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Pursuing Marriage Equality in Four Democracies: Canada, the United States, Belgium, and Spain

Susan Gluck Mezey [α] & David Paternotte [σ]

Abstract - Viewing litigation as an effective weapon in minority group politics, gay and lesbian rights activists in Canada and the United States turned to the judicial arena, seeking the courts' affirmation of their fundamental right to marry. In contrast, Belgian and Spanish activists refrained from constitutional litigation, choosing instead to pursue marriage equality by appealing to national legislative and executive institutions, and developing insider strategies within the political parties. This paper explores the asymmetry between the four countries: it highlights the key differences and similarities among them and offers preliminary explanations for the disparities in strategies for marriage equality. It concludes that the strategies developed by same-sex marriage advocates in these four cases reflected their countries' legal and political environment as well as their historical approach to social reform.

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I. Introduction

This paper explores rights politics in the struggle for marriage equality in Canada, the United States, Belgium, and Spain. It contrasts the litigation mounted by same-sex marriage advocates in the United States and Canada with the path followed by their counterparts in Belgium and Spain. Focusing on these countries, the paper examines the role of litigation and legislation in the battle for same-sex marriage in these four democratic political systems.

In democratic countries, marginalized groups often challenge the status quo by appealing to principles of constitutional equality. In the United States and Canada (both countries with a common law tradition), gay and lesbian rights advocates turned to the courts, using litigation as their primary vehicle to seek equality. In Belgium and Spain (both civil law countries), gay and lesbian rights activists principally relied on political action in the legislative and executive arenas. The purpose of this study is to examine the struggle over marriage equality in these four countries. It highlights key differences and similarities among them and offers preliminary explanations for the disparities in strategies for marriage equality. It concludes that the strategies developed by gay marriage advocates in these four countries reflected their countries' legal and political environment as well as their historical approach to social reform.

The first part of the study demonstrates the significance of litigation in bringing about marriage equality in Canada and United States. Although the subnational governments in these two countries have varying authority over marriage (states having more control over marriage policy than Canadian provinces), both Canadian and U.S. litigants challenged marriage restrictions in the subnational courts. An important difference between them, however, is that the Canadian litigants primarily appealed to the rights and protections of the federal charter, while same-sex marriage advocates in the United States chiefly cited norms of equal rights and justice in state constitutions. In both cases, the litigants asked the courts to exercise their authority to adjudicate constitutional values by striking policies that restricted same-sex marriage. The Canadian litigants ultimately proved more successful in changing the national landscape, with Parliament ultimately legislating the right of same-sex couples to marry as a result of the litigation. In the United States, thus far, the litigation successes have mostly been limited to the geographic boundaries of the state. These limitations, however, do not diminish the importance of constitutional litigation as a catalyst to marriage equality in the United States as well (see Davies 2008; Smith 2008; Mezey 2009) as in Canada.

In discussing the pertinent gay rights litigation in each country, this section examines the legal arguments offered by the pro- and anti-gay rights advocates as well as the courts' approaches to their judicial policymaking roles. The rulings show that as common law courts, the judges were cognizant of their duty to defer to legislative authority in social policymaking, yet at the same time, recognized their obligation to apply constitutional principles in adjudicating claims of equal rights.

The second section, focusing on Belgium and Spain, demonstrates that gay and lesbian activists achieved their goal of marriage equality through traditional political means of legislative and executive policymaking, with same-sex marriage laws enacted in 2003 and 2005 respectively (Paternotte 2011). Although

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gay rights cases have been adjudicated in the European Court of Human Rights, none of these litigation efforts affected marriage equality in these two countries. Litigation was eschewed by same-sex marriage activists, who believed it an unsuitable vehicle for reform.[1]

Last, the third section offers possible explanations for the disparate strategies adopted in these countries. Until now, the literature on legal mobilisation has been largely dominated by North American scholars, who typically restrict their analyses of same-sex marriage advocacy to discussions of litigation campaigns, primarily in the United States and Canada (see Smith 2008 and Mezey 2009). Moreover, such scholars point to the existence of written constitutions in each nation as one of the most important explanatory factors in the decision to pursue litigation. Paradoxically, as sociologists Bernstein and Naples (2010) indicate, same-sex marriage activists in Australia have not sought the help of the courts in their quest for equality. Bernstein and Naples believe that the absence of protection for individual rights in the country's Constitution requires social movements to explore alternative strategies. Thus, their study underscores the importance of viewing the struggle for same-sex marriage beyond the narrow prism of litigation activity and examining the strategies for gay rights advocacy in a broader context.

