusively heterosexual Canadian common law definition of marriage with immediate effect and to order that the relevant registrar accept for registration the marriage certificates of the same-sex couples who sought a judicial remedy. For the significance of the Halpern decision in the context of Canadian jurisprudence, see Mostacci, supra note 30, at 73-85. Additionally, other courts adopted its reasoning. *See, e.g.*, Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶¶ 76–78 (Can. B.C. C.A.). After eight of ten provinces and one of three territories found that the denial of same-sex marriage infringed Section 15(1) of the Canadian Charter, the federal government drafted legislation and asked for the Supreme Court's opinion as to its constitutional validity prior to its passage in July 2005. Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 712, 724 (Can.); *see* Gardiner, *Same-Sex Marriage: A Worldwide Trend?*, *supra* note 15 at 97; Wright, *supra* note 15, at 253, 256–58; Mostacci, *Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 82–85.

243. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

244. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161 (Can. Ont. C.A.).

245. It should be noted that the Canadian Charter does not expressly include a right to marry.

tection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[246]

While Section 15(1) does not list sexual orientation as a prohibited ground of discrimination, it was settled law in Canada by the time *Halpern* was decided that discrimination on the basis of sexual orientation is analogous to the grounds listed in Section 15(1).[247]

Although in 1993 the Ontario Divisional Court had reasoned that the common law definition of marriage was exclusively heterosexual and did not violate Section 15(1),[248] ten years later the Court of Appeal for Ontario held that the common law definition of marriage *did* violate Section 15 of the Canadian Charter and reformulated it to allow same-sex couples to marry.[249] In applying Section15(1), the court in *Halpern* compared opposite-sex couples with same-sex couples and found that the common law created a "formal distinction" between the two on the ground of sexual orientation.[250] It then determined whether that "differential treatment"[251] had a discriminatory effect based on a consideration of four factors: first, whether same-sex couples experienced "a preexisting disadvantage, stereotyping or vulnerability"[252]; second, whether the common law definition accommodated "the actual needs, capacities and circumstances" of same-sex couples[253]; third, whether the common law definition had an "ameliorative purpose

246. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, § 15(1) (Can.).

247. Egan v. Can. [1995] 2 S.C.R. 513, 536, 528–29, 532 576 (Can.) (Lamer, C.J., La Forest, Gonthier, J. Major, J., & Sopinka, J.); *see* Haig v. Can. (1992) 9 O.R. 3d 495; Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 7 (Can. B.C. C.A.); Knodel v. British Colombia, 1991 CanLII 3960, 25–26 (B.C. S.C.); Rosenberg v. Canada (Att'y Gen.) 38 O.R. 3d 577; *cf.* Egan v. Can. [1995] 2 S.C.R. 513, 550–52 (Can.) (L'Heureux-Dubé, J., dissenting); Mostacci, *Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 80–81.

248. *Layland v. Ontario* (1993) 14 O.R. (3d), 658, ¶ 24 (Can.) (Southey J. & Sirois J., & Greer, J., dissenting). Judge Greer dissented from the majority both in finding that the common law did not prevent same-sex couples from marrying and in finding that restricting marriages to heterosexual couples violated Section 15(1) of the Canadian Charter. *See id.*

249. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161 (Can. Ont. C.A.).

250. *Id.* ¶ 69, 72–76; *cf.* Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 3 (Can. B.C. C.A.).

251. Halpern, (2003) 65 O.R. 3d, ¶ 77.

252. *Id.* ¶¶ 82–87.

253. *Id.* ¶¶ 88–93.

or effects on a more disadvantaged . . . group in society"[254]; and fourth, "the nature of the interest affected" by the common law.[255]

Using those four factors, the court found that the common law did have a discriminatory effect because: same-sex couples were historically disadvantaged[256]; the common law did not accord with the needs, capacities, and circumstances of same-sex couples in relation to childrearing and other purposes of marriage and perpetuated the view "that same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships"[257]; opposite-sex couples, who were covered by the common law, were not in a more disadvantaged position than same-sex couples[258]; and marriage is a "fundamental societal institution" and that exclusion from it "offends the dignity of persons in same-sex relationships."[259]

b. The *Fourie* Case

In *Minister of Home Affairs v. Fourie*,[260] the South African Constitutional Court held that the South African common law definition of marriage and the Marriage Act 1961[261] violated Sections 9(1) and 9(3) of the South African Constitution[262] in excluding same-sex couples from the institution of marriage.[263] Although *Fourie* is not

254. *Id.* ¶¶ 96–99.

255. *Id.* ¶¶ 100–107.

256. *Id.* ¶¶ 82–86; *cf.* Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 82 (Can. B.C. C.A.).

257. Halpern, (2003) 65 O.R. 3d, ¶ 94; *cf.* Barbeau, [2003] B.C.C.A. 251, ¶ 82 (Can. B.C. C.A.); Egan v. Can. [1995] 2 S.C.R. 513 (Can.).

258. Halpern, (2003) 65 O.R. 3d, ¶ 98.

259. *Id.* ¶ 107; *cf.* Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 90 (Can. B.C. C.A.).

260. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

261. *Id.* at 3 ¶ 3, 5 ¶ 7. Although the Marriage Act 1961 did not contain a definition of marriage, Section 30(1) provided that a "marriage officer" had to ask each of the parties to a prospective marriage the question: "Do you, A.B . . . witness that you take C.D. as your lawful *wife* (or *husband*)?" *Id.* at ¶ 3 (emphasis added). The words "wife (or husband)" were interpreted by the court as excluding marriage between same-sex couples. *See id.*

262. S. Afr. Const., 1996.

263. *Fourie*, 2006 (1) SA 524 (CC). The court gave the South African Parliament one year to amend the legal definition of marriage by declaring the common law definition of marriage and the Marriage Act 1961 constitutionally invalid to the extent that they did not permit same-sex couples to marry, but suspended the declaration of invalidity for twelve months. *Id.* at 100, ¶ 161. The response of the parliament was to pass the Civil Union Act 2006, and there has been some debate among commentators as to whether this satisfies the requirements set out by the court, or whether it provides a "separate yet equal regime." *See* Jacqueline Heaton, *The Right to Same-sex Marriage in South Africa*, 28 L. in Context 108, 116 (2010). However, that Section 11(1) of the Civil Union Act provides for a couple to refer to their union as a marriage—a "marriage officer must inquire from the parties appearing

a case about the *interpretation* of a right to marry—unlike the ICCPR, there is no express right to marry contained in the South African Constitution[264]—and the unique South African post-apartheid constitutional context was a factor in the court's reasoning,[265] the well-reasoned and compelling decision can be applied to the interpretation of Article 23(2) in the context of the rights of nondiscrimination in the ICCPR.

In terms analogous to Article 26 of the ICCPR, the South African Constitution provides in Section 9(1) that "[e]very one is equal before the law and has the right to equal protection and benefit of the law," and in Section 9(3) prohibits the state from "unfairly" discriminating "directly or indirectly" on a range of express grounds, one of which is sexual orientation.[266] In *Fourie*, the South African Constitutional Court found that Sections 9(1) and 9(3) "cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond merely protecting a private space in which gay and lesbian couples may live together without interference from the state."[267] The sections therefore encompassed not just "the right to be left alone,"[268] but also "the right to be acknowledged as equals and to be embraced with dignity by the law."[269] As put by Justice Sachs:

> The exclusion of same-sex couples from the benefits and responsibilities of marriage . . . represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern . . . . It signifies that their

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before him or her whether their civil union should be known as a marriage or a civil partnership"—indicates that same-sex couples are entitled to marry. Helen Kruuse, *Conscientious Objection to Performing Same-Sex Marriage in South Africa*, 28 INT'L J. L., POL'Y & FAM. 150, 169–70, n. 33 (2014). Kruuse refers to the parliamentary debates of this section as evidence that the legislature intended to comply with the court's decision in *Fourie* and not create a "separate yet equal regime." *See id.*

264. *Fourie*, 2006 (1) SA 524 (CC), at 28, ¶ 47.

265. *Id.* at 37–40 ¶ 59–61, 67–68 ¶ 107, 72 ¶ 113, 93–95 ¶ 150–51; *see also* Mostacci, *Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 74 (explaining that South Africa's legal system evolved in a rapid manner as a reaction to Apartheid).

266. S. AFR. CONST., 1996, art. 9(1), 9(3).

267. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 49 ¶ 78 (S. Afr.).

