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# SAME-SEX SPOUSES LOST IN TRANSLATION? HOW TO INTERPRET “SPOUSE” IN THE E.U. FAMILY MIGRATION DIRECTIVES

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ABSTRACT

*This Article analyzes the word “spouse” in the European Union’s Family Migration Directives in detail, focusing on the treatment of married bi-national same-sex couples. Through these directives, the European Union exercises significant authority over family-based immigration and internal migration, expressly providing immigration rights to the “spouses” of E.U. citizens and legal residents. However, family law, including the familial status of “spouses” is governed by individual E.U. member states. While a growing number of member states authorize same-sex marriage, the majority still do not. The E.U., therefore, must determine how to treat migrating couples who are legal spouses in one member state, but not in another. This issue echoes the choice the U.S. faced in 1996 and again in 2013: should*

*federal law determine spousal status based on the law of the jurisdiction where a marriage was celebrated or where the couple resides, or should it create its own independent federal definition? The two U.S. approaches, a federal definition and a place-of-celebration choice-of-law rule, may help Europeans as they develop their own answer. This Article describes and rigorously applies the European Court of Justice's five methods of directive interpretation (textual, systematic, historical, teleological, and comparative analyses) to the directives, concluding that the best interpretations of the directives result in an autonomous definition of "spouse" that includes same-sex spouses or in a member-state-of-celebration choice-of-law rule. This exercise provides some insight for European courts and scholars about the various paths the European Court of Justice may take to interpret the word "spouse" in the Family Migration Directives. It also provides an introduction to European family-based immigration and an example of the interpretation of directives generally, for judges, attorneys, scholars, and students from outside of the E.U.*

#### INTRODUCTION

In the past two decades, many of the European Union's ("E.U." or "Union") member states have begun to authorize immigration of their own citizens' foreign same-sex partners.<sup>1</sup> Decisions of the Court of Justice of the European Union ("European Court of Justice" or "E.C.J.") make it clear that these countries must provide the same immigration benefits to foreign partners of migrating citizens from other E.U. member states.<sup>2</sup> Yet it is unclear whether member states that generally refuse immigration benefits to unmarried partners must recognize same-sex couples, even if they are lawfully married.

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<sup>1</sup> SCOTT LONG ET AL., *FAMILIES, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW* 152-72 (2006) (describing how nine of the then fifteen E.U. member states granted immigration options to same-sex couples by 2001, followed by Spain in 2005); Robert Wintemute, *Legal Comparison, Conclusions and Recommendations*, in *CONFRONTING HOMOPHOBIA IN EUROPE: SOCIAL AND LEGAL PERSPECTIVES* 265, 269 (Luca Trappolin et al. eds., 2012) (the U.K. has recognized same-sex partners for immigration purposes since 1997); EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS, *PROTECTION AGAINST DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS IN THE EU: COMPARATIVE LEGAL ANALYSIS – 2015 UPDATE* 81–85 (2015), <http://fra.europa.eu/en/publication/2015/lgbt-comparative-legal-update-2015> [hereinafter F.R.A. REPORT] (at least nineteen of the current twenty-eight E.U. member states provide benefits for same-sex spouses and/or partners).

<sup>2</sup> Case C-59/85, *Netherlands v. Reed*, 1986 E.C.R. I-01283, ¶ 30 (requiring member states that grant family reunification to non-married partners of their own nationals to extend reunification to the partners of workers from other E.U. member states).

Two important E.U. directives govern the immigration rights of spouses and partners of E.U. citizens and legal residents: (1) the “Family Reunification Directive,” Directive 2003/86/EC on the right to family reunification, and (2) the “Citizens Directive,” Directive 2004/38/EC on the right of citizens of the union and their family members to move and reside freely within the territory of the member states.<sup>3</sup> These two directives (collectively, “Family Migration Directives”) appear to further the rights of same-sex foreign spouses by expressly providing a right of entry and residence to the “spouses” of eligible E.U. citizens in all E.U. member states and to the “spouses” of legal residents in most member states.<sup>4</sup> Yet the term “spouse” here is less clear than it initially appears.

In the E.U., family law is primarily governed by member states, and the states’ approaches to same-sex couples range from full marriage equality, to registered or *de facto* partnership options, to constitutional bans on

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<sup>3</sup> Both Directives apply to all E.U. member states with the exceptions of Denmark, Ireland, and the United Kingdom, which are not covered directly by the Family Reunification Directive, having opted out under a reservation to the underlying treaty provisions. See Council Directive 2003/86/EC, On the Right to Family Reunification, recitals 17, 18, 2003 O.J. (L 251/12) (EC) [hereinafter Family Reunification Directive]; Council Directive 2004/38/EC, art. 2., On the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of Member States, 2004 O.J. (L 158) 77 (EC) [hereinafter Citizens Directive]. Two additional directives expressly adopt the definition of “family member” in the Family Reunification Directive for purposes of defining the benefits of dependents of long-term residents already in member states and of dependents of “blue card” workers. See Council Directive 2003/109/EC, art. 2, Concerning the Status of Third-Country Nationals who are Long-Term Residents, 2004 O.J. (L 16) [hereinafter Long-Term Residents Directive]; Council Directive 2009/50/EC, art. 2(f), On the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment, 2009 O.J. (L 155). A fifth directive defines and protects the family members of refugees and asylees in the E.U. See Council Directive 2011/95/EU, recital 49, On Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), 2011 O.J. (L 337/9) 12 [hereinafter Qualification Directive]. While analysis of the recast Qualification Directive and its predecessor, Council Directive 2004/83/EC (which still applies to Ireland and the United Kingdom), is generally beyond the scope of this Article, it will be referenced as appropriate. See Council Directive 2004/83/EC, art. 2, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12, 14-15. Hopefully, future scholarship will examine it in depth and compare it to the Family Migration Directives. Under European Union law, a directive is binding legislation, but it is normally set out in lesser detail than E.U. “regulations,” since it is intended to be implemented through member state legislation. See *infra* Part I.

<sup>4</sup> See Citizens Directive & Family Reunification Directive, *supra* note 3.

same-sex marriage recognition.<sup>5</sup> Because most member states have not yet recognized same-sex marriage, the meaning of the term “spouse” in E.U. law is controversial.

The current E.U. questions regarding same-sex spouses echo those faced by U.S. officials back in 2013, when the U.S. Supreme Court struck down the federal definition of “spouse” in the Defense of Marriage Act (“D.O.M.A.”).<sup>6</sup> Under federal law, should the legal status of same-sex spouses be determined by the law of the state where the marriage was celebrated or the law of the state where the couple resides? Or should it be determined by a new independent federal definition?<sup>7</sup> In the U.S., the Obama administration adopted a place-of-celebration choice-of-law rule for immigration and other federal purposes.<sup>8</sup>

Although the E.C.J. has not definitively ruled on the meaning of “spouse” under the Family Migration Directives, legal scholars have offered a wide range of views. Some scholars argue that married, same-sex couples may not qualify as “spouses,” but only as “registered partners” or “unmarried partners,” alternative categories generally leaving immigration eligibility up to each host member state.<sup>9</sup> Other scholars

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<sup>5</sup> For example, Spain recognizes marriage equality; Germany recognizes registered life partnerships; Sweden recognizes *de facto* relationships; and Bulgaria has adopted a constitutional provision barring recognition of same-sex marriages. See *infra* Part IV(D)(1). Some E.U. member states offer more than one form of recognition. See KEES WAALDIJK, MORE OR LESS TOGETHER: LEVELS OF LEGAL CONSEQUENCES OF MARRIAGE, COHABITATION AND REGISTERED PARTNERSHIP FOR DIFFERENT-SEX AND SAME-SEX PARTNERS 42 (Kees Waaldijk ed., 2004), <https://openaccess.leidenuniv.nl/handle/1887/12585>.

<sup>6</sup> United States v. Windsor, 133 S. Ct. 2675 (2013).

<sup>7</sup> See Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 FORDHAM INT’L L.J. 1338, 1356 (2010) (echoing these three choices in the E.U. context as the member-state-of-origin principle based on the law of the place-of-celebration, the host member state principle, and an independent E.U. definition of “spouse”); Scott C. Titshaw, *Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-Windsor World*, 66 VAND. L. REV. EN BANC 167, 168 (2013). As described below, the E.U. actually has one additional option: to focus on a person’s state of nationality. Of course, there is no meaningful American concept of state citizenship or nationality apart from residence and domicile. See U.S. CONST., amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”).

<sup>8</sup> See Titshaw, *supra* note 7, at 169. Recently, the U.S. Supreme Court recognized a constitutional right to marriage equality for same-sex couples, confirming this administrative definition and eliminating the possibility that any future Congress or administration could return to an anti-gay federal definition of marriage. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

<sup>9</sup> See ELSPETH GUILD, STEVE PEERS & JONATHAN TOMKIN, THE EU CITIZENS DIRECTIVE: A COMMENTARY 35-36 (2014). Guild, Peers, and Tomkin base their argument on the apparent intent of some E.U. lawmakers that the term “spouse”

argue that same-sex spouses qualify as “spouses” generally, or at least if the marriage is recognized in their E.U. “home state.”<sup>10</sup> Meanwhile, Koen Lenaerts, the current Vice President of the E.C.J. has opined extra-judicially that the E.C.J. should “proceed on a case-by-case basis” to balance the E.U.’s fundamental goal of free movement against any “overriding reasons of general interest” that opposing member states can muster.<sup>11</sup> Some of these views are based on only partial analyses, while others focus on substantive human rights claims. None of these opinions, however, have systematically examined the meaning of “spouse” in the Family Migration Directives together as this Article attempts to do.

The main purpose of this Article is twofold: first, it aims to clarify the specific family-based immigration rights of legally married same-sex spouses and their children (still unaddressed by the E.C.J.) by interpreting the Family Migration Directives, which ultimately support either a federal definition inclusive of same-sex “spouse[s]” or a “member-state-of-celebration” choice-of-law rule; and second, in the process, it seeks to provide a description and detailed example of how to rigorously apply the E.C.J.’s methods of directive interpretation.

The Article is divided into six parts. Following this introduction, Part I provides a brief overview of the E.U. Family Migration Directives and their treatment of spouses and partners. Part II compares the E.U. and U.S. approaches to family-based immigration, noting the flexibility and limitations of the E.U. approach before briefly describing the U.S. experi-

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would not apply to same-sex couples. *See id.*; *see also* HELEN TONER, PARTNERSHIP RIGHTS, FREE MOVEMENT, AND EU LAW 76-78 (2004) (stating that E.U. legislation does not yet require member state immigration rights for any partner “other than opposite-sex spouses,” but arguing in favor of such recognition).

<sup>10</sup> *See* Jessica Guth, *When is a Partner not a Partner?: Conceptualisations of ‘Family’ in EU Free Movement Law*, 33 J. SOC. WELFARE & FAM. L. 193, 201 (2011) (generally arguing the E.U. should recognize “same-sex married partners” as “spouse[s]” as obligated by European antidiscrimination requirements); Allison R. O’Neill, *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice’s Ability to Dictate Social Policy*, 37 CORNELL INT’L L.J. 199, 210-11, 215 (2004) (arguing that the E.C.J. may be required to reconsider its refusal to recognize same-sex couples as “spouse(s)” in light of actual implementation of marriage equality for those couples in E.U. member states); Jorrit Rijpma & Nelleke Koffeman, *Chapter 20 - Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?*, in SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS 455, 471-72, 489 (Daniele Gallo et al. eds., 2014) (arguing for “mutual recognition” coverage of any marriage valid in the relevant E.U. “home state”); Alina Tryfonidou, *Same-Sex Marriage: The EU is Lagging Behind*, EU LAW ANALYSIS: EXPERT INSIGHT INTO EU LAW DEVELOPMENTS (June 29, 2015), <http://eulawanalysis.blogspot.com/2015/06/same-sex-marriage-eu-is-lagging-behind.html> (arguing that host member states should treat as “spouses” the foreign same-sex spouses of E.U. citizens).

<sup>11</sup> Lenaerts, *supra* note 7, at 1360-61.

ence with both a federal definition of marriage and a place-of-celebration choice-of-law rule. Part III summarizes the five accepted methods for interpreting E.U. directives: textual, systematic, historical, teleological and comparative analyses. Part IV then rigorously applies those methods to analyze the Family Migration Directives. Finally, this Article suggests some conclusions regarding the best interpretation of the directives, highlighting some broader differences between the E.U. and U.S. approaches to the recognition of family for immigration purposes.

Ultimately, this academic analysis not only seeks to provide insight for E.U. decision-makers on the various paths they can take to interpret the word “spouse” in the directives, but also aims to encourage same-sex married couples in the E.U. to more closely examine the arguments accepted by the U.S. Supreme Court in *United States v. Windsor*.<sup>12</sup> Married same-sex couples in the E.U., like their counterparts under the former D.O.M.A. regime in the U.S., arguably enjoy only second-class marital status: they are recognized as legal spouses under the laws of some member states but not yet under E.U. law.<sup>13</sup>

#### I. OVERVIEW OF THE E.U. FAMILY MIGRATION DIRECTIVES, THEIR IMPLEMENTATION, AND POSSIBLE ALTERNATIVE APPROACHES AVAILABLE TO SPOUSES AND OTHER COUPLES

One central theme of the European Union order is its longstanding effort to create a united, borderless geographic area, characterized by free movement without internal border controls. Because a significant number of people living and moving within Europe are “third-country national” immigrants from outside of the Union,<sup>14</sup> there have been

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<sup>12</sup> See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>13</sup> See Alina Tryfonidou, *EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition*, in *RIGHTS ON THE MOVE – RAINBOW FAMILIES IN EUROPE* 137, 148-49 (Carlo Casonato & Alexander Schuster eds., 2014) (describing the two-tiered result of the E.U. status quo, where some marriages are valid both under national and E.U. law while others are valid only nationally).