Moreover, as the experiences of the European countries in our study illustrate, litigation is not the only effective approach to pursue rights struggles. In contrasting the events in Belgium and Spain to those in the United States and Canada, our analysis shows that social reform measures can be achieved by utilising traditional political processes, including coalition formation and party politics. We thus argue that to understand the complexity of marriage equality strategies, scholars must broaden their inquiry to marriage equality strategy beyond the North American continent, and perhaps even more important, not restrict themselves to litigation only. Our study, which relies on the authors' extensive research on those countries, is intended as laying down a marker for achieving that goal.

II. Marriage Equality in Canada and the United States

In the United States and Canada, national and subnational governments share authority over marriage policy. In Canada, primary jurisdiction over marriage resides in the federal government, with the provinces charged with regulating solemnization ceremonies. In the United States, the locus of power is in the states, with the federal government largely relying on state regulation of marriage. The Canadian lesbian and gay rights litigants appealed to equality principles in the 1982 Canadian Charter of Rights and Freedoms, while lesbian and gay rights advocates in the United States primarily relied on their state constitutions, filing their claims in the state courts, and thereby removing them from the jurisdiction of the United States Supreme Court.[2]

a) Legalising same-sex marriage in Canada

With the ratification of the Charter and the equal rights guarantee in section 15, Canadian lesbian and gay rights activists embarked on a strategy of constitutional litigation, seeking judicial support for their claims of equality. Although the Charter does not specify sexual orientation as a protected classification, the courts extended section 15, which prohibits discrimination in a wide range of categories, including race, sex, national or ethnic origin, age, religion, and mental or physical disability to analogous classifications, such as sexual orientation. In determining whether a group is considered analogous to one of the specified groups in the Charter and belongs within the ambit of section 15, the courts asked whether the group "suffers historical disadvantage"; whether it is "a discrete and insular minority"; and whether it is being judged on the basis of "personal and immutable characteristics."[3]

Lesbian and gay rights activists won a partial victory when, in *Egan v. Canada* (1995), the Canadian Supreme Court unanimously agreed that sexual orientation was an innate and immutable characteristic, analogous to the categories specified in section 15. However, the Court agreed with the government that the plaintiff was not entitled to benefits under the national Old Age Security Act because the Act was intended to supplement the income of married couples. Moreover, the Court added, the law reflected Parliament's reasonable belief that heterosexual marriage reflected the social and biological realities of procreation and childcare. The majority stressed that the law did not discriminate on the basis of sexual orientation because all unmarried couples were barred from receiving income under it. Thus, *Egan* established that sexual orientation was protected by section 15, but the Court allowed the government to withhold public welfare benefits from same-sex couples.

Several years later, in *Vriend v. Alberta* (1998), the Court considered a plaintiff's appeal of the Alberta Human Rights Commission's ruling. The commission rejected his claim of discrimination against a private religious college in Edmonton, had dismissed him for refusing to comply with its policy against homosexual practices. The commission stated that the provincial

[1] See, for example, Wintemute 2011; Cichowski 2007; Hodson 2011 for discussions of such international legal forums.

[2] State court rulings based on state constitutional provisions are not subject to United States Supreme Court review.

[3] Although some of the terms differ, these principles are used by U.S. courts to determine the constitutionality of a challenged law.

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human rights act did not include sexual orientation as a protected category (see Bavis 1999).

The Supreme Court held that the law violated section 15 by treating gays and lesbians differently from other groups, and more important, despite allowing complaints from both heterosexuals and gays, it only subjected gays to discrimination on the basis of sexual orientation.

The major breakthrough for gay rights litigants in the Canadian high court came in *M. v. H.* (1999), a case that involved the dissolution of a gay couple's relationship. The couple had lived together for ten years and when the relationship, soured, one moved out and requested spousal support, despite section 29 of the Ontario Family Law Act (FLA) that limited such benefits to different-sex couples only.

The Supreme Court held that the FLA violated section 15 by differentiating against same-sex couples on the basis of their sexual orientation. It rejected the province's argument that the law could restrict support to different-sex couples because it was intended to protect women, who were typically the dependent partner in a marital relationship. The Court, however, pointed out that the law did not distinguish between males and females, but simply provided support for an economically-deprived "spouse." It concluded that the FLA unconstitutionally infringed on the rights of same-sex couples in longstanding relationships.

Provincial authority over marriage in Canada is largely limited to laws licensing marriages so when same-sex couples sought marriage licenses, it was the provincial agents who refused to grant them. Thus, advocates for marriage equality took their cases to the provincial courts, seeking a judicial declaration that the prohibitions on same-sex marriage violated the Charter.

In *EGALE v. Canada* (2001), the first direct challenge to a provincial ban on same-sex marriage, a British Columbia trial court, pointed out that many provincial laws equalised treatment of same-sex and different-sex couples (known as parallelism), and upheld the common law restriction on marriage to different-sex partners.[4] And although it recognised that courts had authority to revise common law, it stressed the importance of judicial deference to the legislature and emphasised that the judiciary must limit itself to incremental changes when making such revisions. Although the plaintiffs argued that same-sex marriage would only be an incremental step, the court disagreed, ruling that they sought to alter a fundamental societal arrangement and the remedy they sought was beyond the proper scope of judicial relief. Such a change, it insisted, must emanate from the legislature, not the judiciary.