268. *Id.*

269. *Id.* at 49–50 ¶ 78.

> capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.[270]

Accordingly, the exclusion of same-sex couples from the institution of marriage clearly[271] breached Sections 9(1) and 9(3), as it "negate[d] [same-sex couples'] right to self-definition in a most profound way"[272] "given the centrality attributed to marriage and its consequences."[273]

3. "Separate but Equal" Treatment

Numerous jurisdictions around the world have introduced civil registration schemes for same-sex couples (which may or may not also be open to opposite-sex couples)[274] that carry with them many, but usually not all, the legal rights, responsibilities, and incidents of marriage. It may be argued that such schemes may be adequate state responses to a rights-based argument that a state is required to recognize same-sex marriage, in that civil registration provides same-sex couples with a degree of recognition and protection which sufficiently mitigates the complete exclusion of same-sex couples from the institution of marriage.

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270. *Id.* at 45 ¶ 71–72, 46 ¶ 72; *see also id.* at 49–51 ¶ 77–79 (describing the incompatibility of the common law and section 30(1) of the Marriage Act with sections 9(1) and 9(3) of the South African Constitution); *id.* at 75 ¶ 117 (identifying the key issue as a lack of legal recognition of same-sex relationships); Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 107–07 (Can. Ont. C.A.); *Layland v Ontario* (1993) 14 O.R. 3d, ¶ 70 (Greer, J., dissenting).

271. *Id.*

272. *Id.* at 47 ¶ 72.

273. *Id.*

274. For example, in the Australian state jurisdiction of Victoria, the *Relationships Act 2008* permits a person in a "registrable domestic relationship" to register their relationship with the Registrar of Births, Deaths and Marriages, to provide conclusive proof, under Victorian law, of the existence of the relationship. *See Relationships Act 2008* (Vic) pt 2.2 (Austl). A "registrable domestic relationship" is defined in section 5 of the *Relationships Act 2008* as follows:

> [A] relationship (other than a registered relationship) between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person—(a) for fee or reward; or (b) on behalf of another person or an organization (including a government or government agency, a body corporate or a charitable or benevolent organization).

Id. s.5. By contrast, in Slovenia, the Registration of Same-Sex Partnership Act 65/06, 8 July 2005, only allows for the registration of a union of two men or two women. Adam Bodnar & Anna Sledsinska-Simon, *'Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe' in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 231.

One of the problems with this argument is its slipperiness. It may refer to the proposition that separate but equal treatment—that is, civil registration schemes which provide same-sex couples with, in substance, all, or nearly all, the legal incidents, rights, and responsibilities of marriage, but which are not formally identified as marriage—are *not* a form of differential treatment. Or, the argument may mean that differential treatment is justified because of, for example, a link between opposite-sex marriage and procreation, or out of respect for religious sensibilities and traditions, or because marriage is "essentially" or "inherently" heterosexual—hence the adequacy of civil registration as a "balanced" response to the rights claim. The first proposition will be dealt with here and the second proposition will be dealt with in the next Subsection.

The first proposition is incorrect: if marriage is not open to same-sex couples, then civil registration schemes are a form of differential treatment, even if those schemes are open to both same-sex and opposite-sex couples, and even if, hypothetically, those schemes provide substantively all the legal rights, responsibilities, and incidents of marriage. These schemes fail to take into account that which is so often emphasized in arguments in favor of "traditional" marriage—that marriage "is much more than a piece of paper"[275] such that "[t]he societal significance surrounding the institution of marriage cannot be overemphasized."[276] If marriage has such great significance as a revered and respected institution, then the exclusion of same-sex couples from the institution *must* be a form of differential treatment. This is true even if the exclusion is, hypothetically, "merely" symbolic: the traditionalist argument is thus hoist by its own petard. As Judge L'Heureux-Dubé noted, in relation to the failure to recognize same-sex couples in the Canadian Old Age Security Act: "[T]he metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex.' "[277]

Accordingly, there is increasing recognition that the differential treatment of same-sex and opposite-sex couples in terms of relationship recognition is a discredited, segregationist response to a claim of discrimination.[278] This response "continue[s] to regulate

275. *Fourie,* 2006 (1) SA 524 (CC) at 44 ¶ 70.

276. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 136 (Can. Ont. C.A.).

277. Egan v. Can. [1995] 2 S.C.R. 513, 567 (Can.).

278. Saez, *Same-Sex Marriage, supra* note 25, at 41.

same-sex couples to a status of second-class citizens who have not achieved full personhood"[279]; exacerbates, rather than mitigates, homophobia and heterosexism; and causes harm, including harm to the children of parents who do not identify as heterosexual.[280]

For example, in *Fourie*, the South African Constitutional Court rejected the argument of the state that the breach of the rights to nondiscrimination contained in Sections 9(1) and 9(3) of the South African Constitution could be remedied by providing same-sex couples with a "remedial mechanism that was alternative and supplementary to the Marriage Act."[281] The court stated that the law had to make "appropriate provision for gay and lesbian people to celebrate their unions *in the same way* they enable heterosexual couples to do,"[282] bearing in mind that "[h]istorically the concept of 'separate but equal' served as a threadbare cloak for covering distaste for or repudiation by those in power of the group subject to segregation."[283]

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279. Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 140 (Can. B.C. C.A.); *see also id.* at 73 [152] (noting that the Law Reform Commission of Canada, in its 2001 report entitled Beyond Conjugality, Recognising and Supporting Close Personal Adult Relationships, stated that registration schemes should not be viewed as a policy alternative to same-sex marriage since to do so would maintain the stigma of same-sex couples as second-class citizens); *id.* at 156 ("Any other form of recognition of same-sex relationships, including the parallel institution of [Registered Domestic Partnerships], falls short of true equality."). As noted by leading experts on human rights law Sarah Joseph and Melissa Castan, General Recommendation 19 issued by the Committee on the Elimination of Racial Discrimination confirms that segregation is a form of discrimination. JOSEPH & CASTAN, *supra* note 11, at 820. The "separate but equal" doctrine was used to justify segregation on the grounds of race in the United States: the doctrine was established by the U.S. Supreme Court in *Plessy v. Ferguson*,163 U.S. 537 (1896), but was abolished by the U.S. Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954).

280. Convention on the Rights of the Child, Committee on the Rights of the Child, *General Comment No. 7: Implementing Child Rights in Early Childhood*, 40th Sess., at 6, ¶ 12, U.N. Doc. CRC/C/GC/7, (2005) ("Young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values . . . . States parties have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs—within families, communities, schools or other institutions . . . . More generally, States parties should raise awareness about discrimination against young children in general, and against vulnerable groups in particular."); *see also* Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 151 (Feb. 24, 2012); *Obergefell*, 135 S. Ct. at 2600–01; Hermann, *supra* note 116, at 371 (noting that the Court in *Obergefell* invoked *Lawrence* for the proposition that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association"); Gerber et al., *supra* note 12, at 665–66 ("The prohibition of marriage for same-sex couples both exacerbates conditions of discrimination and disadvantage and perpetuates societal attitudes as to the 'legitimacy' of these families.").

281. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 51 ¶ 80, 53 ¶ 83 (S. Afr.).

282. *Id.* at 53 ¶ 82 (emphasis added), 93 ¶ 150 (Sachs, J.), 106 ¶ 168 (O'Regan, J.).

283. *Id.* at 93 ¶ 150.

4. Justifications for Differential Treatment

Any argument that the differential treatment of same-sex and opposite-sex couples in relation to marriage can be justified because marriage is "essentially" or "inherently" heterosexual is inconsistent with the arguments presented in this Article that marriage is an evolving institution and that the contemporary ordinary meaning of marriage does not necessarily exclude same-sex marriage. This Subsection, therefore, focuses on arguments that, ostensibly at least, do not rely on the premise that marriage is essentially or inherently heterosexual, but that nonetheless maintain that the differential treatment of same-sex and opposite-sex couples is justified.

The HRC has stated in General Comment 18: Non Discrimination "that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the [ICCPR]."[284] The onus is on the state party to justify differential treatment.[285]

The obvious problem that confronts any state party seeking to justify differential treatment that results in the exclusion of same-sex couples from the institution of marriage is that allowing two consenting adults[286] of the same sex to marry does not result in any obvious, corresponding deprivation, limitation, or trade-off of the

284. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 18: Non-discrimination*, 37th session, at 28, ¶ 13, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994); *see* Gerber et al., *supra* note 12, at 652; Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007) (Separate Opinions by Amor, J. and Khalil, J.); Paladini, *supra* note 8, at 549.