<sup>14</sup> “Third-country national” means any person who is not an E.U. citizen, i.e., any person *not* a national of an E.U. member state. Family Reunification Directive, *supra* note 3, art. 2(a); Consolidated Version of the Treaty Establishing the European Community, art. 17(1), Sept. 22, 2003, 1997 O.J. (C 340) 3. Where U.S. lawyers would say “immigrant” and “immigration,” E.U. legal experts tend to use the terms “third-country national” and “migration.” This is because, unlike the U.S., the E.U. allows restrictions on internal European migration, and its member states generally treat foreign nationals differently depending on whether they are citizens of an E.U. member state or of another country. “Migration law” thus encompasses intra-E.U. migration as well as immigration from outside the Union, and, in the context of a given member state, it distinguishes between that member state’s nationals, foreign E.U. citizens, and foreign third-country nationals.

increasing efforts to harmonize E.U. immigration policy,<sup>15</sup> particularly in the area of family-based immigration.<sup>16</sup>

Family-based immigration has been the most common form of immigration, and policies in this area have important implications for E.U. citizen and resident mobility.<sup>17</sup> The E.C.J. and other European institutions have long recognized that the right to “free movement” has little practical meaning for someone who must leave behind a spouse and children if she moves to another country.<sup>18</sup>

Both Family Migration Directives therefore provide particular immigration benefits to third-country national spouses in order to protect family life and to ensure meaningful migration rights for E.U. citizens and residents.<sup>19</sup> Because primary E.U. law guarantees Union *citizens* a fundamental right to free movement, their third-country national spouses could claim basic derivative migration rights, even without the detailed Citizens Directive, which will be discussed below.<sup>20</sup> The spouses of *legal residents* (or non-citizens) of the E.U., however, do not have a comparable constitutional claim, but the Family Reunification Directive and Long-Term Residents Directive provide them with other family unity and migration rights.<sup>21</sup>

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<sup>15</sup> This goal was most recently clarified in late 2009 when the Lisbon Treaty came into effect, mandating a common E.U. immigration policy. Consolidated Version of the Treaty of Lisbon art. 63, Dec. 17, 2007, 2007 O.J. (C 340/01) 61.

<sup>16</sup> Consolidated Version of the Treaty on the Functioning of the European Union, art. 79(2)(a), Oct. 26, 2012, 2012 O.J. (C 326/49) 77 [hereinafter T.F.E.U.]. The Treaty on the Functioning of the European Union expressly provides the Parliament and Council “shall adopt measures” regarding “entry and residence . . . for the purpose of family reunification.”

<sup>17</sup> *Residence Permit Statistics*, EUROSTAT, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Residence\\_permits\\_statistics#Residence\\_permits\\_by\\_reason](http://ec.europa.eu/eurostat/statistics-explained/index.php/Residence_permits_statistics#Residence_permits_by_reason) (last visited Oct. 18, 2015) (showing that family-based immigration is the leading reason for immigration in most E.U. member states); *Commission Proposal for a Council Directive on the Right to Family Reunification*, ¶ 5.1 COM (1999) 638 Final (Dec. 1, 1999) (describing family reunification as absolutely necessary to “the exercise of free movement in objective conditions of freedom and dignity”) [hereinafter *Council’s Family Reunification Proposal*].

<sup>18</sup> See Case C-60/00, *Carpenter v. Sec’y of State for Home Dep’t*, 2002 E.C.R. I-06279, ¶ 38. See also Kees Waaldijk, *The Right to Relate: A Lecture on the Importance of “Orientation” in Comparative Sexual Orientation Law*, 24 DUKE J. OF COMP. & INT’L L. 161, 197 (2013) (citing numerous scholars who have made this point); *infra* Part IV(C).

<sup>19</sup> The Family Reunification Directive, as incorporated in the Long-Term Residents Directive, protects the free movement rights of long-term residents. See Long-Term Residents Directive, *supra* note 3, art. 16.

<sup>20</sup> See generally EU IMMIGRATION AND ASYLUM LAW COMMENTARY 201 (Kai Hailbronner & Daniel Thym eds., 2d ed. 2015).

<sup>21</sup> See Long-Term Residents Directive, *supra* note 3, art. 16 (describing the incorporation of the Family Reunification Directive in the Long-Term Residents



Despite the recognized need for harmonization, efforts to establish E.U. immigration rules have only been partially successful. In the context of family-based immigration in particular, the Union's current system could be described as a hybrid of minimum Union standards and twenty-eight different member state immigration regimes.<sup>22</sup>

While E.U. institutions do not yet claim exclusive authority over immigration, various treaties, E.C.J. decisions, and other sources of European law set the parameters within which E.U. member states regulate family-based immigration. Fortunately, much of this sprawling body of law has been codified in the Family Migration Directives (as well as in the Long-Term Residents Directive and the Qualification Directive for refugees).<sup>23</sup> As discussed below in detail, the Family Reunification Directive sets the baseline for the migration of family members of third-country national legal residents in E.U. member states, while the Citizens Directive provides a more detailed framework for migration by E.U. citizens and their family members to other member states.

### A. *The Family Reunification Directive*

The Family Reunification Directive provides minimum rights for third-country-national spouses and minor children of legal residents with residence permits valid for a year or longer in an E.U. member state.<sup>24</sup> This directive was conceived as a step toward the “fair treatment” of legal immigrants, granting them “rights and obligations comparable to those of citizens of the European Union.”<sup>25</sup> It does not establish equal migration

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Directive). E.U. scholars often use the term “constitutional” to describe the primary E.U. law comprised of treaties and general principles as opposed to secondary E.U. law such as regulations and directives. *See, e.g.,* Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MKT. L. REV. 1629 (2010). While third-country nationals do not enjoy a direct right to free movement under E.U. treaties, they can still claim the benefit of constitutional human rights guarantees under E.U. law. EU IMMIGRATION AND ASYLUM LAW COMMENTARY, *supra* note 20, at 201.

<sup>22</sup> *See infra* Part I(C).

<sup>23</sup> PETER BOELES ET AL., EUROPEAN MIGRATION LAW 180 (2d ed. 2009).

<sup>24</sup> *See* Family Reunification Directive, *supra* note 3, art. 3(1). The directive does not directly apply to Denmark, Ireland and the United Kingdom. *See id.* recitals 17-18. Since the E.U. attaches numerous rights to E.U. citizenship status, the term “third-country national” is commonly used to designate non-E.U.-citizens. This Article will use that term “third-country national” and “non-E.U.-citizen” interchangeably. It also sometimes uses “foreign” or “foreign national” when describing the treatment of non-citizens from a member state perspective or comparing U.S. immigration law, where there is no meaningful distinction regarding “second” and “third” countries. *See id.* recital 4.

<sup>25</sup> *Id.* recital 3 (citing Conclusions of the Council meeting in Tempere on 15 and 16 October 1999). This legal resident “fairness” concept was later adapted at the treaty level of E.U. law in the T.F.E.U., *supra* note 16, and the ideal of equalization of the

rights for third-country national legal residents, however, as it defers to individual member states' regulatory power over waiting periods,<sup>26</sup> integration requirements,<sup>27</sup> and other restrictions. But the directive has generally had a liberalizing and harmonizing effect.<sup>28</sup>

The directive requires member states to authorize the entry and residence of qualifying family members of legal resident "sponsors" and also to authorize their employment, enrollment in educational institutions, and access to vocational guidance.<sup>29</sup> After five years, generally the family members are entitled to residence permits, independent of their original sponsors.<sup>30</sup> The directive also establishes procedural, temporal, and evidentiary parameters for decisions regarding family reunification.<sup>31</sup>

The Family Reunification Directive enumerates three categories of "family members," each of which is governed by a varying degree of member state discretion, as described in more detail in Subpart IV(A)(1) below. With the possible exception of the term "spouse," the classification scheme and governing rules are clear and detailed, but one large optional category still leaves member states with a significant amount of discretion.<sup>32</sup>

The first category of family members consists of the sponsor's "spouse" and the minor children of the sponsor or spouse.<sup>33</sup> By and large, member states are required to recognize the qualifying person's entitlement to family reunification with all of the rights listed above, including access to employment and education.<sup>34</sup>

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treatment of legal residents and citizens was reiterated in the Stockholm Programme, 2009 O.J. (C115/30), ¶ 6.1.4. *See also* BOELES ET AL., *supra* note 23, at 180 (referencing the failure of the final version of the directive to place third-country nationals in a position comparable to E.U. citizens).

<sup>26</sup> The directive only requires a member state to authorize family reunification of residents who have stayed in their territory for more than two years. Family Reunification Directive, *supra* note 3, art. 8.

<sup>27</sup> *Id.* art. 7(2).

<sup>28</sup> "The [d]irective had a varied impact although it led overall to greater harmonization. Of the 13 countries that had transposed [the directive into member state law] by the end of 2006, the outcome was more liberalization in 8 states, more restrictions in 3 and a mixed effect in the remainder." Helena Wray et al., *A Family Resemblance?: The Regulation of Marriage Migration in Europe*, 16 EUROPEAN J. MIGRATION & L. 209, 218 (2014).

<sup>29</sup> Family Reunification Directive, *supra* note 3, arts. 4, 14.

<sup>30</sup> *Id.* art. 15.

<sup>31</sup> *Id.* arts. 5-8.

<sup>32</sup> *Id.* arts. 4(2)-(3).

<sup>33</sup> *Id.* art. 4(1) (requiring that "Member States *shall authorize* the entry and residence of . . . the sponsor's spouse" as well as defined minor children "of the sponsor and of his/her spouse") (emphasis added).

<sup>34</sup> *See supra* notes 25-31 and accompanying text (i.e. entry, residence, education, employment, etc.).

The second category consists of underage spouses, spouses of underage sponsors, parents, grandparents, certain dependent adult children, registered partners, unmarried partners with whom the sponsor is in “a duly attested stable long-term relationship,” and the partner’s qualifying children.<sup>35</sup> The second group also includes the sponsor’s children with a second polygamous spouse.<sup>36</sup> Unlike the first group and its Union-wide recognition, the directive expressly allows member states to decide whether to “authorize family reunification . . . of unmarried or registered partners” and other family members in this category.<sup>37</sup>

The third category consists of spouses in polygamous marriages, and the directive prohibits their recognition under certain circumstances.<sup>38</sup> Specifically, the directive provides that member states “*shall not* authorize the family reunification of a further spouse” where “the sponsor already has a spouse living with him in . . . the Member State.”<sup>39</sup>

### B. *The Citizens Directive*

The Citizens Directive generally recognizes that E.U. citizenship “confers on every citizen . . . a primary and individual right to move and reside freely within the territory of the Member States,” “an area without internal frontiers.”<sup>40</sup> To respect such a right and also maintain family unity, the Citizens Directive requires member states to allow the migration of the citizens’ family members regardless of their nationality, generally treating them the same as E.U. citizens.<sup>41</sup>

The directive recognizes the right of Union citizens and their “family members” to enter any member state, generally without any formal requirements for the first three months.<sup>42</sup> If employed, self-employed, studying, or otherwise not a burden on the social assistance or healthcare system of the host country, a citizen and her family member can reside in any member state for a longer term,<sup>43</sup> with the possibility of acquiring the right to permanent residence.<sup>44</sup> This directive also provides continuing

<sup>35</sup> Family Reunification Directive, *supra* note 3, art. 4(3).

<sup>36</sup> *Id.* art. 4(4) (“By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.”).

<sup>37</sup> *See, e.g., id.* art. 4(3) (stating that “Member [S]tates may . . . authorize the entry and residence . . . of the unmarried partner . . . with whom the sponsor is in a duly attested stable long-term relationship”) (emphasis added).

<sup>38</sup> *Id.* arts. 4(4)-4(5).

<sup>39</sup> *Id.* art. 4(4) (emphasis added).

<sup>40</sup> Citizens Directive, *supra* note 3, recitals 1-2.

<sup>41</sup> Wray et al., *supra* note 28, at 220.

<sup>42</sup> Citizens Directive, *supra* note 3, arts. 5-6.

<sup>43</sup> *Id.* art. 7.

<sup>44</sup> *Id.* arts. 9-11, 16.

residence rights to spouses and partners, even if the sponsoring Union citizen dies or terminates the relationship.<sup>45</sup>

The Citizens Directive confers more rights to a broader group of family members than does the Family Reunification Directive. The Citizens Directive sets forth a non-comprehensive categorization scheme, focusing solely on prescribing positive rights and omitting any references to relatives whom member states “may” allow to immigrate. It also does not expressly prohibit reunification for polygamous spouses or any other group.