Shortly thereafter, Ontario gay rights advocates challenged the common law definition, restricting marriage to a man and a woman.[5] In *Halpern v. Canada* (2002), the court rejected the province's argument that the only difference between different-sex and same-sex couples was the word "marriage," it held that the common law definition of marriage violated section 15.[6] The court, however, its ruling for two years to allow legislatures to redefine the common law definition of marriage by substituting the words "two persons" for "one man and one woman."

Within a year after the Ontario lower court decided *Halpern*, the British Columbia Court of Appeal reversed the lower court decision in *EGALE v. Canada* (2003a). Citing *M. v. H.*, and *Halpern*, the appeals court held that barring same-sex marriage was unconstitutional under section 15. Following the *Halpern* court's lead, it also stayed its ruling to allow the federal and provincial governments to revise the common law definition of marriage.[7]

Shortly after the British Columbia Court of Appeal ruling, the Ontario Court of Appeal announced *Halpern v. Canada* (2003).[8] It held that preventing same-sex couples from marrying "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships [and] in doing so, it offends the dignity of persons in same-sex relationships" (*Halpern* 2003:para. 107).

The court rejected the government's argument that the law is justified because marriage has traditionally consisted of a relationship between two heterosexual people, a relationship that encourages the birth and well-being of children. It declared itself unable to understand how preserving marriage as a heterosexual institution furthers the state's interests in procreation and childrearing for heterosexual couples would continue to have children if same-sex marriages were permitted and, in any event, same-sex couples are increasingly having and caring for children. The court noted that the plaintiffs were not seeking to abolish the institution, but rather "were merely seeking access to it" (*Halpern* 2003: para. 129). The court saw no reason to suspend relief and ordered the province to issue marriage licenses to same-sex couples at once.

[4] The British Columbia lower court handed down its decision on October 2, 2001.

[5] The common law definition of marriage defined spouses as a man and a woman.

[6] The Ontario lower court issued its ruling in *Halpern* on July 12, 2002, but stayed its ruling for two years. On September 6, 2002, the Quebec lower court ruled in *Hendricks v. Quebec* (2002) that federal and provincial laws limiting marriage to different-sex couples were unconstitutional under section 15; as in *Halpern,* the court stayed the ruling for two years. On January 26, 2004, the plaintiffs appealed the court's stay of relief and, on March 19, 2004, in *Hendricks v. Quebec* (2004), the Quebec Court of Appeal ordered the immediate lifting of the ban on same-sex marriage within the province.

[7] The British Columbia Court of Appeal handed down its decision on May 1, 2003 and stayed relief until July 12, 2004.

[8] The Ontario Court of Appeal issued its ruling in *Halpern* on June 10, 2003.

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A month after the *Halpern* ruling, the Court of Appeal for British Columbia issued a supplementary decision in *EGALE v. Canada* (2003b), ordering the revised definition of marriage as "the lawful union of two persons to the exclusion of all others" to take effect immediately.[9]

By June 2005, as a result of litigation, eight provinces and one territory recognized same-sex marriage, their decisions following the rulings in Quebec, British Columbia, and Ontario (Smith 2008: 156-157). Seeking to eliminate provincial variations in marriage policy, the federal government did not appeal these rulings to the Supreme Court. Soon after, Parliament enacted the Civil Marriage Act (C-33), modifying the common law definition of civil marriage to proclaim marriage as "the lawful union of two persons to the exclusion of all others." Thus within a span of a few years, gay organizations changed the landscape of gay rights in Canada through their legal activism; their litigation prompted the legislature to enact federal marriage equality legislation.

b) Legalising marriage equality in the United States

In contrast to the rapidity with which marriage equality was adopted in Canada, progress in the United States has been much slower and the outcome for same-sex marriage advocates has been far less satisfactory. Unlike in Canada, the United States federal government operates at the margins of marriage policy with definitions of marriage determined at the state level. Aside from a broad declaration that the right to marry is fundamental, the United States Supreme Court had not considered the constitutionality of restrictions on same-sex marriage until 2013. Although the high court declared the challenged law unconstitutional, its ruling did not address the legality of same-sex marriage bans in the states. Thus, the struggle for marriage equality in the United States will largely depend on the efforts of the gay and lesbian activists who must continue to pursue their claims of marriage equality at the state level.