285. *See, e.g.*, Communication No. 941/2000, Young v. Australia, Hum. Rts. Committee, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003); Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007); Communication No. 516/1992, Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic, Hum. Rts. Committee, ¶ 11.5–11.6, U.N. Doc. CCPR/C/54/D/516/1992 (July 19, 1995); Communication No. 180/1984, L. G. Danning v. Netherlands, Hum. Rts. Committee, ¶ 14, U.N. Doc CCPR/C/OP/2 (Apr. 9, 1987).

286. The Authors acknowledge that Article 23(2) confers a right to marry upon men and women of "marriageable age," and that it may be applied so as to confer a right to marry on children who have the capacity to marry under the relevant state laws. However, it is beyond the scope of this Article to explore that issue, and the related issue as to the circumstances in which allowing a child to marry (whether to a person of the same or opposite sex) may violate the rights of that child or cause the child harm. Article 23(3), of course, provides that "no marriage shall be entered into without the free and full consent of the intending spouses."

rights of others.[287] Moreover, while the HRC has accepted that the differential treatment of married and *un*married opposite-sex couples may be justified as reasonable and objective because "the couples in question had the choice to marry or not, with all the ensuing consequences,"[288] the HRC's jurisprudence on the rights of nondiscrimination and sexual orientation since *Joslin*, alongside emerging domestic and supranational case law, indicates that there are no reasonable and objective criteria for differentiation in treatment on the grounds of sexual orientation in relation to a couple's capacity to marry if they choose to do so. This emerging domestic and supranational case law refers to "the larger social, political and legal context"[289] and recognizes that discrimination against same-sex couples has harmed, and continues to harm, persons who are sexually attracted to others of the same sex.[290] It consequently characterizes sexual orientation as a "suspect category,"[291] such that differential treatment based on sexual orientation requires strict scrutiny[292] or "serious reasons by way of justification,"[293] and which avoid "abstract"[294] arguments, "unfounded and stereotypical assumptions"[295] and "severe historical prejudice."[296] In the supra-

287. *See Obergefell*, 135 S. Ct. at 2642; Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 137 (Can. Ont. C.A.).

288. Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007).

289. *Layland v Ontario* (1993) 14 O.R. 3d 658, [44] (Greer, J., dissenting).

290. *See, e.g.*, *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 29 ¶ 49, 30–31 ¶ 50, 37 ¶ 59, 48–49 ¶ 74–76 (S. Afr.); *M v H* [1999] 2 SCR 3, 52-3 (Cory & Iacobucci, JJ); Egan v. Can. [1995] 2 S.C.R. 513, 600 (Can.).

291. Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 72 (Feb. 24, 2012). In relation to Canada, see Mostacci, *Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 78–81.

292. *See* Atala, Inter-Am. Ct. H.R. No. 12.502 ¶ 72, 124. 127, 131. For example, in *Atala*, the Court wrote, "As regards the prohibition of discrimination based on sexual orientation, any restriction of a right would need to be based on rigorous and weighty reasons." *Id.*

293. Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 437; *see, e.g.*, *id.* at 443 ("robust justification") (Rozakis, J., Spielmann, J., & Jebens, J. dissenting); Mostacci, *Different Approaches, Similar Outcomes: Same-Sex Marriage in Canada and South Africa*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 81–82; Karner v. Austria 2003-IX Eur. Ct. H.R. 199, 211–213; Smith and Grady v. United Kingdom, 1999-VI Eur. Ct. H.R. 45; Vallianatos v. Greece 2013-VI Eur. Ct. H.R. 142 (requiring "'particularly convincing and weighty reasons' by way of justification").

294. Atala, Inter-Am. Ct. H.R. No. 12.502 ¶ 146.

295. *Id.* at ¶ 111, 194, 237, 267. *See Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 19, 31–32 ¶ 52, 33–34 ¶ 54 (S. Afr.); Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 123 (Can. Ont. C.A.); Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 90 (Can. B.C. C.A.).

296. *See, e.g.*, *Fourie*, 2006 (1) SA 524 (CC) at 48 ¶ 76.

national jurisprudence specifically, any margin of appreciation afforded to states is consequently narrowed.[297]

The HRC has already rejected arguments that the protection of morals and/or public health (specifically the control of HIV/AIDS)[298] provide reasonable and objective criteria for the differential treatment of homosexual sexual acts, at least in the context of an alleged violation of the right to privacy under Article 17.[299] An assertion (as was made in *Joslin*)[300] that the justification for differential treatment of same-sex and different-sex couples is found within Article 23 itself is, once subjected to analysis, an appeal to one or more of the following arguments: (1) marriage is, by its nature, an exclusively heterosexual institution;[301] (2) differential treatment is justified based on the unique "natural or inherent pro-

297. *See, e.g.*, Vallianatos, 2013-VI Eur. Ct. H.R., ¶¶ 77, 85; Pustorino, *Same-Sex Couples before the ECtHR*, *in* SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, *supra* note 8, at 406, 408.

298. Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee, ¶ 6.5, 8.4, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

299. *Id.* at ¶ 6.5, 8.5–8.6. The right to privacy under Article 17 provides that "no one shall be subjected to *arbitrary or unlawful interference* with his privacy" and this has been interpreted by the HRC as a requirement that any interference with privacy be "reasonable in the particular circumstances." Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 16: Article 17*, 32nd Sess., at 21, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994) (emphasis added); *see* Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee, ¶ 6.4, 8.3, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994). Additionally, because the HRC considered Article 17 in conjunction with Article 2, it had to determine whether the differential treatment of persons of homosexual orientation was reasonable and objective, consistently with its general jurisprudence on the rights to nondiscrimination. *See id.* ¶¶ 6.13, 7.7; Paladini, *supra* note 8, at 541.

300. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 226, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002). (addressing a party's argument that "[t]he institution of marriage is a clear example where the substance of the law necessarily creates a difference between couples of opposite sexes and other groups or individuals, and therefore the nature of the institution cannot constitute discrimination contrary to Article 26"). In relation to the near-identical terms of Article 12 and the right of nondiscrimination in Article 14 of the ECHR, *see* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 433–34.

301. *See, e.g.*, Layland v Ontario (1993) 14 O.R. 3d 658 (where the Ontario Court (General Division) reasoned that the then exclusively heterosexual Canadian common law definition of marriage gave rise to differential treatment of "professed homosexuals" as "a discrete and insular minority" protected by Section 15 of the Canadian Charter, but not discrimination such as to violate Section 15, because "the disadvantage to the [applicant same-sex couples] arises directly from the legal distinction being challenged. It does not exist apart from nor is it independent of such a distinction."). Layland v Ontario (1993) OR (3d) 658, [11]-[13]; *see also* Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 89 (Can. B.C. C.A.); Egan v. Can. [1995] 2 S.C.R. 513, 536 (Can.) (where the plurality judgement reasoned that "marriage is by nature heterosexual" because of "the biological and social realities that heterosexual couples have the unique ability to procreate").

creative potential" of heterosexual sexual relations;[302] or (3) differential treatment is justified in order to "protect" marriage and the family in the "traditional" sense.[303]

These arguments are often conflated[304] and the last argument can be linked to the text of Article 23—that is, "the family is the *natural* and fundamental group unit of society" and "[t]he right of men and women . . . to marry and *to found* a family."[305] The first argument has already been addressed.[306] The second and third arguments are discussed below, along with one other justification for differential treatment that has been advanced in national and supranational courts: that differential treatment is justified because it respects religious opposition to same-sex marriage.

a. The Procreation Justification

The procreation justification is probably the most common justification for the differential treatment of same-sex couples in relation to marriage.[307] The procreation justification differs from the ontological argument by conceding (usually in the alternative)[308] that marriage *may* be defined so as to encompass same-sex couples *but that* an exclusively heterosexual definition is justified because of the procreative potential of heterosexual marriage. However, the procreation justification is inconsistent with both the broader legal

302. *See, e.g, Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 54 ¶¶ 85–86 (S. Afr.); Schalk, 2010-IV Eur. Ct. H.R. at 417–18 (citing Judgment of the Austrian Constitutional Court in *Verfassungsgerichtshof* (Dec. 12, 2003)); Barbeau, [2003] B.C.C.A. 251, ¶¶ 118–19. An analogous argument, in relation to the right of nondiscrimination contained in Article 14 of the European Convention, was advanced by Greece in *Vallianatos v Greece. See* Vallianatos v. Greece 2013-VI Eur. Ct. H.R. 125. Greece sought to justify the differential of same-sex couples in Greek legislation which made provision for the registration of civil unions, but confined those unions to different-sex couples, on the basis that "same-sex couples were not in a similar or comparable situation to different-sex couples since they could not in any circumstances have biological children together." *Id.* at 128. The argument was rejected by the European Court of Human Rights. *Id.*at 138, 145; *see also* Saez, *Same-Sex Marriage, supra* note 25, at 41.