Like in the Family Reunification Directive, the term “family member” in the Citizens Directive covers “spouse[s]” and minor children.<sup>46</sup> In addition, the directive expressly defines “family member” to include a citizen’s registered partner “if the host Member State treats registered partnerships as equivalent to marriage.”<sup>47</sup> “Family members” also include other dependent relatives, who are “direct descendants” (e.g., adult children, grandchildren or great grandchildren) or “direct relatives in the ascending line” (e.g., parents and grandparents).<sup>48</sup> The Citizens Directive covers these relatives and the children of qualifying partners and spouses to the same extent as those of E.U. citizens.<sup>49</sup>

Even for “persons who are not included in the definition of family members under [the Citizens] Directive,” it charges member states with the duty to examine their “situation . . . in order to decide whether entry and residence could be granted,” in the interest of “unity of the family in a broader sense.”<sup>50</sup> The directive states that a “Member State *shall*, in accordance with its national legislation, *facilitate entry and residence* of . . . the partner with whom the Union citizen has a durable relationship, duly attested,” as well as “any other family members” who have been “dependents or members of the household of the Union citizen.”<sup>51</sup> This duty to “facilitate” migration could perhaps prompt some member states to extend their national laws to cover same-sex partners and spouses.<sup>52</sup>

The Citizens Directive is triggered only when an E.U. citizen crosses member state borders; it does not apply to “purely internal” situations, where a member state regulates third-country national family members of

<sup>45</sup> *Id.* arts. 12-13.

<sup>46</sup> *Id.* arts. 2(2)(a)-(c).

<sup>47</sup> *Id.* art. 2(2)(b).

<sup>48</sup> *Id.* arts. 2(2)(c)-(d).

<sup>49</sup> *Id.* arts. 2(2)(a)-(d).

<sup>50</sup> *Id.* recital 6.

<sup>51</sup> *Id.* art. 3(2) (emphasis added).

<sup>52</sup> “Facilitation” arguably prohibits them from refusing long-term stable partners merely because they are of the same-sex, or from adopting blanket policies refusing unmarried partners, but this requirement is not directly enforceable by independent lawsuits against member states who are not complying. Rijpma & Koffeman, *supra* note 10, at 474-75 (citing Case C-83/11, *Sec’y of State for Home Dep’t v. Rahman*, 2012 E.C.R. ¶¶ 21, 24).

its own non-migrating citizens.<sup>53</sup> This limited scope can result in reverse discrimination against the families of the host state's own citizens in comparison to families of immigrants from other E.U. member states.<sup>54</sup>

### C. *Implementation of the Family Migration Directives*

Member states have implemented the Family Migration Directives in a number of different ways. While sixteen E.U. member states recognize same-sex marriages or registered partnerships domestically, not all of them provide equal family reunification rights to same- and different-sex partners.<sup>55</sup> Other countries allow the admission of same-sex partners but only on a narrower basis.<sup>56</sup> And several E.U. member states do not seem to “facilitate” the migration of same-sex couples at all, under either directive.<sup>57</sup>

As an initial matter, a number of member states have avoided the threshold issue of whether married same-sex couples are recognized as “spouses” under the directives. Since E.U. law generally requires member states to treat migrant citizens from other member states as favorably as their own nationals, those states that grant immigration rights to the registered or *de facto* partners of their own citizens must also recognize

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<sup>53</sup> BOELES ET AL., *supra* note 23, at 75; Peter Van Elsuwege & Dimitry Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 EUROPEAN J. MIGRATION & L. 443, 443 (2011). American lawyers may find it conceptually useful to compare this to federal reliance on “interstate commerce” for jurisdiction, but the E.U. has not yet developed such a highly expansive understanding of its jurisdiction.

<sup>54</sup> EU IMMIGRATION AND ASYLUM LAW COMMENTARY, *supra* note 20, at 202.

<sup>55</sup> Kees Waaldijk, *Legal Family Formats for (Same-Sex) Couples*, in RIGHTS ON THE MOVE – RAINBOW FAMILIES IN EUROPE 121, 123 (Carlo Casonato & Alexander Schuster eds., 2014) (listing the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, Germany, Finland, Luxembourg, Czech Republic, Slovenia, Hungary, Austria, Ireland, and much of the United Kingdom). An article from 2014 counted eight member states providing fully equal family reunification rights in the European Economic Area (E.E.A.). Wray et al., *supra* note 28, at 238 (adding the caveat that other member states may provide protections under the category of unregistered cohabiting partners). There now are presumably at least nine, since Luxembourg began recognizing same-sex marriage in January 2015. See Kees Waaldijk, *Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe*, 1 GENIUS 42, 44 (2014). The E.U.’s Fundamental Rights Agency reports that seventeen member states do not treat same-sex spouses as “legal spouses” under the Family Reunification Directive. F.R.A. REPORT, *supra* note 1, at 88.

<sup>56</sup> Wray et al., *supra* note 28, at 238 (citing Italy, which only permits the immigration of same-sex legal spouses of E.U. citizens with marriages in an E.U. member state, and France, which provided only a second-class status at the time).

<sup>57</sup> See F.R.A. REPORT, *supra* note 1, at 81, 90-91.

the partners of immigrating citizens from other member states.<sup>58</sup> Given this rule, the issue of whether a married person is categorized as a “spouse,” a “registered partner,” or an “unmarried partner in a durable relationship” seems beside the point, as long as the person is granted entry and residence. Unless states begin to require different forms of proof for different relationship types (for instance, where a “durable relationship” requires some showing of longevity while a marriage merely requires evidence of legal status), there may be no practical incentive for lawyers, courts, or scholars to classify the couple with any degree of precision.

Nevertheless, other E.U. member states may interpret the term “spouse” differently in the two Family Migration Directives, leading to unequal treatment. For example, Italy grants entry and residence to foreign same-sex spouses of E.U. citizens under the Citizens Directive, but it has not announced a parallel policy for same-sex spouses of legal residents under the Family Reunification Directive.<sup>59</sup> This inconsistency does not stem from a difference in domestic Italian law, which generally refuses immigration recognition to same-sex spouses of its own citizens or residents,<sup>60</sup> but from Italy’s implementation of European law. (This results in better treatment of the spouses of immigrants from other E.U. countries than of the spouses of its own citizens.) The Italian decision to recognize same-sex spouses under the Citizens Directive seemed to focus more on the fundamental European rights to family and family formation, than on a careful interpretation of the directive.<sup>61</sup> This action could

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<sup>58</sup> See Robert Wintemute, *Homophobia and United Kingdom Law: Only a Few Gaps Left to Close?*, in *CONFRONTING HOMOPHOBIA IN EUROPE: SOCIAL AND LEGAL PERSPECTIVES* 233, 250 (Luca Trappolin, Alessandro Gasparini & Robert Wintemute eds., 2012) (citing Article 18 of the T.F.E.U. and Case C-59/85, *Netherlands v. Reed*, 1986 E.C.R. I-01283, for the proposition that an E.U. member state must grant equally favorable treatment in its immigration law to citizens of other member states as to its own citizens, even if that treatment exceeds the minimum requirements of the Citizens Directive). See also Rijpma & Koffeman, *supra* note 10, at 486 (arguing that E.U. non-discrimination rules, on the bases of sex and sexual orientation, require member states to recognize same-sex couples to the extent that they elect to recognize different-sex couples).

<sup>59</sup> See Trib. Reggio Emilia, sez. un.13 febbraio 2012, n. 1401/2011 2012; *Circulare* n. 8996, *Unione fra persone dello stesso sesso. Titolo di soggiorno ai sensi del D. Lgs. 30/2007* (Oct. 26, 2012) (on file with author); Marco Gestri, 23 *ITALIAN Y.B. INT’L L. ONLINE* 553, 556 (2013) (reviewing *SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS* (Daniele Gallo et al. eds., 2014)); F.R.A. REPORT, *supra* note 1, at 89.

<sup>60</sup> See *Circulare* n. 8996, *supra* note 59. See also Wintemute, *supra* note 58, at 271 (indicating that Italy only recognizes same-sex couples for immigration purposes when required by E.U. law).

<sup>61</sup> See Decision Trib. Reggio Emilia, *supra* note 59, at 13 febbraio 2012, prima sezione, n. 1401/2011.

indicate that Italy may yet extend recognition to same-sex spouses of residents under the Family Reunification Directive as well.

#### D. *Alternative Approaches for Same-Sex Spouses and Partners*

Scholars as well as representatives of the European Commission (“Commission”) have suggested that same-sex spouses should be treated not as spouses, but as registered partners under one or both of the Family Migration Directives — a position that is widely held.<sup>62</sup> While this alternative approach could serve as a practical fallback for some same-sex spouses of E.U. citizens moving to member states that recognize registered partnerships,<sup>63</sup> unfortunately, it is less helpful to the spouses of legal residents, and to those in member states that do not recognize such partnerships.

According to the widely held view, if same-sex married couples are not treated as “spouses” for purposes of the directives, their formal marriage certainly should qualify as a registration scheme that is “equivalent to marriage” in the state of formalization.<sup>64</sup> Therefore, Article 2(2)(b) of the Citizens Directive requires member states to authorize entry and residence of an E.U. citizen’s same-sex spouse as a “registered partner” if the host country’s national laws also recognize same-sex marriages or marriage “equivalent” partnerships.<sup>65</sup> In that case, the member state must also allow immigration of the foreign national’s dependent children, grandchildren, parents, and grandparents under Article 2(2)(c)-(d).<sup>66</sup> Even host member states that do not recognize or treat registered partnerships as the equivalent of marriages, however, are still required to “facilitate entry and residence” for the partners of E.U. citizens bound under the registration schemes of other jurisdictions.<sup>67</sup>

Yet this duty to “facilitate” gives these spouses something less than an enforceable “right.”<sup>68</sup> Indeed, some member states seem to have ignored any such command, for spouses of E.U. citizens as well as non-citizen

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<sup>62</sup> See *supra* note 9 and accompanying text. See also *infra* Part IV(B)(4).

<sup>63</sup> The advantage to this argument is the mandatory recognition of such registered partners in contrast to reliance on the general fallback provision that member states “facilitate” migration for families falling outside the directive’s definition of “Family Member.”

<sup>64</sup> See *supra* note 62.

<sup>65</sup> Citizens Directive, *supra* note 3, art. 2(2)(b).

<sup>66</sup> *Id.* arts. 2(2)(c)-(d).

<sup>67</sup> *Id.* art. 3(2).

<sup>68</sup> See *supra* Part I(B) (that member states “shall . . . facilitate” does not directly confer an identifiable right to an immigrant). Member states are limited, however, by the European Convention of Human Rights and the E.U. Charter, which generally require them to recognize same-sex partners on the same terms as they recognize unmarried different-sex partners.

residents.<sup>69</sup> Furthermore, it is doubtful that affected individuals could directly challenge a member state's failure to "facilitate."<sup>70</sup>

Unlike the Citizens Directive, the Family Reunification Directive guarantees no legal rights to married same-sex couples if they do not qualify as "spouses." The Family Reunification Directive merely states that "Member States *may . . . authorise . . . entry and residence*" for partners and their dependent children.<sup>71</sup> Given these gaps and weaknesses, this alternative approach is inadequate for same-sex spouses of legal residents and of E.U. citizens living in states that do not recognize "equivalent partnerships."

## II. THE E.U. - U.S. COMPARISON

A comparison of the family-based immigration systems of the United States and the European Union is fitting here, given the similarities between the two systems. The Family Migration Directives include "spouse[s]" among the most privileged category of "nuclear family" who must be granted entry and residency.<sup>72</sup> Yet neither directive defines the term "spouse." This ambiguity in E.U. immigration law parallels that in U.S. immigration statutes and regulations, which also use the term "spouse" extensively without definition.<sup>73</sup> Additionally, both the E.U. and the U.S. reflect the tensions in a two-tiered system, in which family-based immigration is largely governed at the federal or Union level,<sup>74</sup> but family law is governed at the state or member state level.<sup>75</sup> The member

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<sup>69</sup> See *supra* Part I(C); F.R.A. REPORT, *supra* note 1, at 81, 88.

<sup>70</sup> See TONER, *supra* note 9, at 67 (doubting this language would easily be construed to grant directly effective rights).

<sup>71</sup> Family Reunification Directive, *supra* note 3, art. 4(3).

<sup>72</sup> *Id.* recital 9.

<sup>73</sup> See generally Scott Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 541 (2010).

<sup>74</sup> Much like the U.S. commerce clause power examined in early Supreme Court cases, E.U. authority over immigration may be limited to cases where immigrants move from one E.U. member state to another. No Union jurisdiction has yet been recognized for dealing with the entirely "internal situations" of E.U. citizens who only remain within their own member state. This has resulted in reverse discrimination by member states against their own citizens in some cases. See Alina Tryfonidou, *EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition*, in RIGHTS ON THE MOVE – RAINBOW FAMILIES IN EUROPE 137, 174 (Carlo Casonato & Alexander Schuster eds., 2014).

<sup>75</sup> See Case C-147/08, *Römer v. Freie & Hansestadt Hamburg*, 2011 E.C.R. I-03591, ¶ 38 (observing that "as is European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States"); *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (states have "virtually exclusive" control over marriage and domestic relations). Of course, the interaction between family law and immigration law is not a one-way street. By determining



states make different assumptions about “family” and, in the case of Europe, those differences still have important implications on family-based immigration, particularly for same-sex couples and their children.

#### A. *Family Diversity and Limitations in the E.U.*

Modern U.S. immigration is governed by a centralized federal system, whereas E.U. immigration is managed by a decentralized one — a hybrid of twenty-eight separate member state immigration systems operating within the constraints of the Union’s harmonizing requirements. The major implication of this decentralized system is the wide variation of approaches: some E.U. member states recognize “durable” same- and different-sex couples regardless of marital or partnership registration status,<sup>76</sup> while other member states do not even recognize married same-sex couples for immigration purposes.<sup>77</sup> Some member states authorize family reunification for grandparents or parents of legal residents while others do not.<sup>78</sup> This diverse treatment of family members is an important distinction between the E.U. and U.S. immigration systems.