With a tradition in the United States of social reform movements with little political power seeking judicial intervention to offset their inability to exercise political clout at the ballot box, it was almost a foregone conclusion that gay rights advocates would turn to the judiciary to vindicate their rights through litigation (see Schein gold 2004; McCann 2004; Mezey 2007). Like women and racial minorities, lesbians and gays believe the courts a more likely arena in which to challenge inequality than representative bodies (see Keck 2009; Pinello 2003).

The modern struggle over same-sex marriage in the United States began in Hawaii with an apparent victory by gay rights activists in the Hawaii Supreme Court in *Baehr v. Lewin* (1993). Seeking to insulate themselves from similar threats, state legislatures in over half the states banned same-sex marriage through constitutional amendments or statutory provisions or, in some cases, both, requiring marriage equality activists to litigate restrictions on marriage on a state-by-state basis.

The difficulty of persuading the courts that laws based on sexual orientation violate constitutional equality is that, unlike laws based on race, ethnicity, or gender, the courts have been reluctant to accept the fact that gays have a history of discrimination against them, that they possesses immutable and innate characteristics, and that they lack the power to influence representative institutions. Thus most courts uphold classifications based on sexual orientation if they believe they have a legitimate goal and the classification of sexual orientation is reasonably related to that goal.[10]

Thus far, the United States Supreme Court has adjudicated six gay rights cases, with three successful outcomes for the gay community. In *Romer v. Evans* (1996), the first United States Supreme Court ruling decided on equal protection grounds, the Court struck a Colorado constitutional amendment on the grounds that it violated equal protection by unreasonably singling out gays to deprive them of rights accorded to others in society and, moreover, was motivated by animus toward them.

In *Lawrence v. Texas* (2003), the Court struck a Texas sodomy law, aimed at same-sex couples. Basing its opinion on the right to privacy, it held that the law unconstitutionally interfered with a basic and deeply-rooted right to engage in private human relationships. The majority was careful to note, however, that its opinion should not be interpreted as a precursor of approving same-sex marriage.

In *United States v. Windsor* (2013), the Court struck the most important provision of the 1996 federal Defense of Marriage Act, the law that restricted federal benefits to heterosexual couples only. The high court found the law unconstitutional because it deprived legally married same-sex couples of their rights protected by the Fifth Amendment of the U.S. Constitution.

Same-sex marriage activists realized their first state court victory in *Goodridge v. Department of Public Health* (2003), in which the Massachusetts Supreme Judicial Council declared that depriving same-sex couples of the right to marry in Massachusetts violated the state constitution's guarantee of equality. Basing its

[9] On July 8, 2003, the British Columbia Court of Appeal's supplementary opinion lifted the stay and gave immediate effect to its May 1, 2003 ruling.

[10] In classifications involving race and ethnicity (known as "suspect classifications"), the courts use strict scrutiny and require the government to demonstrate a compelling reason for the law and show that the classification is necessarily related to it. In cases involving gender (known as a "semi-suspect" classification), the courts apply heightened scrutiny and the government must show it has an important reason for the law and that the means (that is, the classification) is substantially related to it.

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ruling on the state constitution, the court rejected the state's argument that its interests in procreation and child welfare justified the ban on same-sex marriage. Concerned that it was violating its duty to defer to the legislature, the court stated that it was bound to adjudicate constitutional challenges such as these.

Beginning in 2008, same-sex marriage litigants scored victories in the Connecticut, Iowa, and California courts.[11] Although activists succeeded in attaining marriage equality through state legislatures, the litigation energised them to attack restrictions on same-sex marriage in other states, much the same way that *Brown v. Board of Education* (1954) helped spark civil rights movement activities a few decades earlier. And by the end of 2012, marriage equality extended to Vermont, New Hampshire, Maine, New York, Washington, Washington, D.C., and Maryland through legislative actions.[12]

In *Kerrigan v. Commissioner of Public Health* (2008), Connecticut same-sex marriage advocates argued that barring their marriage deprived them of equal protection under the state constitution. The state contended that the state civil union law (enacted in 2005) had granted same-sex couples equality and that the law did not discriminate on the basis of sexual orientation because it allowed both heterosexuals and gays to marry persons of the opposite sex.

The state supreme court ruled there was a constitutional distinction between civil unions and marriages and, given the backdrop of historical discrimination against gays, merely granting same-sex couples legal equality with different-sex couples was insufficient to overcome the state's constitutional mandate not to discriminate. Finally, the court said it saw no reason to refrain from injecting itself into this public policy debate and defer to the legislature's authority to define marriage. With society's antipathy toward gays so extreme and enduring, it believed that judicial intervention was necessary because gays would be unlikely to be able to attack the discrimination effectively through the legislative process.

The most interesting set of events took place in California. Although the state had a far-reaching domestic partnership law, litigants challenges the restrictions on marriage. Both sides agreed that the fundamental question in the litigation was whether the state may deny same-sex couples the right to marry. Marriage equality advocates contended that it was discriminatory to limit marriage to different-sex couples; opponents argued that allowing same-sex couples to marry would threaten the institution of marriage.