303. *Cf.* Schalk, 2010-IV Eur. Ct. H.R. at 425–26 (where four nongovernmental organizations appearing as interveners argued that "the exclusion of same-sex couples from entering into marriage did not serve to protect marriage . . . in the traditional sense").

304. *See, e.g., Fourie*, 2006 (1) SA 524 (CC) at 54 ¶¶ 85–86; Halpern v Canada (Att'y Gen.) (2003), 65 O.R. 3d) 161 (C.A.), [89], [92], [116]; Layland v. Ontario (1993) 14 O.R. 3d 658, [12]; Barbeau, [2003] B.C.C.A. 251, ¶ 168; Egan v. Can. [1995] 2 S.C.R. 513, 536–38 (Can.).

305. ICCPR, *supra* note 2, art. 23 (emphasis added).

306. *See supra* Part II.

307. As discussed in detail below, this justification was raised in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Halpern v. Can.* (Att'y Gen.) (2003), 65 O.R. 3d 161 (Can. Ont. C.A.) and *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

308. *See, e.g.*, Barbeau, [2003] B.C.C.A. 251, ¶ 117.

changes which have "detached the concept of parenthood from marriage, recognizing parenthood as a direct link between child and parent, regardless of the marital status of the parents"[309] and the technological changes that have made procreation "possible in ways unthinkable [fifty] years ago."[310] Furthermore, it is inconsistent with both jurisprudential developments which have rejected biologically based arguments purporting to justify discrimination on the grounds of sex[311] and jurisprudential developments in relation to transsexualism and marriage, which deny that the potential to procreate is a precondition of the right to marry.[312]

In addition, since *Joslin* was decided in 2002, the procreation justification and ontological arguments which have referred to the "procreative potential" of opposite-sex relationships have been considered and rejected by courts in the United States, Canada, and South Africa.[313]

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309. Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 174, 178.

310. Saez, *Same-Sex Marriage*, *supra* note 25, at 49; *see also* Barbeau, [2003] B.C.C.A. 251, ¶ 127.

311. See Egan v. Can. [1995] 2 S.C.R. 513, 569 (Can.).

312. *See* Christine Goodwin v. U.K. 2002-VI Eur. Ct. H.R. 1, 34; *cf.* Corbett v. Corbett (Ashely) (No 2) [1970] 2 All ER at 33 (Eng.); *see also* Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 157–58, 164; *cf.* Schalk v. Austria, 2010-IV Eur. Ct. H.R. at 426–29 (citing Judgment of the Austrian Constitutional Court in *Verfassungsgerichtshof* (Dec. 12, 2003)); Pustorino, *Same-Sex Couples before the ECtHR: The Right to Marriage*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 401–02; Zanghellini, *supra* note 12, at 128.

313. Decisions in all three jurisdictions are discussed *infra*. In relation to Canada, it should be noted that under the Canadian Charter, the question of justification is formally addressed (in Section 1) *after* a finding of "discrimination" within the terms of Section 15(1), which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, § 15(1) (Can.); *see, e.g.*, Egan v. Can. [1995] 2 S.C.R. 513, 558, 584, 586 (Can.). This differs from the terminology used by the HRC in General Comment 18 which, as detailed above in the body of the text, uses the term "discrimination" in a conclusory manner to describe "differential treatment" which cannot otherwise be justified, that is, *after* addressing the question of justification. *See* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 18: Non-discrimination*, 37th session, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994). Also, the justification analysis undertaken pursuant to Section 1 of the Canadian Charter, insofar as it relates to "a free and democratic society" ("such reasonable limits . . . as can be demonstrably justified *in a free and democratic society*") obviously differs from the test set out by the HRC in its General Comment 18, which makes no such reference, and almost certainly makes it harder for the state to justify discriminatory treatment. *See* Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, § 1 (Can.). Nevertheless, it is maintained that the reasoning of the Canadian courts under Sections 1 and 15(1) of the Canadian Charter, in response to arguments concerning the "unique" procreative potential of heterosexual marriage, can be usefully applied to the distinction

In the U.S. Supreme Court case *Obergefell*, in response to the claim that prohibitions on same-sex marriage in a number of U.S. states breached the Fourteenth Amendment to the U.S. Constitution (which provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws"), the respondents contended that "licensing same-sex marriage severs the connection between natural procreation and marriage" and was likely to lead to fewer heterosexual marriages.[314] The U.S. Supreme Court rejected this justification because it was "illogical"[315] and rested on "a counterintuitive view of opposite-sex couples' decision-making processes regarding marriage and parenthood."[316]

In Canada, in *Halpern*, the Attorney General of Canada argued before the Court of Appeal in Ontario that the exclusively heterosexual common law definition of marriage did not violate the right of nondiscrimination under Section 15(1) because "the concept of marriage—across time, societies and legal cultures—is that of an institution to facilitate, shelter and nurture the unique union of a man and a woman who, together, have the possibility to bear children from their relationship and shelter them within it."[317] The court rejected this argument because first, "[w]hile it is true that, due to biological realities, only opposite-sex couples can 'naturally' procreate, same-sex couples can choose to have children by other means . . . [and] an increasing percentage of children are being conceived and raised by same-sex couples"[318]; and second, "procre-

between "differentiation of treatment" and "discrimination" drawn by the HRC in General Comment No 18. *See* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 18: Non-discrimination*, 37th session, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994); Knodel v. British Colombia, 1991 CanLII 3960, 37–38, 45–46 (B.C. S.C.); Barbeau, [2003] B.C.C.A. 251, ¶¶ 120–27.

314. *Obergefell*, 135 S. Ct. at 2606–07.

315. *Id.* at 2607 (citing Kitchen v. Herbert, 755 F.3d 1193, 1223 (10th Cir. 2014)).

316. *Id.*

317. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶¶ 89, 116, 120 (Can. Ont. C.A.). This argument was closely allied to the reasoning of the Ontario Court in *Layland v Ontario* in 1993, which had rejected a claim that the exclusively heterosexual common law definition of marriage violated Section 15(1) of the Canadian Charter. Layland v. Ontario (1993) 14 O.R. 3d 658, [17].

318. Halpern, (2003), 65 O.R. 3d 161, ¶¶ 93, 122–23; *cf.* Andrews v. Ontario (Minister of Health) 64 O.R. 2d 258, 8 (Can. Ont. H.C.J) ("Homosexual couples are not similarly situated to heterosexual couples. Heterosexual couples procreate and raise children.").

ation and childrearing are [not] the only purposes of marriage, [n]or the only reasons why couples chose to marry."[319]

In the alternative, it was also argued by the Attorney General of Canada in *Halpern* that Section 1 of the Canadian Charter justified the exclusion of same-sex couples from the institution of marriage because Section 1 provides that rights may be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[320] Such limits, they claimed, were "required to encourage procreation [and] childrearing,"[321] which only opposite-sex unions could do "naturally."[322] This alternative argument was similarly rejected by the Court of Appeal because permitting same-sex couples to marry would, self-evidently, not stop married couples from procreating and raising children,[323] same-sex couples were capable of having children[324] and, in any event, "[t]he ability to 'naturally' procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples."[325]

Finally, in *Fourie*, the Constitutional Court of South Africa found that under the South African Marriage Act, to justify the exclusion of same-sex couples from the institution of marriage by reference to the "procreative potential" of heterosexual relationships would demean adoptive parents and heterosexual couples who are unable to conceive, no longer have the capacity to do so, or voluntarily decide not to procreate.[326]

b. The "Protection" of "Traditional" Family and Marriage Justification

In *Joslin*, the state party argued that the exclusion of same-sex couples from the institution of marriage was justified "to achieve the purpose of protecting the institution of marriage and the social

319. Halpern, (2003), 65 O.R. 3d 161, ¶¶ 94, 99 ("Persons do not marry solely for the purpose of raising children.").

320. *Id.* ¶ 109.

321. *Id.* ¶ 127.