Some of the differing approaches by E.U. member state immigration regimes were intentional effects of the directives. At times, both directives defer to the member state governments and laws for determining familial status. For instance, the Citizens Directive expressly provides that registered partners must be allowed to enter and reside as “family

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which family members can cohabitate, work or study in a given place, Union-wide immigration law has profound implications on families and the laws regulating them in member states. As scholars have begun to recognize, it is impossible to adequately understand and deal with the many problems for immigrant and blended citizen-immigrant families without understanding both the family law and immigration law components of fam-migration. *See, e.g.,* Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 VA. L. REV. 629, 649 (2014) (identifying and explaining distinctions between federal immigration law and state family law definitions of parentage in the U.S.); Kari E. Hong, *Famigration (Fam Imm): The Next Frontier in Immigration Law*, 100 VA. L. REV. ONLINE 63, 64 (2014) (noting the need for scholarship examining immigration through a family law lens). This Article is an attempt to connect the dots in some other areas of intersection between family and immigration law. Additionally, the approaches of E.U. member states regarding familial relations have been vastly different. *See also* Tryfonidou, *supra* note 74, at 140 (listing Bulgaria among E.U. member states providing no legal status to same-sex couples); Elena Moore, *Delaying Divorce: Pitfalls of Restrictive Divorce Requirements*, 1-29 J. FAM. ISSUES 1, 4, 7 (2015) (describing Ireland’s four-year waiting period for divorce as one of the E.U.’s longest periods).

<sup>76</sup> F.R.A. REPORT, *supra* note 1, at 85.

<sup>77</sup> *See supra* Part I(C).

<sup>78</sup> *See* THE LIBRARY OF CONGRESS, FAMILY REUNIFICATION AND LAWS, PART IV: FOREIGN COUNTRY SURVEYS (2015), [http://www.loc.gov/law/help/family-reunification/foreign.php#\\_ftn196](http://www.loc.gov/law/help/family-reunification/foreign.php#_ftn196) (describing provisions for needy or dependent grandparents of legal residents to immigrate to Estonia and Luxembourg).

members” only if the “host member state treats registered partnerships as equivalent to marriage.”<sup>79</sup> The Family Reunification Directive gives member states discretion over the recognition of the second and third categories of family members, including “partners,” as described above.<sup>80</sup> Both directives permit, but do not require, full recognition of *de facto* partners.<sup>81</sup>

But at other points, the directives provide clear E.U. rights to specified “family members.” For instance, the Citizens Directive mandates specific rights to E.U. citizens and their non-citizen spouses or qualifying registered partners, to reunite with minor or dependent “direct descendants” and dependent “direct relatives in the ascending line.”<sup>82</sup> Under this broad and dynamic meaning of “family,” E.U. citizens can reunite with their extended family, including parents-in-law, grandparents and grandchildren, and, in some member states, with registered or *de facto* partners.<sup>83</sup>

U.S. immigration law, on the other hand, has a narrower and less flexible definition of family. For most U.S. immigration purposes, family means “immediate relatives,” namely spouses and minor children.<sup>84</sup> A U.S. citizen may petition for the entry and residence of his foreign national parents,<sup>85</sup> as well as for his siblings, adult children, or married children; however, the waiting periods for these latter categories can range from seven to well over twenty years.<sup>86</sup> There are no categories for grandchildren or grandparents, and unmarried partners are only recognized in very limited circumstances.<sup>87</sup>

<sup>79</sup> Citizens Directive, *supra* note 3, art. 2(2)(b).

<sup>80</sup> See *supra* Part I(A).

<sup>81</sup> The Family Reunification Directive leaves the recognition of “unmarried partner[s],” up to the member state with no real guidance. Family Reunification Directive, *supra* note 3, art. 4(3). The Citizens Directive merely requires member states to “facilitate entry and residence” of “the partner with whom the Union citizen has a durable relationship, duly attested.” Citizens Directive, *supra* note 3, art. 3(2).

<sup>82</sup> Citizens Directive, *supra* note 3, arts. 2(2)(c)-(d).

<sup>83</sup> *Id.* The right to reunite with these extended and alternative family members is mandatory under the Citizens Directive, but discretionary under the Family Reunification Directive.

<sup>84</sup> Titshaw, *supra* note 73, at 547-48.

<sup>85</sup> Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

<sup>86</sup> See Bureau of Consular Affairs, *Visa Bulletin, January 2015*, U.S. DEP’T OF STATE (Dec. 9, 2014), <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-january-2015.html>.

<sup>87</sup> See 9 F.A.M. § 41.31 N14.4 (2013) (providing for B-2 classification of cohabitating partners of nonimmigrant visa holders); 22 C.F.R. § 41.21 (2010) (authorizing derivative status under some diplomatic visa categories for unmarried partners “recognized as immediate family members . . . by the sending [g]overnment”).

The E.U.'s broader and more flexible definitions of family seem to reflect the richly diverse cultural and familial norms in Europe, encompassing, for example, an extended family that includes grandparents and unmarried partners.<sup>88</sup> But despite its flexibility, the E.U. system and its definitions of "family" have a number of shortcomings.

First, the E.U. system may be criticized as inconsistent and arbitrary. Each host member state defines family as broadly or as narrowly as it sees fit within the parameters of the directives — which may not align with a particular family's self-definition. For example, a legal resident of Italy may not be allowed to migrate with his Canadian same-sex spouse to Romania, as they would not be recognized as family members, but they can move to Belgium.<sup>89</sup> On the other hand, another legal resident of Italy may be able to immigrate with her Canadian mother to Romania, but not to Belgium.<sup>90</sup> While the people in both hypotheticals may view

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<sup>88</sup> The U.S. system may be limited by the historical origins of the Immigration and Nationality Act ("I.N.A.") in 1952. During a time when young couples with children were beginning to leave behind extended families in cities and rural areas as they moved to the suburbs, it may have seemed reasonable to limit "family" to the "nuclear family" of different-sex married couples and their children. That grouping is the only "immediate family" recognized without quota restrictions and the accompanying lengthy wait in many areas of the I.N.A. This limited definition of family has been criticized, but there is no current movement towards reforming these restrictions. See Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L.J. 629, 629-30 (2011).

<sup>89</sup> Although not entirely clear, it appears that Romania may not recognize same-sex spouses for immigration purposes. See COMM. OF MINISTERS, REPORT ON IMPLEMENTATION OF THE RECOMMENDATION CM/REC(2010)5 OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON MEASURES TO COMBAT DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION OR GENDER IDENTITY IN ROMANIA, ILGA-Europe 2-3, 27, 50 (2012) (citing provisions of Romania's amended civil code that prohibit legal recognition of same-sex relationships including those entered abroad, as well as statutory and constitutional provisions mandating compliance with E.U. freedom of movement requirements and human rights treaties). Belgium, which has recognized marriage equality for same-sex couples for over a decade, allows migration by third-country national spouses and partners of its permanent or temporary residents. *Ad-hoc Query on Marriage – Rights to Entry and Permanent Residence*, EUROPEAN MIGRATION NETWORK 1 (May 3, 2011), [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/family-reunification/274\\_emn\\_ad-hoc\\_query\\_marriage\\_-\\_entry\\_rights\\_residence\\_22nov2010\\_wider\\_dissemination\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/family-reunification/274_emn_ad-hoc_query_marriage_-_entry_rights_residence_22nov2010_wider_dissemination_en.pdf).

<sup>90</sup> See MIGRANT IMMIGRATION POLICY INDEX: 2015: ROMANIA 6 (2014), <http://www.mipex.eu/romania> (stating "[n]on-EU sponsors can reunite with . . . adult parents" in Romania); *Ad-Hoc Query on extended family reunification*, EUROPEAN MIGRATION NETWORK 2 (Mar. 1, 2011), [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/family-reunification/276\\_emn\\_ad-hoc\\_query\\_extended\\_family\\_reunification\\_25nov2010\\_wider\\_dissemination\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/family-reunification/276_emn_ad-hoc_query_extended_family_reunification_25nov2010_wider_dissemination_en.pdf) (stating that "in principle" parents and other

themselves as family members, certain E.U. member states' immigration policies do not, and thus, their legal recognition is simply contingent upon their host state's laws.

Second, the "broader" sense of family under E.U. immigration law may also be misleading. Though the categories seem extensive, they are subject to the specific procedures and detailed substantive requirements in the directives, as well as to the discretion of member states for certain matters.<sup>91</sup> For instance, the directives permit member states to refuse recognition of certain types of families, and the Family Reunification Directive also allows for wait times and integration prerequisites prior to entry, forestalling immigration for some recognized family members.<sup>92</sup> Because the directives allow member states to exclude certain family members and otherwise limit their rights, the E.U.'s definitions are likely broader in theory than in fact.

Finally, the E.U. may be less attractive to families who view immigration as an initial step on a road to citizenship. Citizenship eligibility is utterly unregulated by the E.U., and many European countries have daunting requirements and long wait periods, even for children born in their territories.<sup>93</sup> These barriers may disincentivize prospective immigrants at the outset when they can foresee a long, unpredictable wait before they qualify under the Citizens Directive to move freely around Europe and to obtain preferential treatment for their families. Thus, even to the extent that the flexible definitions of "family" under the E.U. directives actually apply, families may be discouraged in practice by other aspects of the system.

This comparison reveals that the E.U. experience may serve as both an inspiration and a deterrent for U.S. policy proposals. Europe's recogni-

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"extended family members" of third-country national residents "cannot benefit" from family reunification in Belgium).

<sup>91</sup> See generally *supra* Parts I(A)-(C).

<sup>92</sup> See discussion *supra* Part I(A) and notes 26-27.

<sup>93</sup> See generally RAINER BAUBÖCK ET AL., ACCESS TO CITIZENSHIP AND ITS IMPACT ON IMMIGRANT INTEGRATION: EUROPEAN SUMMARY AND STANDARDS 3 (2013), [http://eudo-citizenship.eu/images/acit/acit\\_report\\_eu%20level%20summary.pdf](http://eudo-citizenship.eu/images/acit/acit_report_eu%20level%20summary.pdf). No country in Europe recognizes automatic citizenship to any child born within its territory under the *ius soli* principle as do the United States and Canada. *Id.* at 8. The average wait to become a naturalized citizen in the fifteen oldest E.U. member states is around ten years, but it takes an average of fifteen to twenty years in some countries. *Id.* at 9, 24. This is based on widely varying integration requirements, including language and other tests, which may be liberalized for the close relatives of a member state's citizens, as well as the minimum durational residence requirements, which generally range around five to ten years. *Id.* at 11. See also SARA WALLACE GOODMAN, EUDO CITIZENSHIP OBSERVATORY: NATURALIZATION POLICIES IN EUROPE: EXPLORING PATTERNS OF INCLUSION AND EXCLUSION 7, 13-19 (2010), <http://eudo-citizenship.eu/docs/7-Naturalisation%20Policies%20in%20Europe.pdf>.

tion of extended and alternative family forms may provide valuable data regarding the actual results of such recognition. However, the inequality and lack of unity under the E.U.'s host-state-determined treatment of unmarried partners and others may serve as a cautionary tale for Americans tempted to experiment with state-of-residence-based federal immigration rules regarding familial status.<sup>94</sup>

### B. *Federal Definitions and the Place-of-Celebration Rule in the U.S.*

Since the E.U. has not yet determined the meaning of “spouse” under the Family Migration Directives, an important question remains: how should “spouse” be defined? Should the word “spouse” have an inclusive or exclusive autonomous E.U. meaning? Or should its meaning be treated as a choice-of-law issue to be determined under the law of the place or member state of celebration, the member state of residence, or the member state of nationality?

Here, the U.S. experience provides an important case for comparison. Although the idea of member state “nationality” or “citizenship” has had no U.S. equivalent since the United States achieved a borderless union with its ratification of the post-Civil-War amendments and its adoption of federal immigration laws in the nineteenth century,<sup>95</sup> the concepts of domicile and residence are important under state family law. Thus, the U.S. has addressed the issue of defining “spouse” in a multi-tiered system, in two notable ways: a federal definition of “spouse” and a place-of-celebration rule.

When it appeared that Hawaii might become the first U.S. state to license same-sex marriages in 1996, the U.S. Congress and President Clinton established a federal definition of “spouse” by enacting the Defense of Marriage Act (“D.O.M.A.”), which defined marriage as the union of one man and one woman, for all federal purposes, including immigration.<sup>96</sup> D.O.M.A. rendered a state’s same-sex marriage license meaning-

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<sup>94</sup> Although the U.S. Supreme Court decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), unifies most aspects of law for married same-sex couples among the states, discrepancies continue regarding other issues such as consanguinity, marriage alternatives, and parentage of children conceived through assisted reproductive technology. See, e.g., Scott Titshaw, *Sorry Ma’am Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 62-73 (2010).

<sup>95</sup> The Fourteenth Amendment guarantees that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and the state in which they reside[.]” clarifying that citizenship is a purely federal matter, with no meaningful state role beyond establishment of its own standards for recognizing state residence. U.S. CONST. amend. XIV, § 1.