The state supreme court found none of the state's arguments constitutionally sufficient (I*n re Marriage Cases* (2008). Because the law affected a powerless group with a history of discrimination against it, the court scrutinised it more carefully (that is, subjected it to a heightened form of scrutiny) and found that the state lacked justification for it. The court reached this conclusion by reasoning that allowing same-sex couples to marry will not alter the institution of marriage. Moreover, by excluding same-sex couples from the privilege of marriage, the state was sending a message that such couples are disfavored. It ruled that the right to marry must be accorded to all Californians regardless of their sexual orientation and struck the restrictions on marriage between same-sex partners.[13]

In the Iowa case, *Varnum v. Brien* (2009), decided under the equal protection guarantee of the Iowa Constitution, the court found that, apart from their sexual orientation, the same-sex couples were in committed, loving relationships - many raising children - and just like different-sex couples, would benefit from society's recognition of their marital status.

Rejecting the state's argument that the law did not discriminate on the basis of sexual orientation, the court ruled that by denying the right to marry a person of the same sex, it defined the plaintiffs by their sexual orientation. It acknowledged its obligation to defer to the legislative judgment, but it concluded that deference was inappropriate because gays required protection from the operation of majority rule. The court held that the state's primary justifications for the law - maintaining the integrity of traditional marriage, creating an optimal child-rearing environment, and promoting procreation - failed because excluding same-sex couples from civil marriage did not substantially advance these objectives. It unanimously held that restricting marriage to different-sex couples was unconstitutional and ordered the state to allow gays and lesbians to marry.

III. Marriage Equality in Spain and Belgium

The campaigns for same-sex marriage in Belgium and Spain present a different picture. Initially, activists had sought to establish civil partnerships for both same-sex and different-sex couples. Same-sex marriage emerged as an alternative in 1996 as Flemish and Catalan gay and lesbian groups officially endorsed it and were rapidly joined by the rest of the movement in both countries. Same-sex couples eventually succeeded in securing marriage equality in Belgium in 2003 and in

[11] The New Jersey court also ruled in favour of marriage equality, but allowed the legislature to create civil unions instead of marriage.

[12] The path toward legalising same-sex marriage through the legislative arena has not been smooth. In Maine, opponents were able to annul the law through a statewide referendum; since then it has been restored. More recently, opponents also attempted to reverse the laws in Washington and Maryland by appealing to anti-gay sentiments among the electorate. And within days after the New Jersey legislature approved marriage equality, the governor vetoed it.

[13] Although the California Supreme Court's ruling on marriage equality was reversed by the ballot initiative known as Proposition 8, two lower federal courts subsequently found Proposition 8 unconstitutional; their rulings are now on appeal in the United States Supreme Court.

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Spain in 2005 (Borghs and Eeckhout 2009; Paternotte 2011; Platero 2007).

The earliest campaigns for marriage equality were linked to the AIDS crisis, which erupted in these two countries in the mid-1980s. Indeed, it quickly appeared that the lack of legal status for same-sex couples was reinforcing the exclusions provoked by the disease. As a result, in the early 1990s, activists and lawyers sought to resolve these problems through legal means. At the time, they believed marriage was not a realistic option and would have encountered even more resistance; moreover, some activists also opposed marriage on ideological grounds. Both in Belgium and in Spain, these efforts led to the adoption of civil partnerships open to both same-sex and different-sex couples at both national and regional levels.

Marriage was nonetheless not out of their consideration and it actually served as a legal model to carve an alternative status for same-sex couples. In addition, once civil partnerships had been advocated using the equal rights discourse, it did not take long before activists started to think about demanding marriage itself. In both countries, activists' claims began to change in 1996, and marriage became their priority. At the same time, they kept asking for a satisfactory partnership law for all couples, whatever their sexual orientation, who did not wish to marry. Discursively, this dramatic change is explained by the predominance of the equal rights logic, which was no longer subordinated to political realism or ideological concerns. Moreover, some activists believed that, strategically, they would attain a better partnership law if they asked for more radical policies such as marriage equality.