322. *Id.* ¶ 122 (internal quotation marks omitted); *cf.* Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 104 (Can. B.C. C.A.).

323. Halpern, (2003), 65 O.R. 3d 161, ¶ 121; *cf.* Layland v. Ontario (1993) 14 O.R. 3d 658, [19].

324. Halpern, (2003), 65 O.R. 3d 161, ¶¶ 121–123.

325. *Id.* ¶ 130; Layland v. Ontario (1993) 14 O.R. 3d 658, [19].

326. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 54 ¶ 86 (S. Afr.).

and cultural values that the institution represents."[327] A similar justification has been mounted in domestic and supranational fora.[328]

A number of domestic courts have rejected the argument that the differential treatment of same-sex couples in relation to marriage is justified to protect "traditional" marriage and the family. These courts have reasoned that allowing same-sex marriage does not deprive opposite-sex couples of their right to marry[329]; that there is no rational connection between supporting heterosexual families and denying homosexuals the right to marry[330]; that same-sex couples want to marry for the same reasons as heterosexual couples,[331] such that same-sex couples cannot be understood to disrespect the institution of marriage, but rather they "respect it so deeply that they seek to find its fulfilment for themselves"[332]; and that the institution of traditional marriage cannot be protected in a way which limits the rights of same-sex couples.[333]

Fundamentally, the time-worn but discredited portrayal of persons attracted to the same sex as a "threat"[334] is what underlies the language of protection in this context—whether the threat be to society generally, to children, or one or more of other conservative bulwarks. Similarly, the notion that affording same-sex marriage couples a right to marry "devalues" or "undermines"[335] heterosexual marriage merely gives expression to an implicit assumption that heterosexuality is superior to homosexuality. Neither that por-

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327. Communication No. 902/1999, Joslin v. New Zealand, U.N. GAOR 75th Sess. at 220, Hum. Rts. Committee, U.N. Doc. A/57/40 (July 17, 2002).

328. *See* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 425, 432; *Fourie*, 2006 (1) SA 524 (C.C.), ¶ 46 ("Counsel for the Minister of Justice argued that . . . the institution of marriage . . . in terms of its historical genesis and evolution was heterosexual by nature. Same-sex couples accordingly had no constitutional right to enter into *or manipulate* that institution.") (emphasis added); Halpern, (2003), 65 O.R. 3d, ¶ 133; Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶¶ 105, 118, 127 (Can. B.C. C.A.).

329. Halpern, (2003), 65 O.R. 3d, ¶ 137; Layland v. Ontario (1993) 14 O.R. 3d, [58] (Greer, J., dissenting) ("[H]eterosexuals will not be circumscribed or in any way limited by extending to gays and lesbians the right to marry.").

330. *See, e.g.*, Halpern, (2003), 65 O.R. 3d, ¶ 130.

331. Barbeau, [2003] B.C.C.A. 251, ¶ 15.

332. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); Halpern, (2003), 65 O.R. 3d, ¶ 129 ("They are not seeking to abolish the institution of marriage; they are seeking access to it.").

333. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 34 ¶ 54 (S. Afr.).

334. Barbeau, [2003] B.C.C.A. 251, ¶ 127 (Can. B.C. C.A.) ("It is apparent . . . that the trial judge was of the view that permitting same-sex marriage represented a significant *threat* to the institution of marriage.") (emphasis added).

335. *Fourie* 2006 (1) SA 524 (CC) at 109 ¶ 172.

trayal, nor that assumption, constitute a reasonable and objective justification for differential treatment.[336]

c. The Religious Justification

The religious justification can be distinguished from an ontological argument which relies on religious doctrine, beliefs, or traditions to define marriage as essentially and exclusively heterosexual. Rather, the religious justification is premised on the protection of religious freedom and assumes that many religious communities do not condone marriage between persons of the same sex.[337] Based on its premise and assumption, the religious justification maintains that the exclusion of same-sex couples from the institution of marriage is justified because if such couples could marry, that would violate co-equal rights of religious freedom[338] or rights of nondiscrimination[339] in relation to religious groups who do not recognize the right of same-sex couples to marry.

Article 18(1) of the ICCPR protects religious freedom, but that freedom does not carry with it the right to impose one's religious views on others, even if that religious view is held by an overwhelming majority.[340] Such an imposition would be inconsistent, generally, with the universal nature of human rights, and specifically, with the rights of others to practice their religion freely—which includes the right of many people of religious faiths to recognize and celebrate marriages between persons of the same sex as part of their religious practice.[341] The HRC has already advised that "each State should provide for the possibility of both religious and civil marriages,"[342] thus making it possible for each state party to accommodate same-sex marriage within the secular institution of civil

336. *See id.* at 38 ¶ 60.

337. *See, e.g.*, *id.* at 55 ¶ 88 (referring to the submissions of the two amici, Doctors for Life International and the Marriage Alliance of South Africa).

338. *See, e.g.*, Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 719 (Can.).

339. *See id.* at 718.

340. The HRC has stated in a General Comment on Article 18 the following:

> The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the [ICCPR], including [A]rticles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 22:* U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994).

341. *See* Barbeau v. British Columbia (Att'y Gen.) [2003] B.C.C.A. 251, ¶ 134 (Can. B.C. C.A.).

342. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Comment No 19:* U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994); *see* Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 721 (Can.).

marriage, even in the face of pervasive and institutionalized religious hostility to same-sex marriage. Moreover, the religious justification has been considered and rejected by courts in South Africa, Canada,[343] and the United States, notwithstanding that religious freedom is expansively protected in each jurisdiction[344] on the basis that accommodation of both rights of religious freedom and of nondiscrimination are possible within a legal framework that recognizes civil marriage and which accommodates justifiable limitations on rights.

For example, in *Fourie*, two amici argued that same-sex marriage should not be recognized because "to disrupt and radically alter an institution of centuries-old significance to many religions, would accordingly infringe the [South African] Constitution by violating religious freedom."[345] They further argued that to change the definition of marriage would discriminate against persons who believed that marriage was a heterosexual union ordained of God, and who regarded their marriage vows as sacred.[346]

In response, the South African Constitutional Court found that "[t]he constitutional claims of same-sex couples can . . . not be negated by invoking the rights of religious believers to have their religious freedom respected. The two sets of interests involved do not collide, they co-exist in a constitutional realm based on the accommodation of diversity."[347] Moreover, the South African Constitutional Court applied the same reasoning to same-sex civil marriages.[348]

In *Halpern*, the Court of Appeal for Ontario reached a similar conclusion about the two sets of interests, stating that the case did not present a situation where balancing of competing rights was required—that is, both rights could be respected. The court held that the protection of freedom of religion in Section 2(a) of the Canadian Charter "ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious

343. *See, e.g.*, Barbeau, [2003] B.C.C.A. 251, ¶¶ 39, 154–55, 181; Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 155 (Can. Ont. C.A.).

344. In relation to Canada, see, for example, Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 721–722 (Can.); Minister for Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 55 ¶ 88 (S. Afr.).

345. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 55 ¶ 88 (S. Afr.).

346. *Id.* at 58 ¶ 93.

347. *Id.* at 62 ¶ 98.

348. *Id.* at 109 ¶ 172 (O'Regan, J.).

groups are not imposed on persons who do not share those views."[349]

Subsequently, in 2004, the Supreme Court of Canada in *Reference re Same-Sex Marriage*[350] found that proposed legislation which defined marriage "for civil purposes"[351] inclusively to encompass both same- and opposite-sex couples did not violate the protection of religious freedom in Section 2(a) of the Canadian Charter, nor the religious ground of the rights of nondiscrimination contained in Section 15. In relation to the former, the Canadian Supreme Court observed that "the guarantee of religious freedom in Section 2(a) of the [Canadian] Charter is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs,[352] and the court "had not been shown impermissible conflicts"[353] with the protection of freedom of religion would arise which could not be resolved within the ambit of the "reasonable limits" justification clause in Section 1 of the Canadian Charter.[354] In relation to the latter, the court found that the interveners' religious justification argument "fail[ed] to meet the threshold requirement"[355] of a breach of the rights of nondiscrimination because the proposed legislation neither granted benefits nor imposed burdens differentially: "The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another."[356] Importantly, the proposed legislation did not compel religious officials to perform same-sex marriages contrary to their religious beliefs; the court opined that "such compulsion would almost certainly run afoul of the [Canadian Charter's] guarantee of freedom of religion."[357]

Finally, in *Obergefell*, the U.S. Supreme Court held that the Fourteenth Amendment protection of the right of same-sex couples to marry did not violate the First Amendment protection of religious freedom because those who oppose same-sex marriage on religious grounds may continue to make their argument, while at the same

349. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 53 (Can. Ont. C.A.).

350. Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 713 (Can.).

351. *See id.* at 705 ¶ 1 (providing text of *proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*).

352. *Id.* at 723 ¶ 60.

353. *Id.* at 721 ¶ 54.

354. *Id.* at 720–21 ¶¶ 52–54.

355. *Id.* at 718 ¶ 45.

356. *Id.* at 718–719 ¶ 46.

357. *Id.* at 722 ¶ 56–58.

time those who believe same-sex marriage is "proper or indeed essential" "may engage those who disagree with their view in an open and searching debate."[358]

C. *Object and Purpose*

The object and purpose of the ICCPR, as stated in its preamble,[359] includes[360] the "recognition of the inherent dignity and of *the equal* and unalienable rights of *all* members of the human family."[361] To the extent that this object and purpose encompasses equal treatment, it overlaps with the application of the rights of nondiscrimination, in particular the equal protection requirement in Article 26, which has already been addressed. This Section, therefore, focuses on the object and purpose in terms of the recognition of "inherent dignity," whilst acknowledging that equality of treatment is critical to that recognition.[362]

Domestic jurisprudence increasingly recognizes that the denial of the right to marry a person of the same sex fails to respect the inherent dignity of people attracted to the same sex.[363] The jurisprudence connecting same-sex marriage with human dignity is consistent with, and naturally evolves from, domestic, supranational, and international jurisprudence which recognizes numerous principles, including that: the concept of dignity evolves over

358. *Obergefell*, 135 S. Ct. at 2607.

359. The preamble of a treaty is commonly used to identify the treaty's object and purpose. GARDINER, *supra* note 47, at 192, 196–97.

360. Note that although Article 31(1) of the Vienna Convention on the Interpretation of Treaties refers to both a treaty's "object" and "purpose," the terms "object" and "purpose" are understood to be synonymous and to compromise a composite term or a single lexical unit; and also to include the plural, that is, a treaty may have, and indeed, almost invariably has, multiple objects and purposes. LINDERFALK, *supra* note 56, at 207–17; *see also* GARDINER, *supra* note 47, at 191.

361. ICCPR, *supra* note 2, at preamble.

362. *See* Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 79 (Feb. 24, 2012) (referencing the Proposed Amendment to the Political Constitution of Costa Rica related to Naturalisation. *Advisory Opinion OC-4/84*, Jan. 19, 1984, ¶ 55) ("[T]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual."); *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 30 ¶ 50, 73 ¶ 114 (S. Afr.). In the context of the relationship between inherent human dignity and rights to nondiscrimination under the Canadian Charter, see Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497, 530–31 ¶¶ 53–54]; Knodel v. British Colombia, 1991 CanLII 3960 (B.C. S.C.) 45; Egan v. Can. [1995] 2 S.C.R. 513, 543–45, 552–53 (L'Heureux-Dubé), 583–84.

363. *See Fourie* 2006 (1) SA 524 (CC) at 14–15 ¶ 26, 73 ¶ 114 ¶ 50; Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 107–08, 119, 261 (Can. Ont. C.A.); Saez, *Same-Sex Marriage*, *supra* note 25, at 7.

time[364]; homosexuality is a "sexual orientation" that is inherent and immutable and "an essential component of a person's identity"[365]; "respect for the individual person means respect for the unique and diverse character of every human person"[366]; "homosexuals . . . have dignity in their own distinct identity,"[367] such that laws criminalizing same-sex sexual activity diminish that dignity[368]; homosexual sexual activity can lead to, and be an expression of, enduring and intimate relationships that should be legally recognized[369] and that are of equal value to heterosexual relationships[370]; the ability of a person to parent a child is unrelated to her or his sexual orientation[371]; "a person's sexual orientation is . . . linked to the notion of freedom and a person's right to self-determination and to freely choose the options and circumstances that give meaning to his or her existence"[372]; and marriage is "one of the most significant forms of personal relationships,"[373] such that denying same-sex couples access to marriage "conveys the ominous message"[374] that they are second-class citizens.[375]

The recognition that denying the right to marry to homosexuals fails to respect their inherent dignity is the logical consequence of a shift in the legal treatment of homosexuals in domestic, suprana-

364. *See* Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 139–40.

365. Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 139 (Feb. 24, 2012); *see* Communication No. 1932/2010, Fedotova v. Russian Federation, at 5, 8–9, 15, Hum. Rts. Committee, U.N. Doc. CCPR/C/106/D/1932/2010 (Oct. 2012).

366. Knodel, 1991 CanLII 3960, 1, 45.

367. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015); Saez, *Transforming Family Law through Same-Sex Marriage*, *supra* note 29, at 141, 172–73, 194.

368. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 575 (2003); *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 29 ¶¶ 48–49 (S. Afr.).

369. *See, e.g.*, Giraldo v Colombia Case 11.656, Inter-Am. Comm'n H.R., Report No. 71/99, (1999); Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 435; *see* Magi, *Same-Sex Couples before the Inter-American System of Human Rights*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8; Pustorino, *Same-Sex Couples before the ECtHR*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 402–03.

370. *See, e.g.*, *Fourie* 2006 (1) SA 524 (CC) at 30 ¶ 50, 33 ¶¶ 53–54, 35 ¶ 56; Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶¶ 107, 119, 124, 131 (Can. Ont. C.A.).

371. Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 45 (Feb. 24, 2012) (quoting decision of the Juvenile Court of Villarrica, Oct. 29, 2003); *see id.* ¶ 126 (discussing the Supreme Court of Justice of Mexico, Action of Unconstitutionality A.I. 2/2010, Aug. 16, 2010, ¶ 338; *see id.* ¶¶ 128–29; *Fourie* 2006 (1) SA 524 (CC) at 33 ¶ 53.

372. Atala, Inter-Am. Ct. H.R. No. 12.502 ¶ 136; *see Fourie* 2006 (1) SA 524 (CC) at 47 ¶ 72.

373. Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, ¶ 5.

374. Halpern v. Can. (Att'y Gen.), 2002 CanLII 42749, ¶ 261.

375. Layland v. Ontario (1993) 14 O.R. 3d 161 (Can. C.A.) [54].

tional, and international jurisprudence, from "classifying lesbians and gays as exclusively sexual beings, reduced to one-dimensional creatures"[376] or "isolated individuals seeking sexual gratification,"[377] where homosexuality "is a matter of capacity,"[378] to human beings who can legitimately give expression to their sexual identity[379] and whose sexuality (like heterosexuality) intimately connects them to others.[380]

For example, the reasoning of the U.S. Supreme Court in *Obergefell* is built upon its 2003 reasoning in *Lawrence v. Texas*,[381] which emphatically overruled the 1986 decision in *Bowers v. Hardwick*[382] and found that a state law criminalizing "deviate" same-sex intercourse[383] violated the substantive guarantee of liberty protected by the Due Process Clause of the U.S. Constitution.[384] *Obergefell* also builds upon the Court's reasoning in numerous cases that invalidated discriminatory laws on the subject of marriage because marriage was a fundamental right protected by the Equal Protection and Due Process Clauses in the U.S. Constitution.[385]

In *Lawrence*, the Supreme Court had emphasized the significance of privacy, the protection of "individual" rights and decisions, and state intrusion in finding that the Due Process Clause was

376. Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 742 (1999); *see Fourie* 2006 (1) SA 524 (CC) at 32 ¶ 52.

377. Hermann, *supra* note 116, at 373.

378. Layland v. Ontario (1993) 14 O.R. 3d 658, [17].

379. *See* Communication No. 1932/2010, Fedotova v. Russian Federation, at 16, Hum. Rts. Committee, U.N. Doc. CCPR/C/106/D/1932/2010 (Oct. 2012); *cf.* Communication No. 61/1979, Hertzberg v Finland, Hum. Rts. Committee, U.N. Doc. CCPR/C/OP/1 at 124 (Apr. 2, 1982); *see* Paladini, *supra* note 8, at 533, 542–43.

380. *See* Atala and Daughters v. Chile, Judgment, Inter-Am. Ct. H.R. No. 12.502 ¶ 137 (Feb. 24, 2012) (citing Supreme Court of Justice of Mexico, *Action of Unconstitutionality AI 2/2010*, Aug. 16, 2010, ¶¶ 263–64).