<sup>96</sup> See Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407, 468-73 (2011) (describing the legislative history of D.O.M.A.).

less for immigration purposes, leaving thousands of U.S. citizens and immigrants to choose between remaining alone in the U.S., apart from their spouses, or moving abroad with their spouses.<sup>97</sup> It also may have disqualified the children of married same-sex couples under immigration and nationality laws that hinged on their parents' relationships, such as "stepchildren" and children "born in wedlock."<sup>98</sup>

The unjust treatment of these families prompted serious efforts to reform immigration legislation.<sup>99</sup> But before these efforts could succeed, in 2013, the U.S. Supreme Court struck down D.O.M.A.'s federal definition of "spouse," in *United States v. Windsor*,<sup>100</sup> as a violation of due process and equal protection. The Court reasoned that the federal definition degraded and demeaned same-sex couples, their children, and the family status bestowed on them under state law by differentiating them from other state-recognized families and relegating them to "second-class" status for federal purposes.<sup>101</sup> In the process, the Supreme Court also expressed grave federalism concerns, since Congress had rejected "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each [s]tate, though they may vary . . . from one state to the next."<sup>102</sup>

Immediately after *Windsor*, the choice for defining "spouse" for federal purposes came down to two options:<sup>103</sup> (1) the law of the state where the marriage was celebrated or (2) the law of the state where the couple would reside. This time, Congress did not act, and the Obama administration adopted a "place-of-celebration" rule that recognized same-sex marriages for immigration purposes if the marriages were legally valid where they were celebrated, whether in a U.S. state or a foreign coun-

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<sup>97</sup> See generally SCOTT LONG, JESSICA STERN & ADAM FRANCOEUR, *FAMILIES, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW* 152 (2006).

<sup>98</sup> See Titshaw, *supra* note 96, at 411, 415-20 (describing and arguing against such a reading of D.O.M.A.).

<sup>99</sup> Ryan Lizza, *What the DOMA Decision Means for Immigration Reform*, THE NEW YORKER (June 26, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/06/what-the-doma-decision-means-for-immigration-reform.html>.

<sup>100</sup> See Defense of Marriage Act, Pub. L. No. 104-99, §§ 1-3, 110 Stat. 2419 (1996) (defining marriage for all federal purposes as the union of one man and one woman); *United States v. Windsor*, 133 S. Ct. 2675, 2675 (2013) (striking down that definition as a violation of the Fifth Amendment of the U.S. Constitution).

<sup>101</sup> *Windsor*, 133 S. Ct. at 2693-96.

<sup>102</sup> *Id.* at 2692.

<sup>103</sup> One former U.S. Attorney General still supported a definition that excluded same-sex couples, but the Supreme Court's respect for same-sex couples and state marriage law in *Windsor* clearly discouraged a renewed exclusionary federal definition. See Alberto R. Gonzales & David N. Strange, *What the Court Didn't Say*, N.Y. TIMES (July 18, 2013), <http://nyti.ms/15NKz1A>.

try.<sup>104</sup> Though some legislators attempted to mandate a state-of-residence rule,<sup>105</sup> the place-of-celebration approach persisted. This rule was consistent with most prior U.S. immigration precedents regarding marriages that were prohibited by the state — those involving anti-miscegenation, consanguinity, or a transgender or minor spouse.<sup>106</sup> (In some contexts, like consanguinity, these rules still remain relevant today.)

More importantly, the place-of-celebration rule was the only possible approach that balanced respect for the traditional state role in licensing marriages on the one hand, with the federal need for a fair and unified immigration rule for all families on the other. Other options would forgo one of these principles. A federal definition of marriage (even if inclusive of same-sex couples) would ignore state family law entirely in favor of an independent federal definition, which would be inappropriate without clear legislative guidance or a clear constitutional rationale.<sup>107</sup>

Alternatively, a state-of-residence choice-of-law rule would have destroyed the unity of federal family-based immigration law, creating different immigration rules with different requirements depending on the couple's state of residence.<sup>108</sup> For instance, if a U.S. citizen married her same-sex Spanish fiancé in New York and then moved to Iowa, under Iowa state law, the U.S. citizen could have petitioned immediately for lawful permanent residence on behalf of her Spanish wife and stepchildren. If the wife were in the U.S. illegally, her marriage might even provide a basis for relief from removal. If the couple moved to Texas, however, the U.S. citizen would have no family-based route to permanent residence for her spouse or stepchildren and would be ineligible to request relief from removal if her wife faced deportation proceedings.

The U.S. Supreme Court's recent recognition of a right to marriage equality for same-sex couples in all states has now eliminated the interstate differences on which this hypothetical was based.<sup>109</sup> Yet similar sce-

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<sup>104</sup> See Scott C. Titshaw, *Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-Windsor World*, 66 VAND. L. REV. EN BANC 167, 169 (2013) (describing how President Obama, the State Department, the Department of Homeland Security and the Board of Immigration Appeals clarified this rule within days of publication of the Supreme Court's opinion).

<sup>105</sup> See S. 435, 114th Cong. (2015). This bill actually focused mainly on state of domicile rather than residence, presumably adding an implicit element of intent.

<sup>106</sup> See Titshaw, *supra* note 73, at 564-79.

<sup>107</sup> The U.S. Supreme Court found a constitutional right in *Obergefell v. Hodges*, recognizing that the fundamental right to marriage applies to same- as well as different-sex couples, resulting in recognition of marriage for same-sex couples in all U.S. States. 135 S. Ct. 2584, 2584 (2015). The reasoning in *Obergefell* means the federal government must also recognize the equality of same-sex spouses, eliminating the option of any future Congress or President reverting to an anti-gay federal marriage definition.

<sup>108</sup> See *infra* Part IV(D)(2) for a fuller description of this argument.

<sup>109</sup> See *supra* note 107.

narios will occur in Europe if the E.C.J. adopts a state-of-residence (“host state”) rule when it determines the meaning of “spouse” under the Family Migration Directives. The European Court would be better advised to instead borrow the successful U.S. place-of-celebration rule to effectively alleviate the current confusion regarding immigration policy.

### III. METHODS FOR INTERPRETING E.U. DIRECTIVES

E.U. directives are authoritative instruments, with no exact equivalent in other legal systems.<sup>110</sup> They are typically used to harmonize member states’ laws in a particular area, such as in family reunification.<sup>111</sup> Unlike E.U. regulations, directives typically require each member state to “transpose” them into domestic law<sup>112</sup> — that is, member states are bound “to the result to be achieved” in the directive but are left with “the choice of form and methods.”<sup>113</sup> Yet directives can prescribe the “result to be achieved” in meticulous detail,<sup>114</sup> often leaving member states with little discretion regarding “form and methods.”<sup>115</sup>

Directives also serve as a source of rights and responsibilities for individuals in several different situations.<sup>116</sup> Like other E.U. laws, they take precedence over conflicting domestic law,<sup>117</sup> and thus, member states’ courts must consider them, referring unclear issues under E.U. law to the E.C.J.<sup>118</sup>

The methods of directive interpretation employed by the E.C.J. are somewhat similar to those of statutory interpretation in the U.S. and other countries.<sup>119</sup> The E.C.J. has explained that it interprets E.U. law “in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the [E.U.] legal system and, where necessary, general principles common to the legal systems of the Member States.”<sup>120</sup>

<sup>110</sup> SACHA PRECHAL, *DIRECTIVES IN EC LAW* 1 (2d ed. 2005).

<sup>111</sup> *Id.* at 83-84.

<sup>112</sup> *Id.* at 5-6, 15-16.

<sup>113</sup> T.F.E.U., *supra* note 16, art. 288.

<sup>114</sup> PRECHAL, *supra* note 110, at 14.

<sup>115</sup> *Id.* at 14, 40, 73, 306.

<sup>116</sup> *Id.* at 307.

<sup>117</sup> *Id.* at 93-94.

<sup>118</sup> *Id.* at 131-34, 180, 188 (describing duty of national courts to consider E.U. law); *Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings*, 2012 O.J. (C 338/1).

<sup>119</sup> See LINDA JELLUM, *MASTERING STATUTORY INTERPRETATION* 21-48 (2d ed. 2013) (describing American statutory interpretation based on theories largely coinciding with these methods — textualist, intentionalist (historic) and purposivist — while discussing contextual analysis as one of the tools used under each theory).

<sup>120</sup> *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur S.A. v. Bundesrepublik Deutschland and The Queen v. Sec’y of State for Transp., ex parte: Factortame Ltd. & Others*, 1996 E.C.R. I-1029, ¶ 27.



The “generally accepted methods” of the E.C.J. are the familiar textual, systematic, historical, and teleological analyses, systematized by nineteenth century German legal scholar Carl Friedrich von Savigny.<sup>121</sup>

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<sup>121</sup> See Koen Lenaerts & José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, 20 COLUM. J. EUR. L. 3, 6, 16-17, 37 (2014) (discussing the “‘classical methods of interpretation’ – literal interpretation, contextual interpretation [including both systematic and historical intent] and teleological interpretation” and later focusing on comparative and international methods of “consistent interpretation”); Opinion of the Advocate General, Case C-399/11, *Melloni v. Ministerio Fiscal*, ¶ 39 (examining the “wording, scheme and purpose,” including legislative intent, of a directive). See also Winfried Brugger, *Concretization of Law and Statutory Interpretation*, 11 TUL. EUR. & CIV. L.F. 207, 232 (1996) (attributing the “classical cannon of interpretation” encompassing “grammatical (also called textual, semantic), systematic (contextual, structural), historical and teleological (purposive) interpretation” to Carl Friedrich von Savigny); Hannes Rösler, *Interpretation of EU Law*, in 2 MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 979 (Jürgen Basedow et al. eds., 2012) (classifying the E.C.J.’s methods of interpretation as “grammatical, systematic and purposive” with rare use of von Savigny’s fourth method – historical analysis); Bohumila Salachová & Vítěk Bohumil, *Interpretation of European Law, Selected Issues*, in 61 ACTA UNIVERSITATIS AGRICULTURAE ET SILVICULTURAE MENDELIANEAE BRUNENSIS 2717 (2013) (listing von Savigny’s classical methods as “grammatical, logical, historical and systematical”); Eberhardt Grabitz & Meinhard Hilf, *DAS RECHT DER EUROPÄISCHEN UNION*, Rn 32-33 (40th ed. 2009) (describing the acknowledged German focus of legal interpretation as text, context, legislative intent, and purpose).

Focusing on the international treaties that initially established the E.U. legal order, one might look to the Vienna Convention on the Law of Treaties as the most direct source of E.U. interpretive methods, and the E.C.J. has relied upon it in the context of interpreting treaties entered between the E.U. and non-member states. SERGO MANANASHVILI, *MÖGLICHKEITEN UND GRENZEN ZUR VÖLKER- UND EUROPARECHTLICHEN DURCHSETZUNG DER GENFER FLÜCHTLINGSKONVENTION* 87-88 (2009). The rules of interpretation in the Vienna Convention were also strongly influenced by von Savigny. See Vienna Convention on the Law of Treaties, arts. 31(1)-(3), May 23, 1969, 18232 U.N.T.S. 331 (listing ordinary textual meaning, context, and object and purpose as the general rule for interpreting treaties, among other Treaty-specific considerations such as subsequent practice). Like the E.C.J., the Convention makes it clear that terms may have a “special meaning” in a legal document. *Id.* art. 31(4). It allows for “supplementary means of interpretation” such as examining preparatory works to understand original intent where textual meaning is “ambiguous or obscure” or when the general rules of interpretation would lead to a “result that is manifestly absurd or unreasonable.” *Id.* art. 32.

The E.C.J. also relies on international treaties and customary international law as sources in interpreting statutes in a way that U.S. courts do not. Like its member states and many countries other than the U.S., E.U. law recognizes binding international treaties as superior to ordinary legislative acts, although not to its constitutional order. Lenaerts & Gutiérrez-Fons, *supra* note 121, at 40-41. Because the most compelling international law related to the definition of “spouse” in the E.U.

The “fundamental principles” of E.U. law are incorporated in the teleological method.<sup>122</sup> The E.C.J. also employs a comparative method to examine the “general principles common to the legal systems of the Member States.”<sup>123</sup>

The E.C.J. has developed its own emphases and nuanced understandings of each method, based on the unique context and needs of the E.U. legal system.<sup>124</sup> The Court usually starts by examining the precise language and grammar of the text in question.<sup>125</sup> It may then employ systematic, historical, teleological, or comparative methods to examine the specific provision, in the context of the legislation or the larger E.U. system, as well as the purpose of such provision, legislation, or system.<sup>126</sup> The E.C.J. may also investigate the historical intent of legislators or evaluate the comparative constitutional approaches of member states to the same issues, if appropriate, within the E.U.’s autonomous legal order.<sup>127</sup>

Like U.S. courts, the E.C.J. does not follow the rules of interpretation in a formalistic way.<sup>128</sup> In any given case, the Court “is, in principle, free to choose which of the methods of interpretation at its disposal best serves the E.U. legal order.”<sup>129</sup> For interpreting directives, “all the methods . . . operate in a mutually reinforcing manner.”<sup>130</sup> In the process, the E.C.J. also attempts to balance the natural tension between effective judicial support for treaty and legislative goals with respect for inter-institutional balance and “mutual and sincere cooperation” among the E.U. member states — principles upon which the E.U. was founded.<sup>131</sup> And as

Family Migration Directives is European human rights law, which is incorporated into the E.U. constitutional order in a unique way, this Article will not delve into the way that the E.C.J. might consider other treaties. For a good basic description of how the E.C.J. will consider international law, see *id.* at 37-43.

<sup>122</sup> See *Lenaerts & Gutiérrez-Fons, supra* note 121, at 44-51.

<sup>123</sup> *Id.* The E.C.J. sometimes applies other methods as well, e.g., conformance with international law, but those are beyond the scope of this Article. See *id.* at 37-43.

<sup>124</sup> See *id.* at 44-51.

<sup>125</sup> *Id.* at 13-14.

<sup>126</sup> *Id.* at 59-61. Each of the methods described coincides with one or more theories of interpretation. While these theoretical bases for interpretation color the sources examined and other ways the methods are utilized, a discussion of the theory is beyond the scope of this Article. For such a detailed discussion, see JELLUM, *supra* note 119, at 21-48.