Lesbian Gay Bisexual, Transgender (LGBT) organizations, mostly the Flemish Federatie Werkgroepen Homoseksualiteit (FWH)/Holebifederatie in Belgium and the Spanish Federación Española de Gais, Lesbianas, Bisexuales y Transexuales (FELGTB), began to lobby the political parties. Apart from gay pride marches, which were massive in Madrid, these groups did not demonstrate in favour of marriage equality; instead they sought to go around the customary channels to their political allies. This proved to be a fruitful tactic as their allies promised they would legalise same-sex marriage after they won the general election. And indeed after they succeeded in doing so - in Belgium in 1999 and Spain in 2004 - same-sex marriage came about soon thereafter.

a) The absence of litigation strategies in Belgium and Spain

As in Canada and the United States, Belgian and Spanish activists often relied on constitutional principles. Indeed, their claim for same-sex marriage was profoundly moulded by a legal conception of equality that argued that similarly-situated people must be treated the same. They contended that civil marriage must be as available to same-sex couples as to different-sex couples because there was no essential difference between the two groups: "What is good for heterosexuals is also good for homosexuals and the latter should therefore have access to it" (Groeseneken 1993: 10). Equality was consequently defined as the absence of discrimination.[14] As a Flemish activist critically put it in 1997, "marriage is a privilege reserved for heterosexuals."[15] The Spanish gay federation similarly claimed in 2002 that "marriage means nothing less than full legal equality, without which it is impossible to imagine a horizon free of discrimination" (Federación Estatal de Gays y Lesbianas). [16]

This definition of equality is also one of the fundamental constitutional principles in Belgium and Spain, and appears in many international and European treaties. Consequently, references to national constitutions and international agreements were manifold. Through direct reference to constitutional values, activists argued that same-sex marriage did not constitute a new right but merely extended an existing one to those who had been excluded from its enjoyment. Additionally, by framing their claim as the elimination of discrimination, they attempted to broaden their support among the population and gain greater legitimacy for their demands.

Claims of constitutional rights resonated even more in Spain, where the 1978 Constitution is widely seen as guaranteeing the democratic order after the end of the Franco dictatorial regime. By invoking the Constitution, gay and lesbian activists coordinated their demands within the basic framework of the emerging Spanish democracy. Same-sex marriage was presented as a necessary step to improve the quality of democracy and a way to make amends for the persecution of gays during the dictatorship (Calvo 2011).

As we see, constitutional values also played a central part in Belgium and Spain, and discourses in favour of equal marriage do not differ much from North America. However, unlike their counterparts in the United States and Canada, activists in Belgium and Spain did not resort to litigation strategies in their struggle to legalise same-sex marriage, in large part,

[14] Two other features of this discourse must be pointed out. First, equality is a concrete expression of freedom of choice. Indeed, same-sex marriage must be seen as a way to allow same-sex couples the opportunity to decide whether they want to marry, just as different-sex couples are able to do. Second, the discourse relies on a specific account of marriage, viewing it as highly historical and therefore open to profound changes. Same-sex marriage advocates argue that civil marriage no longer serves reproductive purposes, but merely consolidates a long-lasting commitment between two adults (Paternotte 2011: chapter 1).

[15] Federatie Werkgroepen Homoseksualiteit, *Persbericht*, Ghent, 24 February 1997.

[16] Federación Estatal de Gays y Lesbianas, "Ponencia política," in *Segundo congreso de la FELG "libertad, igualdad, fraternidad, diversidad,"* Madrid, 2002.

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because they did not believe that courts, either national or European ones, would be favourable arenas in which to pursue their rights. In Belgium, Flemish activists considered engaging in litigation in 1998, but quickly decided against it in favour of more promising lobbying strategy of targeting all democratic parties. [17]

In Spain, the long reign of the Partido Popular (PP), which had long obstructed any progress for gay and lesbian claims, could have led proponents of same-sex marriage to turn to litigation, but that would have been unusual in Spanish politics and, with most judges viewed as conservative, activists did not view them as potential allies. Moreover, because they were able to secure civil partnerships at the regional level (in 1998, Catalonia became the first region to enact a civil union law and was quickly followed by most of the other Spanish regions), they decided to refrain from litigating in their pursuit of marriage equality. The few legal cases around same-sex unions and same-sex families, such as the early Juan Reina and Montserrat Gallart cases (Paternotte 2011: 65-67), were all initiated by citizens willing to defend their rights and were not necessarily supported by lesbian and gay rights organization, or only at a later stage.

This difference is also mirrored by the role of lawyers. Indeed, a few lawyers and legal experts such as Daniel Borrillo, Pedro Zerolo, Michel Pasteel, and Paul Borghs played an important part in the advocacy process in both Belgium and France. However, none initiated mobilisation efforts, nor formed their own groups, such as Lambda Legal in the United States or Equality for Gays and Lesbians Everywhere in Canada, but instead joined existing LGBT organizations (see Bernstein and Naples 2011).

Therefore, their influence mostly appeared apparent in providing legal counsel and in framing the same-sex union claims, which ultimately led to the emergence of the same-sex marriage claims (Paternotte 2012). Some of them, such as Pedro Zerolo in Spain and Michel Pasteel in Belgium, later entered politics and decisively contributed to debates within their political parties and to the adoption of reform legislation. The case of Paul Borghs is even more instructive. He studied law because he was an activist and his group, the most important Flemish LGBT organisation, needed a legal expert. He is now widely regarded as the main legal expert on LGBT issues in Belgium, but does not work as a lawyer.