381. Lawrence v. Texas, 539 U.S. 558 (2003); *see also* Hermann, *supra* note 116, at 390–91.

382. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain a binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

383. "Deviate sexual intercourse" was defined under the statute as "(a) any contact between any part of the genitals of one person and the mouth or anus of another person or (b) the penetration of the genitals or the anus of another person with an object." *Lawrence*, 539 U.S. at 563.

384. *Lawrence*, 539 U.S. at 578; *Obergefell*, 135 S. Ct. at 2608.

385. *Loving v. Virginia*, 388 U.S. 1 (1967) (including prohibitions on interracial marriage); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage by fathers who had not paid child support payments); *Turner v. Safley*, 482 U.S. 78 (1987) (limitations on the marital privileges of prisoners); and laws which entrenched sex-based inequality in marriage. *Obergefell*, 135 S. Ct. at 2602–04; *see also* Hermann, *supra* note 116, at 377–78, 385–86, 392; *cf. Obergefell*, 135 S. Ct. at 2617–19 (Roberts, C.J. dissenting).

breached,[386] and had noted that "[t]he present case does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[387] However, the Supreme Court had also observed, "[T]o say that the issue . . . was simply the right to engage in certain sexual conduct *demeans the claim* the individual put[s] forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[388] Similarly, the Court noted that *Bowers*' "continuance as a precedent demeans the lives of homosexual persons."[389] The Supreme Court in *Lawrence* also referred to its 1992 decision in *Planned Parenthood v. Casey*,[390] stating that "our laws and tradition afford constitutional protection to personal decisions relating to marriage" and that

> [t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment . . . . *Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.*[391]

The precedent of *Lawrence* provided a basis upon which the Supreme Court in *Obergefell* could find that "the right to personal choice regarding marriage,"[392] including a person's interest in marrying a person of the same sex, was a fundamental interest "central to individual dignity and autonomy."[393] The Court noted *Lawrence*'s holding [that] "the State 'cannot demean [gays' and les-

386. *See, e.g.*, *Lawrence*, 539 U.S. at 563 ("Liberty protects the person from unwarranted government intrusions *into a dwelling or other private places.* In our tradition the State is not omnipresent *in the home.*") (emphasis added). *See also id.* at 564 ("We conclude the case should be resolved by determining whether the practitioners were free as adults to engage *in the private conduct* in the exercise of their liberty under the due process clause.") (emphasis added). *See also id.* at 558 ("Their penalties and purposes . . . [touch] upon the most private human conduct, sexual behavior, and in the most private of places, the home."). *See also id.* at 578 ("'It is a promise of the Constitution that there is a personal liberty which the government may not enter.' The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

387. *Id.* at 578.

388. *Id.* at 558 (emphasis added); *see also id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons to make this choice.") (cited in *Obergefell*, 135 S. Ct. at 2600).

389. *Id.* at 575 (emphasis added).

390. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

391. *Lawrence*, 539 U.S. at 573–74 (emphasis added).

392. *Obergefell*, 135 S. Ct. at 2589.

393. *Id.*; Hermann, *supra* note 116, at 369–71, 378, 395.

bians'] existence or control their destiny by making their private sexual conduct a crime'" and extended it to same-sex marriage.[394]

Consequently, in *Obergefell*, the claim that the implied right to marry under the U.S. Constitution encompassed same-sex marriage was characterized as a claim for "equal dignity in the eyes of the law."[395] Accordingly, the Supreme Court found that a failure to recognize that the right to marry encompasses same-sex marriage imposes a "disability on gays and lesbians [which] serves to disrespect and subordinate them"[396] and "has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society"[397] which "dignifies couples who 'wish to define themselves by their commitment to each other.'"[398]

The link between the recognition of same-sex marriage and human dignity is also supported by empirical evidence establishing damage to the mental health of homosexuals caused by prohibitions on same-sex marriage, including those individuals who do not themselves have a desire to wed,[399] and the possible harm to children who are being raised in same-sex families subject to those prohibitions.[400] This damage is analogous to the harm caused to same-sex attracted people by laws criminalizing homosexual acts, which the HRC has already recognized are sufficient to deem a

394. *Obergefell*, 135 S. Ct. at 2604 (quoting *Lawrence*, 539 U.S. at 578); Hermann, *supra* note 116, at 369–70; *cf. Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

395. *Obergefell*, 135 S. Ct. at 2608.

396. *Id.* at 2604.

397. *Id.* at 2602.

398. *Id.* at 2600 (quoting United States v. Windsor, 133 S. Ct 169, 2689 (2013)).

399. Gerber et al., *supra* note 12, at 661; *see* Emily Bariola et al., *The Mental Health Benefits of Relationship Formalisation among Lesbians and Gay Men in Same-Sex Relationships*, 39(6) Australian & N.Z. J. Pub. Health 530 (2015) (showing that "relationship formalisation appears to be an important protective factor for mental health among gay men and lesbians" and arguing that the findings of the study show "that affording same-sex couples the opportunity to formalise their relationship is not only a civil rights issue but also a public health issue"); *see also* Ben Kail et al., *State-Level Marriage Equality and the Health of Same-Sex Couples*, 105 Am. J. Pub. Health 1101 (2015) (an empirical study that found "relative to states with antigay constitutional amendments, that same-sex couples living in states with legally sanctioned marriage reported higher levels of self-assessed health"); Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, JAMA Pediatrics, (Feb. 20, 2017), http://jamanetwork.com/learning/audio-player/14092806 (an empirical study of adolescent suicide attempts in forty-seven states in the United States prior to *Obergefell v Hodges* which concluded that, amongst adolescents who are members of sexual minorities, there was a statistically significant reduction in suicide attempts in states where same-sex marriage was legal) [https://perma.cc/AT3M-7L77].

400. Gerber et al., *supra* note 12, at 664–66.

person a "victim" for the purposes of the individual communication procedure under the Optional Protocol.[401] The consequences of the law drawing such distinctions between same-sex and opposite-sex couples cannot be ignored, particularly when the Royal College of Psychiatrists in the United Kingdom has pointed to health disadvantages stemming from such discrimination. In a submission to the U.K. government, the organization noted:

> LGB [Lesbian, Gay and Bisexual] persons make up a population that suffers from worse health (in particular mental health and substance dependence) than heterosexual people. To withhold marriage equality is to treat this minority differently on the basis of their sexual orientation. This discrimination contributes to the minority stress experienced by LGB persons, an important factor in their health disadvantage.[402]

In summary, and to apply the words of the general rule of treaty interpretation, an interpretation of Article 23(2) that encompasses same-sex marriage is enlightened by the object and purpose of the ICCPR, whereas an interpretation that fails to recognize a right to same-sex marriage militates *against* that object and purpose.

Conclusion

Many would say that the struggle for legal recognition for same-sex marriage is at best misguided, because the institution of marriage is irredeemably oppressive.[403] The politics of marriage make it difficult to make simplistic assertions about marriage being a social or individual good, as part of the case for same-sex marriage. Nevertheless, legal rights to same-sex marriage have been, and continue to be claimed, and these claims necessitate a legal response—"what is in issue is not the decision to be taken, but that choice is

401. Communication No. 488/1992, Toonen v. Australia, Hum. Rts. Committee, ¶ 5.1, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994). There, the HRC found that, even in the absence of prosecution and enforcement, "the continued existence" of laws criminalizing homosexual acts in the Australian state of Tasmania had a "pervasive impact . . . on . . . public opinion" which "affected [the author] personally" such as to deem a person a victim under the Optional Protocol. *Id.* In his submissions, the author referred to the "constant stress and suspicion" created by the laws, and the "profound and harmful impacts on many people in Tasmania, including himself . . . fuel[ing] discrimination and harassment of, and violence against, the homosexual community of Tasmania." *Id.* at ¶ 2.5–2.7. He also argued that "the existence of the law has adverse social and psychological impacts on himself and on others and in his situation." *Id.* at ¶ 7.8; *see also* Paladini, *supra* note 8, at 541 n.38.

402. John Eekelar, *Perceptions of Equality: The Road to Same-Sex Marriage in England and Wales*, 28 Int'l J. L., Pol'y & Fam. 1, 10 (2014); *see Layland v Ontario* (1993) 14 O.R. 3d 658, [13].