<sup>127</sup> See *Lenaerts & Gutiérrez-Fons, supra* note 121, at 59-61.

<sup>128</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICABLE OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”). See also JELLUM, *supra* note 119, at 25 (reaffirming the current validity of this forty-year-old quote).

<sup>129</sup> *Lenaerts & Gutiérrez-Fons, supra* note 121, at 6.

<sup>130</sup> *Id.* at 61.

<sup>131</sup> *Id.* at 5-6.

a relatively new judicial institution in a Union whose democratic legitimacy has been frequently criticized, the E.C.J. may react more quickly to concerns of institutional legitimacy than more established national courts would; this may cause the Court to hesitate before interpreting E.U. law in ways that reach ahead of European public opinion and other institutions' positions.<sup>132</sup>

While there is general agreement on the methods the E.C.J. uses to interpret directives, there is some disagreement over their naming.<sup>133</sup> This debate is easy to understand in light of the fact that E.U. law has borrowed from both international treaty interpretation and the statutory interpretation of civil and common law traditions.<sup>134</sup>

This Article adopts a modified version of methods identified in a recent article on interpretation co-authored by E.C.J. Vice President Koen Lenaerts and international scholar José A. Gutiérrez-Fons.<sup>135</sup> The following subparts will introduce: (1) textual, (2) systematic, (3) historical, (4) teleological and (5) comparative analyses. The E.U. treaties neither list nor rank methods of legal interpretation,<sup>136</sup> and I am not attempting to prioritize them here. Rather, I move from the most specific to the least specific of the source materials, anticipating the example analyzed in Part IV.

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<sup>132</sup> See Robert Wintemute, *In Extending Human Rights, Which European Court is Substantively 'Braver' and Procedurally 'Fitter'?*, in *FUNDAMENTAL RIGHTS IN THE EU: A MATTER FOR TWO COURTS* 178, 180-91 (Sonia Morano-Foadi & Lucy Vickers eds., 2015) (arguing that the E.C.J. has been too cautious in cases involving sexual orientation and gender identity discrimination, waiting for the European Court of Human Rights to lead the way in recognizing rights).

<sup>133</sup> Compare Rösler, *supra* note 121, at 979 (classifying the E.C.J.'s methods of interpretation as "grammatical, systematic and purposive") with Lenaerts & Gutiérrez-Fons, *supra* note 121, *passim* (classifying the others as textualism, contextualism (both "systematic" and based on "*travaux préparatoires*"), and teleological). See also Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-621, ¶ 47 (explaining that, as of 1998, "the scope . . . of [European] Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the [EC Treaty] and its legal context").

<sup>134</sup> See Lenaerts & Gutiérrez-Fons, *supra* note 121, at 6.

<sup>135</sup> *Id.* Lenaerts and Gutiérrez-Fons provide an excellent starting point for understanding the methods of interpretation utilized by the [E.C.J.] with regard to both secondary law like directives and the treaties comprising primary E.U. law. See *id.* at 5-6. The current work could be read in conjunction with that article in order to illustrate one detailed example of interpretation of a disputed term in E.U. directives.

<sup>136</sup> *Id.* at 6.

### A. Textual Analysis

The E.C.J. will generally start with a textual analysis, looking for an unambiguous meaning of the text.<sup>137</sup> This plain meaning approach promotes the interests of predictability, transparency, institutional balance, and legal legitimacy.<sup>138</sup> Yet textual analysis is rarely sufficient; plain meaning seldom ends the E.C.J.'s interpretation of E.U. treaties or secondary E.U. law, including directives.<sup>139</sup> Primarily focusing on textual analysis is subject to criticism even in the context of U.S. federal statutes, since the "plain meaning" may be different or ambiguous for different people,<sup>140</sup> a problem that is complicated exponentially in the multi-lingual, multi-jurisdictional context of the E.U.<sup>141</sup>

As it applies here to "spouse[s]," both proponents and opponents of recognizing married same-sex couples as "spouse[s]" under the Family Migration Directives could reasonably argue for opposite but "unambiguous meanings" of the word "spouse." This is not unusual. Thus, for the E.C.J., the plain meaning of the words and grammar in a text rarely ends an inquiry into E.U. legislation, particularly in light of two interconnected factors: (1) the need for Union-wide legal uniformity and equality and (2) the principle of linguistic equality in a multilingual order.

#### 1. Uniformity and Autonomy

The principle of uniformity is common in two-tiered systems: federal judicial systems usually rely on a higher-level supreme court for the final interpretation of federal laws.<sup>142</sup> In the E.U., the E.C.J. "was established

<sup>137</sup> See, e.g., Case C-48/07, *Belgium v. Les Vergers du Vieux Tauves*, 2008 E.C.R. I-10627, ¶ 44; Case C-263/06, *Carboni v. Ministero dell'Economia e delle Finanze & Riunione Adriatica di Sicurtà SpA*, 2008 E.C.R. I-1077, ¶ 48; Case C-220/03, *European Cent. Bank v. Germany*, 2005 E.C.R. I-10595, ¶ 31.

<sup>138</sup> See *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 9 (crediting the benefits of "literal" textualism to legal certainty and the institutional balance of powers enshrined in Article 13(2) of the Treaty on European Union); *JELLUM*, *supra* note 119, at 31 (describing benefits of textualism for "increasing predictability and efficiency, encouraging more careful legislative drafting, and limiting inappropriate use of legislative history").

<sup>139</sup> *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 6-7, 9, in addition to the multilingual issues discussed below with regard to directives, the E.U. treaties were generally drafted in very broad terms, adding another reason to go beyond the text in interpreting them.

<sup>140</sup> *JELLUM*, *supra* note 119, at 29.

<sup>141</sup> See, e.g., Opinion of the Advocate General, Case C-582/08, *Comm'n v. United Kingdom*, 2010 E.C.R. I-7195, ¶ 27 (reasoning that "the literal interpretation and the clear meaning may not be synonymous as the literal meaning of a provision may be ambiguous").

<sup>142</sup> This commonality can be implemented through different models. For instance, the U.S. employs a single Supreme Court as the court of last resort for legal issues triggering federal jurisdiction. Germany, on the other hand, features different

with a view to ensuring the proper application and uniform interpretation” of E.U. law “in all the Member States . . . prevent[ing] . . . divergences in judicial decisions on questions” of E.U. law.<sup>143</sup> As such, the E.C.J. acknowledges that uniform application of E.U. law is fundamental to the European legal order, even in the context of directives.<sup>144</sup>

In order to ensure E.U. law has a uniform and consistent meaning throughout the Union, the E.C.J. has long recognized the “autonomy principle,” whereby E.U. terms generally have a single definition — independent of any national understanding of the same term.<sup>145</sup> With the exception of E.U. legislation that expressly defers to the member states, such as the Citizens Directive that relies on member state treatment of “registered partners,”<sup>146</sup> the terms of E.U. provisions “must normally be given an autonomous and uniform interpretation” throughout the Union.<sup>147</sup> Because of differences in general and legal cultures, such Union-wide definitions are not likely to correspond with an ordinary reading of the text in some member states.

The autonomy principle is crucial for the uniform interpretation of E.U. legislation, particularly in light of the principle of linguistic equality

supreme courts for different subject matter areas, such as the Federal Constitutional Court, the Federal Court of Justice for Civil and Criminal Matters, and other federal courts of last resort for Labor Law, Financial Law, and Social Law. *See Court System in Germany*, COUNCIL OF EUROPE, <http://www.coe.int/t/dghl/cooperation/cepej/profiles/CourtSystemGermany.pdf> (last visited Oct. 18, 2015).

<sup>143</sup> Case C-283/81, C.I.L.F.I.T. v. Ministry of Health, 1982 E.C.R. 3415, ¶ 7.

<sup>144</sup> *See* Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur S.A. v. Bundesrepublik Deutschland and The Queen v. Sec’y of State for Transp., ex parte: Factortame Ltd.*, 1996 E.C.R. I-1029, ¶¶ 33, 46 (calling uniform application of the law a “fundamental requirement of the [Union’s] legal order”); SACHA PRECHAL, *DIRECTIVES IN EC LAW* 259 (2d ed. 2005) (describing concern with uniform application of E.U. law as a primary concern of the E.C.J.).

<sup>145</sup> Joined Cases C424/10 & C-425/10, *Ziolkowski v. Land Berlin*, intervening parties: *Vertreter des Bundesinteresses beim Bundesverwaltungsgericht*, 2011 E.C.R. I-14051, ¶ 32 (“according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union”); Case C-283/81, C.I.L.F.I.T. v. Ministry of Health, 1982 E.C.R. 3415, ¶ 19 (noting that “even where the different language versions are entirely in accord with one another” E.U. law “uses terminology which is peculiar to it” and concepts with a different meaning than they have under the law of the various member states). *See also* Lenaerts & Gutiérrez-Fons, *supra* note 121, at 7.

<sup>146</sup> *See supra* Part I(B).

<sup>147</sup> Case C-174/08, *NCC Construction Danmark A/S v. Skatteministeriet*, 2009 E.C.R. I-10567, ¶ 24, <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-174/08> (last visited Sept.18, 2015).

described below.<sup>148</sup> Without a controlling, autonomous E.U. definition, many terms of a directive could have different meanings when transposed into the ordinary language or domestic legal terminology of the twenty-eight different E.U. countries.<sup>149</sup>

## 2. Multilingualism and Linguistic Equality

The European Union has twenty-four official and working languages.<sup>150</sup> E.U. treaties, legislation and other official documents are provided in all of the languages,<sup>151</sup> and all E.U. citizens have the right to access these documents and communicate with Union officials in any of these languages.<sup>152</sup> Under the principle of linguistic equality, there is no one official version of an E.U. document.<sup>153</sup> This means that a purely textualist approach must focus on many different versions of the text and ensure that the “plain meaning” is plain in all twenty-four languages.<sup>154</sup> Of course, this is highly unlikely.<sup>155</sup>

Since the textual approach is the starting point of directive interpretation, a close reading of the various versions of a directive may nevertheless help determine the purpose or the overarching scheme of the directive, and it may guide the subsequent systematic, historical, or teleo-

<sup>148</sup> See *infra* Part III(A)(2). See also Lenaerts & Gutiérrez-Fons, *supra* note 121, at 16.

<sup>149</sup> See generally Lenaerts & Gutiérrez-Fons, *supra* note 121, at 6-7.

<sup>150</sup> This is unique. See Theodor Schilling, *Language Rights in the European Union*, 9 GERMAN L.J. 1219, 1222-25 (2008) (describing the E.U. as exceptional in comparison to bilingual Canada, trilingual Belgium, quadrilingual Switzerland, South Africa (with eleven official languages, but only two government languages), and various international organizations, which each employ only a few official languages).

<sup>151</sup> Act Concerning the Conditions of Accession of the Republic of Croatia and the Adjustments to the Treaty on European Union, et al., 55 O.J. (L 112/21) 21, 25 (adding Croatian to the twenty-three languages previously listed in the Treaty on European Union). This often results in E.U. terminology which is peculiar to it, and divergent from the ordinary legal meaning of the same terms in the native country for a given linguistic version of E.U. texts. Lenaerts & Gutiérrez-Fons, *supra* note 121, at 7.

<sup>152</sup> T.F.E.U., *supra* note 16, art. 20(2)(d).

<sup>153</sup> Council Regulation 1/58/EC on Determining the Languages to be Used by the European Economic Community, 1958 O.J. (L 385/58) 58. (last modified by Council Regulation 517/2013, Adapting Certain Regulations and Decisions by Reason of the Accession of the Republic of Croatia, 201 O.J. (L 158) 1, 71 (EU)). See also Case C-283/81, C.I.L.F.I.T. v. Ministry of Health, 1982 E.C.R. 3415, ¶ 18 (“the different language versions are all equally authentic”).

<sup>154</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 13, 35 (explaining that “textualism, as a method of interpretation does not suffice where linguistic divergences exist”); Case C-29/69, Stauder v. City of Ulm, Sozialamt (Social Welfare Office), 1969 E.C.R. 419, ¶ 3.

<sup>155</sup> In light of the problems pointed out above, resort to external sources of plain meaning, namely dictionaries, are not common in the E.U. system.

logical analyses.<sup>156</sup> Moreover, the dual principles of Union-wide uniformity and multilingual equality magnify the universal legal tendency to shift away from ordinary, plain meanings towards new, technical legal terminology,<sup>157</sup> a corollary of the autonomy principle described above.<sup>158</sup>

## B. *Systematic Analysis*

Under a systematic approach, the E.C.J. examines the functional context of a provision or term, within the legislation at issue or within the broader legal system to which it belongs, to find a meaning in harmony with the context.<sup>159</sup> Unlike the historical analysis approach below, the relevant context is not the meaning of the words on the date of enactment, but their “state of evolution at the date on which the provision in question is to be applied.”<sup>160</sup> This method assumes that legislators are rational actors who work to establish an internally consistent and complete legal order.<sup>161</sup>

Similar to U.S. rules of statutory interpretation, the E.C.J. follows the principle of *effet utile*; it reads each provision of a law to have its own specific and exclusive meaning so that no provision is redundant.<sup>162</sup> The Court also observes the principle that ambiguous provisions should be read to be consistent with the general scheme of the law of which they are a part.<sup>163</sup> And akin to the U.S.’s “constitutional avoidance” doctrine, the E.C.J. observes the principle of “harmonious interpretation,” in which secondary E.U. legislation must be “interpreted, as far as possible, in such

<sup>156</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 13-14 (describing how textual analyses of certain language versions of E.U. texts “operate as an ancillary, corroborative argument”).