IV. Making Sense of the Asymmetry

This study shows that, although constitutional values played a significant role in advancing the goals of sexual minorities in all four countries, advocates opted for divergent strategic approaches. Same-sex marriage advocates in Canada and the United States began their attacks on marriage inequality by pursuing a litigation strategy, while advocates of marriage equality in Belgium and Spain sought to legalise same-sex marriage in the legislative arena rather than in the courts. This intriguing asymmetry is poorly explained by the literature, which, largely based on the North American model, typically focuses on the courts as the predominant arena in which to gain new rights. This observation reveals the problems with existing legal mobilisation studies and invites scholars to engage more thoroughly with transatlantic comparisons.

The preference for lobbying and protest over litigation raises important questions about social movements' strategies and distinctive preferences, such as why activists choose different venues to advocate the same rights. Given the underdevelopment of the literature about legal mobilisation and litigation in Europe, we do not attempt here to provide a definitive answer, but rather to offer explanations that should be explored further in future research; such research must go beyond institutional and legal approaches and delve into the culture and history, as well as into specific political opportunities, of the countries in which same-sex marriage activists plan their strategies.

One of the most common assumptions about differences between the United States and Canada and European countries relates to the distinction between their common law and civil law traditions. For the most part, a country's legal tradition is generally characterised as either common law or civil law. The common law tradition arose in the United Kingdom and was transported to its colonies, including the United States and Canada. The European countries traditionally follow a civil law approach to judging, although there are subgroups within the civil law tradition as well as systems bridging the gap between the two, known as hybrid systems (see Kim 2010).

This explanation arises from the observation that courts in civil law countries, such as Belgium and Spain, assume a different posture in adjudication and do not have the same expansive view of public policymaking as courts in common law countries and consequently there is little or no tradition and practice of rights-based litigation (Mécary 2013: 41). Moreover, others, such as Smith (2008), add a neoinstitutionalist argument to this approach that posits that strategies adopted by social and political reform movements are influenced by specific institutional settings such as the existence of constitutional protection of individual rights or conditions under which courts can be seized.

Our study suggests that these explanations do not fully explain the differences between the European and North American experiences (see also Waaldijk 2000). First it is important to note that the actual practices of these two types of legal systems often

[17] Federatie Werkgroepen Homoseksualiteit. Cel Politiek, *Verslag Cel Politiek 16 januari 1998*, Ghent, 1998.

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represent an amalgam of the two traditions. Courts in countries with civil law traditions, those largely in continental Europe, may be generally more restrained in their judicial interpretations of the law because they are bound to a greater extent by existing legislation and regulatory codes (see Friesen 1996 and Hansen 2004). Yet, the rulings show that in adjudicating social policy claims of marriage inequality, the United States and Canadian courts, despite their well-established tradition of judicial review of legislative policymaking, are fully aware of their obligation to defer to the legislative judgment and, when they override legislative policy choices, they are careful to justify their refusal to defer to the legislative bodies. They express concern about judicial overreaching, but stress their compelling interest in ruling on individual rights claims according the principles of equality jurisprudence.

Additionally, the civil law-common law explanation is undermined by the fact that in common law countries, such as Australia, and to a lesser extent Great Britain, the courts have been largely bypassed by gay and lesbian rights activists in their struggle for marriage equality. Finally, although infrequent, lesbian and gay rights have also been advanced through the courts in some civil law countries. Particularly in national contexts where parliamentary reform was blocked because of political hostility, activists engaged in litigation at a national and later at a European level, seeking to gain new rights as well as, often, to attract attention. This has been the case in countries such as Austria, France, Germany or Italy (Beck 2012; Guaiana 2011; Kollman 2009; Paternotte 2013). In sum, our analysis confirms that neither the divide between civil law and common law countries, nor the existence of specific institutional arrangements such as a charter of rights, suffices to explain the patterns we report here.

Our study demonstrates that a combination of cultural, societal, and contextual factors is essential to understand strategic choices of marriage equality advocates. First, litigation is not a common social movement strategy in numerous European countries; activists prefer to change laws through parliamentary processes, lobbying political parties and public officials, and even involving themselves in party politics and forming broad coalitions to support their agenda. This is based in part, as seen in Belgium and Spain, on the facts that courts are perceived as less democratic than legislatures and judicial opinions do not enjoy as much legitimacy as legislation. This view also ensues from another conception of democracy which, following Rousseau, regards the Parliament as the true expression of the people's will. Moreover, judges in these countries, especially in Spain, are considered more conservative and less likely to satisfy LGBT demands (Pichardo Galán 2011).