403. *See* Chesire Calhoun, Feminism, the Family and the Politics of the Closet 107–60 (Oxford Univ. Press, 2000).

available."[404] It is increasingly likely that in the next few years, one or more same-sex couples, who are in a position to submit a communication to the HRC as individuals subject to the jurisdiction of the large and growing number of states parties who have ratified or accessioned the ICCPR's First Optional Protocol,[405] will urge the HRC to interpret the ICCPR as recognizing a right of same-sex couples to marry.[406]

This Article has deliberately focused on the interpretation of the right to marry under Article 23(2). An argument that fails to argue for a reinterpretation of Article 23(2) itself, and focuses on the nondiscrimination provisions of the ICCPR alone, or that is grounded on the right to privacy,[407] reinforces, rather than tackles, a heteronormative interpretation of a key ICCPR article that can no longer be justified under international law. Consequently, such an argument also lacks the internal coherence which justifies "the authority we want to claim for human rights law in order to deploy it effectively as a tool for progressive social change."[408]

It has been assumed, in much of the recent literature on the ICCPR and same-sex marriage, that it is not possible to interpret the ICCPR such that it provides same-sex couples with a right to marry in a manner which is consistent with the intentions of its framers. Consequently, the question as to whether the ICCPR does, or should, encompass a right to same-sex marriage has been characterized as a "choice"[409] between two alternative methodologies—or perhaps, more accurately, two alternative sets of methodologies—of legal interpretation. On the one hand, an "originalist" (or "textual"[410] or "literal"[411]) interpretation of the ICCPR, which is grounded in the intentions of the framers, "crystallizes the meaning" of Article 23 and precludes any recognition of a right to same-sex marriage. Whereas on the other hand, the adoption of a nonoriginalist methodology (and various alternative approaches

404. *Minister for Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 46–47 ¶ 72 (S. Afr.).

405. *See* First Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 5, art. 1.

406. *See* Paladini, *supra* note 8, at 533, 536.

407. *Id.* at 555–56.

408. Zanghellini, *supra* note 12, at 144, 146, 150.

409. Paladini, *supra* note 8, at 533, 546, 555.

410. *Id.* at 533, 545–46, 555.

411. *Id.* at 533, 545, 554; *see* Schalk v. Austria, 2010-IV Eur. Ct. H.R. 444 (Malinverni & Kolver, JJ., concurring).

that have been labelled "teleological,"[412] "less literal,"[413] "extensive,"[414] and "broader"[415]) which treats the ICCPR as a "living instrument"[416] may lead to an interpretation which recognizes such a right.[417] This Article does not accept that common assumption and avoids the characterization of a choice of methodologies. Instead, it has sought to present an internally coherent argument for the reinterpretation of Article 23(2) so that it encompasses same-sex marriage through an application of the interpretative principles codified in the Vienna Convention and established in international law. Accordingly, an interpretation of Article 23(2) that encompasses same-sex marriage is justified by reference to the common intentions of its framers, insofar as those intentions can be established by applying Article 31 of the Vienna Convention.

Although "[i]nternational law is still in a transitional phase . . . of discarding its traditional heteronormative character,"[418] the contemporary ordinary meaning of the expression "the right of men and women to marry" is broad enough to permit the contemporary interpreter to select a meaning which encompasses same-sex marriage, and the nondiscrimination textual context of the ICCPR and the object and purpose of the ICCPR demand such an interpretation. If the HRC does not reinterpret the right to marry in Article 23(2) accordingly, it risks increasing isolation from global trends in legislative reform and jurisprudence.

412. Paladini, *supra* note 8, at 533, 546; Communication No. 1361/2005, X v. Colombia, Hum. Rts. Committee, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007).

413. Paladini, *supra* note 8, at 555.

414. *Id.*

415. *Id.* at 545.

416. Communication No. 829/1998, Rodger Judge v. Canada, Hum. Rts. Committee, ¶ 10.3, 78th session, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 13, 2003); Paladini, *supra* note 8, at 533, 545.

417. *See* Gallo et al., *Same-Sex Couples*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 3, 10 ("[M]ore and more same-sex couples are going to court to claim that their rights are not protected. In response to these issues, the courts of some jurisdictions have been progressive, dynamic, activist and even creative in their interpretation of the law, while others have been conservative, static, literal and *originalist*.").

418. Zanghellini, *supra* note 12, at 146.

Appendix: Legalization of Same-Sex Marriage Internationally

Year	Country	Mechanism	Details
2000	Netherlands	Act of Parliament	Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex, Stb. 2001, 9.
2003	Belgium	Act of Parliament	Loi owrant le marriage à des personnes de même sexe
2005	Spain	Act of Parliament upheld by Constitutional Court ruling in 2012	Ley 13 of 1 July 2005; Tribunal Constitutional de España, decision no. 198/2012, 6 November 2012
2005	Canada	Act of Parliament following opinion from the Supreme Court about the proposed legislation's consistency with the Charter	Civil Marriage Act, S.C. 2005, c. 33; Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).
2006	South Africa	Constitutional Court decision, responded to by the introduction of Civil Union laws, but no amendment of marriage laws	*Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.); Civil Union Act 17 of 2006 (S. Afr.) (no amendment to Marriage Act 1961 or Recognition of Customary Marriages Act 1998)
2009	Norway	Act of Parliament	*Lov Nr 53*, 2008
2009	Sweden	Act of Parliament	Marriage Code Amendment Act 2009
2010	Portugal	Act of Parliament following opinion from the Constitutional Court as to the draft law's constitutionality	Lei no 9-2010 Judgment 121/2010, *Case 192/2010*
2010	Iceland	Act of Parliament	One Marriage Act 2010
2010	Argentina	Act of Parliament	Law No. 26618, July 21, 2010 (Arg.).
2012	Denmark	Act of Parliament	Lov nr. 532 af 12 June 2012 Gældende
2013	Brazil	Ruling by the National Justice Council	CNJ, Decision No. 174, 14 May 2013[419]
2013	France	Act of Parliament	LOI no. 2013-404 du 17 mai 2013 ouvrant le marriage aux couples de personnes de même sexe [Law No. 2013-404 of May 17, 2013 on Opening Marriage to Same-Sex Couples], Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 18, 2013, p. 8253.

419. Jose Miguel Cabrales Lucio, *Same-Sex Couples Before the Courts in Mexico, Central and South America*, *in* Same-Sex Couples Before National, Supranational and International Jurisdictions, *supra* note 8, at 117.

2013	Uruguay	Act of Parliament[420]	Ley Nş 18.246 Unión Concubinaria
2013	New Zealand	Act of Parliament	Marriage (Definition of Marriage) Amendment Act 2013, s 2 (N.Z.).
2014	England and Wales	Act of Parliament	Marriage (Same Sex Couples) Act 2013, c. 30 (Eng.).
2014	Scotland	Act of Parliament	Marriage and Civil Partnership Act 2014
2014	Luxembourg	Act of Parliament	Loi du 4 juillet 2014 portant de réforme du mariage [Law of July 4, 2014 on the Reform of Marriage]
2015	Finland	Act of Parliament that comes into effect in March 2017, in response to a citizen's initiative[421]	Laki avioliittolain muuttamisesta (156/2015)
2015	Ireland	Constitutional amendment by referendum[422]	Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015.
2015	United States	Decision by the Supreme Court of the United States	*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
2016	Colombia	Decision of the Constitutional Court of Colombia	*Celebración de Marrimonio Civil Entre Parejas del Mismo Sexo en Colombia. Sentencia de Unification* (Comunicado No 17, 28 April 2016).
2017	Germany	Bill before Parliament as at 30 June 2017[423]	*Gesetzentwurf des Bundesrates 'zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts'*

420. *Id.* at 121.

421. Raffy Ermac, *Finland's Citizens Successfully Rally to Enact Marriage Equality*, Advocate (Feb. 24, 2015, 3:50 PM), http://www.advocate.com/politics/2015/02/24/finlands-citizens-successfully-rally-enact-marriage-equality [https://perma.cc/X8TH-HFC5].

422. *More than a million vote for gay marriage; Archbishop Says Church Needs Reality Check*, Irish Examiner (May 24, 2014, 10:36 AM), http://www.irishexaminer.com/breakingnews/ireland/more-than-a-million-vote-for-gay-marriage-archbishop-says-church-needs-reality-check-678522.html [https://perma.cc/VCJ8-GXGA].

423. The Bill has been passed by the Bundestag but has to be passed by the Bundesrat and subsequently signed by the Bundespraesident before coming into force.