<sup>157</sup> See Case C-283/81, C.I.L.F.I.T. v. Ministry of Health, 1982 E.C.R. 3415, ¶ 19 (“[E]ven where different language versions are entirely in accord with one another . . . [E.U.] law uses terminology which is peculiar to it.”).

<sup>158</sup> See *supra* Part III(A)(1).

<sup>159</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 20. Americans tend to reference the former as statutory context and the latter as *in pari materia* (regarding other statutes “on the same subject matter”). See JELLUM, *supra* note 119, at 127-30.

<sup>160</sup> Case C-283/81, C.I.L.F.I.T. v. Ministry of Health, 1982 E.C.R. 3415, ¶ 20 (emphasis added).

<sup>161</sup> *Id.* at 17. See also T.F.E.U. *supra* note 16, art. 7 (requiring “consistency between” E.U. policies and activities); Koen Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, 44 COMMON MKT. L. REV. 1625, 1625-26, 1643-44, 1659 (2007).

<sup>162</sup> PRECHAL, *supra* note 144, at 259 (classifying *effet utile* as a primary tool of the E.C.J.); Lenaerts & Gutiérrez-Fons, *supra* note 121, at 17, 20. See also LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 132 (2d ed. 2013) (Americans would call this a “rule against surplusage” or redundancy).

<sup>163</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 17. (this rule is sometimes called *in pari materia*). See JELLUM, *supra* note 162, at 127-30.

a way as not to detract from its validity.”<sup>164</sup> As such, this principle discourages interpretations that conflict with superior E.U. law, such as the fundamental rights to equal treatment and freedom of movement, as well as other primary goals of European integration.<sup>165</sup>

Under a systematic approach, the E.C.J. looks beyond the directive in question, to its functional relationship with related directives and the larger normative system to which they belong, “[j]ust as the different parts of an engine must work together to keep it running.”<sup>166</sup> Here, in the context of family-based migration, the Family Migration Directives work together just as the various legislation they replaced had functioned before. Thus, it makes sense to interpret terminology consistently if it is repeated in similar contexts in both directives.<sup>167</sup>

The focus of the systematic approach on internal consistency in and among the texts is similar to the textual approach, but also in the broad sense, it shares elements of the teleological approach, which will be discussed further below.

### C. *Historical Analysis*

A historical analysis relies on the directive’s legislative history — its *travaux préparatoires* — as a primary tool for understanding the text.<sup>168</sup> Like American “intentionalists,” European jurists focusing on legislative history seek to reveal and implement the specific intent of the legislators who enacted a directive at the time of enactment.<sup>169</sup> Their primary tools are the written records of the legislative process, the failure or success of proposed textual amendments during that process, and the legislative acquiescence to existing statutory interpretation based on a subsequent failure to amend.<sup>170</sup>

The historical approach, like intentionalism, has a number of shortcomings, however. First, it can have an ossifying effect because the historical legislative intent remains fixed and unable to adapt to unforeseen technological and societal developments.<sup>171</sup> Because E.U. legislation often

<sup>164</sup> Case C-403/99, *Italy v. Comm’n*, 2001 E.C.R. I-6897, ¶ 37.

<sup>165</sup> *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 20, 21; *PRECHAL*, *supra* note 144, at 180-81. *See, e.g.*, *Joined Cases C-402/07 & C-432/07, Sturgeon v. Condor Flugdienst GmbH and Böck v. Air France*, 2009 E.C.R. I-10923, ¶¶ 46-48 (interpreting a regulation on airline passenger compensation to avoid conflict with the right to equal treatment).

<sup>166</sup> *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 16.

<sup>167</sup> Americans would call this the canon of consistent usage. *See JELLUM*, *supra* note 162, at 127 (“identical words should have identical meanings”).

<sup>168</sup> *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 23-31.

<sup>169</sup> *See id.* at 24 (noting increased European focus on *travaux préparatoires* to determine legal aims); *JELLUM*, *supra* note 162, at 36 (describing the method and goals of American intentionalists).

<sup>170</sup> *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 30-31.

<sup>171</sup> *See id.* at 28; *JELLUM*, *supra* note 162, at 41.



requires supermajorities or unanimous agreement to enact, the probability of ossification may be even greater, and corrective amendments even less likely to occur, in the E.U. context.<sup>172</sup>

Second, ascertaining specific legislative intent may be a futile exercise. As one American scholar put it:

[T]he idea that there is one unified “meeting of the minds” [among enacting legislators] is nonsense. While members of the legislature may share the goal of passing a bill to address a particular problem, rarely will all members have the same reason for passage or even the same expectations regarding the bill’s effects.<sup>173</sup>

U.S. Supreme Court Justice Antonin Scalia has been particularly critical in his assessment of the historical method, maintaining that, “[i]f one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.”<sup>174</sup> Not only is it impossible to determine specific intent in many contexts, but extensive legislative source material renders historical analysis ripe for manipulation by activist judges.<sup>175</sup> Justice Scalia suspects that manipulative judges understand that “the trick is to look over the heads of the crowd and pick out your friends.”<sup>176</sup>

Just as American legislation is often the result of compromises within and between the House of Representatives, the Senate and the President, European directives are cobbled together through a complex drafting, consulting, amending, and voting process involving the Commission, the Council of the European Union (“Council”) and the European Parliament (“Parliament”), as well as various committees and advisory bodies within and beyond those three institutions. Determining legislators’ common intent proves difficult, if it exists at all.<sup>177</sup> The members of various E.U. institutions do not necessarily have the same understanding of a particular provision of Union law.<sup>178</sup>

<sup>172</sup> T.F.E.U., *supra* note 16, art. 20(2)(d).

<sup>173</sup> See JELLUM, *supra* note 162, at 22.

<sup>174</sup> *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (emphasis in original).

<sup>175</sup> JELLUM, *supra* note 162, at 36.

<sup>176</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (Amy Gutman ed., 1997) (quoting Judge Harold Leventhal).

<sup>177</sup> JELLUM, *supra* note 162, at 35-36.

<sup>178</sup> See Opinion of the Advocate General, Case C-28/76, *Milac v. Hauptzollamt Freiburg*, 1976 E.C.R. 1664; Guido Itzcovich, *The Interpretation of Community Law by the European Court of Justice*, 10 GERMAN L.J. 537, 554-55 (2009). Part IV(B)(4) below provides an excellent illustration of this point.

While U.S. jurists have tended to move away from legislative history as a primary interpretative tool in favor of the primacy of the text,<sup>179</sup> the E.C.J. seems to be moving in the opposite direction, as *travaux préparatoires* have become increasingly detailed and available.<sup>180</sup> At the outset, however, the E.C.J. hardly used legislative history and repeatedly refused to interpret the provisions of the 1957 Treaty of Rome (establishing the European Economic Community) under this historical approach.<sup>181</sup> This reluctance was understandable since there were no readily available negotiation records at the time regarding the founding treaty of what would later become the European Union.<sup>182</sup>

With greater maintenance of and public access to recent *travaux préparatoires*, however, the E.C.J. appears to be more willing to engage in historical analysis.<sup>183</sup> Historical analysis may be even more influential in the context of directives and regulations, since they are likely to be detailed and technical in nature, and are often accompanied by legislative records that are publicly available and free to anyone with an Internet connection.<sup>184</sup>

Nevertheless, it is still too early to tell just how important legislative history will become to the E.C.J.'s analysis.<sup>185</sup> The concerns about the ossifying effect, futility, and manipulability of legislative history still persist. Therefore, scholars tend to agree that legislative history should generally play a secondary role, if any, in the interpretation of E.U. directives.<sup>186</sup>

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<sup>179</sup> WILLIAM ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 770-71 (3d ed. 2001).

<sup>180</sup> See Lenaerts & Gutiérrez-Fons, *supra* note 121, at 24, 26.

<sup>181</sup> Opinion of the Advocate General, Case C-2/74, *Reyners v. Belgian State*, 1974 E.C.R. 657, 665-66. The European Economic Community ("E.E.C.") was the early predecessor of the E.U.

<sup>182</sup> Opinion of the Advocate General, Case C-583/11 *Kanatami v. Parliament & Council*, 2013 E.C.L.I. 21, ¶ 32 (attributing the E.C.J.'s refusal to focus on drafting history in earlier eras to the unavailability of *travaux préparatoires* for the founding documents).

<sup>183</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 24, 26-27, 31 (for instance, the negotiation histories for later treaties, such as the Treaty of Lisbon, have been better maintained).

<sup>184</sup> Itzcovich, *supra* note 178, at 554. For publicly available E.U. legislative records, see generally EUR-LEX, <http://eur-lex.europa.eu/>.

<sup>185</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 59-60 (recognizing the legitimacy of considering *travaux préparatoires* while stating that the role they will tend to play for the E.C.J. "remains an open question").

<sup>186</sup> *Id.* at 22, 26, 28-29.

#### D. Teleological Analysis

The most prominent E.C.J. method of interpretation is teleological analysis.<sup>187</sup> Under this method, which is similar to purposivism, the Court determines the objectives of a particular law or, in some cases, of the E.U. system as a whole, and then interprets the provision in question in a way that best accomplishes those objectives.<sup>188</sup> This approach is often combined with the systematic approach because a systematic understanding of the law and its normative system helps uncover the relevant objectives and vice versa.<sup>189</sup>

In the specific context of directives, European judges primarily use the teleological approach, given the goal-oriented nature of this form of legislation. As discussed above, while directives allow member states some discretion in the “form and methods” for achieving a result or purpose, that margin of discretion is sometimes reduced “to a considerable degree” because member states are “under an obligation to take, within a given period, all the measures needed in order to achieve *the result* required by a directive.”<sup>190</sup> Thus, the purpose of the directive evidently has a controlling effect, and the teleological approach looks to uncover and implement this purpose.

While the details of this analysis are largely unclear, some guidelines on the teleological approach are apparent. A broad interpretation of the text is warranted if it is the only way to achieve the objectives of the law, or if the provision in question “give[s] expression to a principle of constitutional importance for the objectives set out in the Treaties.”<sup>191</sup> For example, the E.C.J. has specifically held that the provisions of the Citizens Directive and others governing the right to move and reside freely within the Union, “cannot be interpreted restrictively.”<sup>192</sup> Exceptions, on

<sup>187</sup> Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 *FORDHAM INT’L L.J.* 656, 664 (1996) (former Advocate General Fennelly calls the teleological approach the “characteristic element in the [E.C.J.]’s interpretive method”). This approach was dominant during the developing stages of many familiar statutory regimes, including those of medieval England and the early U.S. as well as the E.U. JELUM, *supra* note 162, at 39. These early lawmakers tended to draft laws broadly, “imbued with a purpose driven functionalism.” Lenaerts & Gutiérrez-Fons, *supra* note 121, at 31.

<sup>188</sup> Fennelly, *supra* note 187, at 666.

<sup>189</sup> *Id.* at 664.

<sup>190</sup> Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur S.A. v. Bundesrepublik Deutschland and The Queen v. Sec’y of State for Transp., ex parte: Factortame Ltd.*, 1996 E.C.R. I-1029, ¶ 46 (emphasis added). *See also* T.F.E.U., *supra* note 16, art. 288.

<sup>191</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 33.

<sup>192</sup> Case C-267/83, *Diatta v. Berlin*, 1985 E.C.R. 567, ¶¶ 16-17; Case C-413/99, *Bombast v. Sec’y State for Home Dep’t*, 2002 E.C.R. I-7091, 158, ¶ 74; Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. Eind*, 2007 E.C.R. I-10719, ¶ 43; Case C-127/08, *Metock v. Minister for Justice, Equality & Law Reform*, 2008 E.C.R. I-6241, ¶ 84; Case C-162/09, *Sec’y for Work v. Lassal*, 2010 E.C.R. I-9217, ¶ 31.

the other hand, “are to be interpreted strictly so that general rules are not negated.”<sup>193</sup>

In the context of “constructive ambiguity,” where legislators have “agreed to disagree,” several scholars have observed that the E.C.J. follows a “meta-teleological approach” — particularly when the E.U. is required to cope with changing times.<sup>194</sup> This highly flexible method of interpretation has been described as a “function of the dynamic character of the process of integration recognized in the [t]reaty,” supporting the overarching “objective of creating ‘an ever closer union among the peoples of Europe.’”<sup>195</sup>

### E. Comparative Analysis

In addition to the classic methods discussed above, the E.C.J. also uses a comparative approach, considering “where necessary, general principles common to the legal systems of the Member States.”<sup>196</sup> U.S. federal courts have occasionally looked to the constitutional orders of U.S. states to determine whether a right is fundamental.<sup>197</sup> The E.C.J. however does so much more frequently as the Court is constitutionally required to respect member state national identities and “value diversity.”<sup>198</sup>

Under this method, there can be “a strong correlation between the degree of convergence among the national legal systems and the deference shown to national law by the E.C.J.”<sup>199</sup> In examining member

<sup>193</sup> Case C-346/08, *Comm’n v. United Kingdom*, 2010 E.C.R. I-03491, ¶ 39; Case C-476/01, *Kapper*, 2004 E.C.R. I-5205, ¶ 72.

<sup>194</sup> Miguel Poiars Maduro, *Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 1, 5 (2007); MITCHEL LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 359 (2004).

<sup>195</sup> Maduro, *supra* note 194, at 11. Here, American students of statutory interpretation might recognize echoes of Professor Bill Eskridge’s description of dynamic statutory interpretation. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION*, 9-10 (1994).

<sup>196</sup> *Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur S.A. v. Bundesrepublik Deutschland and The Queen v. Sec’y of State for Transp., ex parte: Factortame Ltd.*, 1996 E.C.R. I-1029, ¶ 27.