Therefore, marriage equality activists in these European countries had no reason to put their faith in a judiciary that was not associated with democratic values and had almost no experience with social reform litigation. Indeed, the perceptions in both countries were accurate in that various courts and legal advisory groups attempted to obstruct same-sex marriage. Even when they were not consulted by either the parliament or the government; conservative judges seized the opportunity to issue advisory opinions about the constitutionality of legislative bills. However, their intervention was strongly criticised and they failed to block or even slow the political process.

These events took place in both of our European countries. In Belgium, the Conseil d'État, law section, recommended that the government "abandon" its project on same-sex marriage in November 2001, using unusually harsh language and referring to the fathers of the Civil Code (Conseil d'État 2001). In Spain, two judicial bodies tried to oppose the law; the Consejo de Estado condemned the reform in December 2004 (Consejo de Estado 2004), and the Consejo General del Poder Judicial (CGPJ), the governing body of the judiciary, did the same in January 2005 (Sánchez Amillategui & Rodríguez-Piñero Royo 2006). Some judges, who can celebrate marriages in Spain, also refused to do so once the law was adopted. Indeed, ironically, it was the opponents of marriage equality who resorted to constitutional litigation in an effort to obstruct the law once it had been approved by Parliament.

Second, the absence of litigation in Spain and Belgium also reflects the existence of alternative institutional channels when the federal legislature was not an option. When the main political arenas were closed to activists, the latter found other points of entry, successfully targeting local and regional authorities (Paternotte 2008). As in the United States or in Canada, these are often linked to the institutional architecture of the country, and especially federalism, which allows activists to develop multi-level strategies. However, unlike their North American counterparts, they did not use courts at other levels, but rather negotiated through political venues such as city councils and regional parliaments to increase pressure on the federal level and, in a few cases, to secure limited partnership rights (Paternotte 2008). For instance, in the mid-1990s, several city councils introduced municipal registers for unmarried couples in both countries. Mostly symbolic, these registers nonetheless kept the debate on same-sex unions alive. Later, Flemish activists reached an agreement between ruling Flemish parties (all parties are regional in Belgium) on the principle of equal rights between same-sex and different-sex couples. In Spain, the debate on same-sex unions moved to the regional level because of blockages by the incumbent PP at the national level, and 14 out of 17 regions set up a kind of civil partnership (Platero 2007). The possibility of developing multi-level strategies provided activists with alternative venues without using national courts.

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Furthermore, the choice of political rather judicial venues at substate levels was obviously subjected to institutional constraints (such courts do not exist in Belgium and Spain and marriage belongs to the exclusive competence of the federal level). However, as argued by Paternotte (2008), it mainly mirrors national political cultures and modes of moblisation, as well as the history and organisation of LGBT movements in Belgium and Spain.

Third, we may not overlook that same-sex marriage was approved in Belgium and Spain in a political context in which marriage equality activists enjoyed wide political opportunities in terms of access to political institutions and allies within the political elite. Indeed, Belgian and Spanish activists rapidly found allies in political circles with important victories in decisive general elections; these victories were especially significant as there is strong party discipline in both countries, including on votes related to moral issues. In 1999, Christian Democrats lost power after fifty years in government in Belgium, opening the way to a decade of secular governments. In Spain in 2004, José Luis Rodriguez Zapatero unexpectedly won the general elections after the Madrid bombings, inaugurating eight years of social reform. As shown by Hilson (2002), political opportunities are crucial to understand strategic choices and activists are more likely to opt for the courts, even if litigation does not belong to their national political culture, when they do not enjoy access to the political arena: "a lack of PO may influence the adoption of litigation as a strategy in place of lobbying" (239).

V. Conclusion

This study assessed the path toward marriage equality in four countries, demonstrating that both judicial and legislative strategies were crucial elements in securing rights; the choice of strategies depended to a large extent on the countries' political and social culture, as well as the legal environment. Same-sex marriage advocates in all four countries framed their rhetoric on their countries' constitutional commitment to equality. However, although they shared a common goal of marriage equality, their strategies differed, largely driven by their countries' approaches to social reform policy.

With the courts in the United States and Canada traditionally playing a greater role in battles over rights politics, marriage equality advocates in these two countries succeeded in placing marriage equality on their nations' political agendas through their litigation activity. Although national and subnational legislatures ultimately played significant roles in furthering marriage equality in both countries, litigation was the spark to their success, albeit in the United States, the successes thus far have been limited to the geographic limits of the state.

Unlike the campaigns for marriage equality in Canada and the United States, same-sex marriage activists in Europe did not resort to litigation to achieve their goal as activists in Belgium and Spain were unaccustomed to relying on the judiciary to bring about social reform. The primary locus of marriage equality advocacy in those countries was in the legislative arena, with activists in Belgium and Spain pursuing marriage equality in their democratically-elected representative institutions.

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