<sup>197</sup> *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (looking to state movement in eliminating anti-miscegenation laws in recognizing related federal rights); *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986) (referencing continued state anti-sodomy laws in refusing to strike down Georgia’s law); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (looking to state movement in eliminating sodomy laws in holding such laws violate due process rights under federal constitution).

<sup>198</sup> See *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 47-48.

<sup>199</sup> *Id.* at 49. See, e.g., Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MKT. L. REV. 1629, 1633 (2010).

states' legal systems, the E.C.J. uses an "evaluative approach,"<sup>200</sup> which involves identifying any trends among member states or seeking out solutions that reflect the mission of the Union.<sup>201</sup> The E.C.J. then chooses solutions "which, having regard to the objects of the [t]reaty, appear to [the Court] to be the best or . . . the most progressive."<sup>202</sup> Through this analysis, the E.C.J. has derived and recognized fundamental rights from the guarantees of the European Convention on Human Rights and from the constitutional traditions common to the member states.<sup>203</sup> The comparative method is particularly useful when the E.C.J. is developing general principles of E.U. "federal common law," filling in the gaps, whether or not they were intentional, when no E.U. treaty or legislation is on point.<sup>204</sup>

This practice is of strategic institutional importance, particularly for the E.U. whose legitimacy has been criticized at times.<sup>205</sup> As some scholars noted, "[w]hen it comes to discovery and development of *general principles of E.U. law*, the E.C.J. can reinforce its legitimacy by adopting a comparative law methodology, taking account of Member States' [established and democratically legitimated] legal systems."<sup>206</sup> As such, the E.C.J. may sometimes compare member state laws in order to uncover general interests that might outweigh central Union objectives, in light of

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<sup>200</sup> See Lenaerts & Gutiérrez-Fons, *supra* note 121, at 49-51. The E.C.J. does not find a "lowest common denominator" or merely apply the majority approach. *Id.* at 50. Regarding the former, such a calculus would be difficult in any case since the populations of the member states vary so dramatically from less than 500,000 in Malta to over 81,000,000 in Germany. COUNCIL OF THE EUROPEAN UNION FACT SHEET, NEW METHOD OF CALCULATING A QUALIFIED MAJORITY IN THE COUNCIL (Sept. 29, 2014), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/genaff/144960.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/144960.pdf). This is the reason for the qualified majority voting system in the Council, requiring votes of fifty-five percent of member states, representing sixty-five percent of E.U. population. *Id.*

<sup>201</sup> Opinion of the Advocate General, Case C-550/07, *Akzo Nobel Chem. v. European Comm'n*, 2010 E.C.R. I-8360, ¶ 96. See also Lenaerts & Gutiérrez-Fons, *supra* note 121, at 51.

<sup>202</sup> Opinion of the Advocate General, Case C-14/61, (Jan. 24, 2012) *Hoogovens v. High Authority*, 1962 E.C.R. 253, 283-84; Opinion of the Advocate General, Case C-282/10, *Dominguez v. Centre Informatique du Centre Ouest Atlantique*, 2012 E.C.J. EUR-Lex 62010CJ0282. See also Lenaerts & Gutiérrez-Fons, *supra* note 121, at 50.

<sup>203</sup> See Consolidated Version of the Treaty on the European Union. art. 6(3), 2012 O.J. (C 326/01) 13 (requiring respect for "[f]undamental rights, as guaranteed by the [E.C.H.R.] and as they result from the constitutional traditions common to the Member States, [which] shall constitute general principles of the Union's law") [hereinafter T.E.U.].

<sup>204</sup> See Lenaerts & Gutiérrez-Fons, *supra* note 121, at 48 (describing the comparative law method as providing "a good framework for the E.C.J. to undertake 'federal common law-making'").

<sup>205</sup> See *supra* note 132 and accompanying text.

<sup>206</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 46-47.

the promise of the primary E.U. treaties to “respect [member states’] rich cultural and linguistic diversity.”<sup>207</sup>

In effect, the comparative analysis can also overlap with the teleological approach above, in terms of its consideration of the goal of interstate diversity (what Americans would classify as “federalism”). In addition to broad fundamental human rights, the comparative approach has also been used to determine the meaning of specific terms in E.U. documents in certain civil cases, including one concerning the clarifications of “spouse” and “marriage” to not include unmarried partners and partnerships,<sup>208</sup> which will be discussed further below.

#### IV. INTERPRETING THE FAMILY MIGRATION DIRECTIVES

The meaning of the word “spouse” in the Family Migration Directives remains open to question, and scholars have offered widely different views.<sup>209</sup> Below, I examine this question in great detail without any pretense that the E.C.J. or the Advocate General would examine the issue so comprehensively under all of the interpretive methods. Courts on both sides of the Atlantic generally do not employ all of the aforementioned rules of statutory or directive interpretation; they pick and choose their methods depending on the case. However, this rigorous academic exercise may provide insight for the E.C.J. and scholars in Europe on the paths of interpretation the court can or may take.

The organization of the following analysis is somewhat artificial because the scope of each method is not entirely clear. For example, the early legal recognition of same-sex marriage in the Netherlands and

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<sup>207</sup> T.E.U., *supra* note 203, art. 3(3). *See also* T.F.E.U., *supra* note 16, art. 167(4) (“The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”). Those same documents also provide for freedom of movement in a borderless area and to “combat discrimination based on sex . . . or sexual orientation” in “defining and implementing its policies and activities.” *Id.* art. 10.

<sup>208</sup> *See, e.g.*, Case C-59/85, *Netherlands v. Reed*, 1986 E.C.R. I-01283, ¶ 10 (pointing out that social developments in the Union as a whole would be necessary to justify expansion of the term “spouse” in a regulation to include unmarried partners in a stable relationship); *Joined Cases C-122/99 P & C-125/99 P. D. & Sweden v. Council*, 2001 E.C.R. I-4319, ¶ 34 (stating in dicta in case refusing to recognize a same-sex partnership as a “marriage” under the E.U.’s Staff Regulations that “according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex”). *See also infra* Part IV(B)(1).

<sup>209</sup> *See, e.g.*, *Lenaerts & Gutiérrez-Fons*, *supra* note 121, at 49 (citing recent developments at various levels of European law and noting that “it will be interesting to see how the [E.C.J.] will interpret the concept of ‘spouse’ for the purposes of relevant secondary [E.U.] law, notably” the Citizens Directive). *See also supra* notes 9-11.

Belgium can fit under a historical analysis, because this history helps reveal the possible intent of legislators when they referenced “spouse[s]” in the directives;<sup>210</sup> or under a textual analysis, with its ordinary meaning of the word “spouse;” or under a comparative analysis, focusing on the developing legal orders of E.U. member states. Yet regardless of the theoretical organization in instances of overlap, the resulting analysis is largely similar.

A. *Textual and Systematic Analyses: Defining “Spouse” Broadly and Consistently*

Combining textual and systematic approaches here is sensible because both methods rely on the text of the two E.U. directives — the first in isolation and the second together. The text of the directives generally supports a broadly inclusive interpretation of “spouse,” to include married same-sex couples,<sup>211</sup> and the systematic comparison of the texts supports a common, consistent treatment of “spouse[s]” in both directives.

1. The Text of the Family Reunification Directive

The Family Reunification Directive provides three lists of family members, whom member states (1) shall, (2) may, or (3) shall not provide entry and residence.<sup>212</sup> Under the first category, the directive emphasizes that “[f]amily reunification should apply in any case to the members of the nuclear family.”<sup>213</sup> After defining “sponsor” to be a “third-country national residing lawfully in a Member State,” the directive provides that member states “*shall authorise* the entry and residence . . . of the . . . sponsor’s spouse” and “the minor children of the sponsor and his/her spouse” if they meet certain required conditions.<sup>214</sup>

Under the second category, the directive provides that “the Member States *may authorise* the entry and residence” of “first-degree [depen-

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<sup>210</sup> See Kees Waaldijk, *Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe*, 1 GENUIS 42, 44 (2014) (chronology of legal recognition of civil marriage in Europe).

<sup>211</sup> Family Reunification Directive, *supra* note 3, recitals 5, 9.

<sup>212</sup> *Id.* art. 4.

<sup>213</sup> *Id.* recital 9. German: “Die Familienzusammenführung sollte auf jeden Fall für die Mitglieder der Kernfamilie, d.h. den Ehegatten und die minderjährigen Kinder gelten.” Spanish: “La reagrupación familiar debe aplicarse en todo caso a los miembros de la familia nuclear, es decir, al cónyuge y a los hijos menores de edad.” French: “Le regroupement familial devrait viser, en tout état de cause, les membres de la famille nucléaire, c’est-à-dire le conjoint et les enfants mineurs.” Italian: “Il ricongiungimento familiare dovrebbe riguardare in ogni caso i membri della famiglia nucleare, cioè il coniuge e i figli minorenni.” Dutch: “De leden van het kerngezin, dat wil zeggen de echtgenoot en de minderjarige kinderen, hebben steeds recht op gezinshereniging.”

<sup>214</sup> *Id.* art. 4(1) (emphasis added).

dent] relatives in the ascending line” and certain dependent adult children of the sponsor or spouse, as well as:

*the unmarried partner, being a third-country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership . . . and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of the state of health, of such persons.*<sup>215</sup>

The directive also provides that member states “may” set a minimum age up to twenty-one for immigrating sponsors and their “spouse[s]” in order “to ensure better integration and to prevent forced marriages.”<sup>216</sup>

Under the third category, the directive generally disapproves of polygamous marriages.<sup>217</sup> In order to “respect the rights of women and of children,”<sup>218</sup> it provides that member states “*shall not authorise* the family reunification of a further spouse” for a polygamous sponsor who “already has a spouse living with him in the territory of a Member State.”<sup>219</sup> Yet member states may choose whether to provide immigration benefits to the sponsor’s children with that “further spouse.”<sup>220</sup>

To begin the textual analysis of the word “spouse,” it seems worthwhile to examine the ordinary meaning of “spouse.” Yet depending on the perspective, there are two ordinary, but opposite, meanings. And those meanings have been changing rapidly. By the time the Family Reunification Directive was enacted in 2003, the Netherlands, Belgium and Ontario (Canada) already authorized marriage for same-sex couples.<sup>221</sup> Thus, the term “spouse,” as understood by laypersons and lawyers in 2003, arguably included married same-sex couples. Nevertheless, many European jurisdictions have either adopted or expressly rejected same-sex marriage since 2003, and legally defined “spouse” one way or the other. In each case, the people of these states have clearly contemplated the

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<sup>215</sup> *Id.* arts. 4(2)-4(3) (emphasis added).

<sup>216</sup> *Id.* art. 4(5). For the purposes of dependents of refugees, it is completely comprehensive, creating a catch-all category of “other family members not referred to in Article 4” and clarifies that member states “may authorize family reunification” for them as well. *Id.* art. 10(2).

<sup>217</sup> *Id.* art. 4(4).

<sup>218</sup> *Id.* recital 11.

<sup>219</sup> *Id.* art. 4(4).

<sup>220</sup> *Id.*

<sup>221</sup> Waaldijk, *supra* note 210, at 45. Today, ten member states have decided to legally authorize same-sex marriages, and two others are seriously considering such a change. See *infra* notes 335-36 and accompanying text. The Canadian province of Ontario began authorizing same-sex marriages in June 2003. *Halpern v. Toronto (City)*, 172 O.R. 3d. 162, 201 (2003).



possibility of same-sex marriage and thereby expanded the ordinary meaning of the words “marriage” and “spouse.”<sup>222</sup>

Neither the E.C.J. nor the Advocate General normally resort to dictionary citations, as American judges sometimes do, to find the plain meaning of a term.<sup>223</sup> In the E.U. context, the use of dictionaries is especially futile, considering that the E.U. has twenty-four official languages, using different words for the rapidly evolving term “spouse” in their respective directives.<sup>224</sup>

The terms for “spouse” in different language versions of the Family Reunification Directive include: “le conjoint” in French, “el cónyuge” in Spanish, “il coniuge” in Italian, “dem Ehegatten” in German, and “de echtgenoot” in Dutch. Depending on the dictionary, the popular meaning of these terms is either heteronormative or gender neutral. Generally, the brief definitions in standard online editions of respected dictionaries present a gender-neutral meaning that could include same-sex spouses, even in the languages of countries that do not legally recognize same-sex marriage.<sup>225</sup> Older dictionaries usually include gendered

<sup>222</sup> See *infra* Part IV(D)(1).

<sup>223</sup> See, e.g., *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1981) (quoting Webster’s Third International Dictionary and Black’s Law Dictionary to indicate that “[t]he term ‘marriage’ ordinarily contemplates a relationship between a man and a woman”).

<sup>224</sup> There are now twenty-four official E.U. languages, see *supra* note 150, and in 2003 there were already twelve languages, including the examples employed below. Treaty of Nice Amending the Treaty on European Union and the Treaties Establishing the European Communities and Certain Related Acts, art. 13, 2001 O.J. (C 80/1) 55.

<sup>225</sup> See, e.g., *Spouse*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/spouse> (last visited Sept. 14, 2015) (defining “spouse” in gendered, but not necessarily heterosexual terms as “someone who is married: a husband or wife”); *Conjoint* — LAROUSSE, [http://www.larousse.fr/dictionnaires/francais/conjoint\\_conjointe/18238](http://www.larousse.fr/dictionnaires/francais/conjoint_conjointe/18238) (last visited Sept. 18, 2015) (defining the French “conjoint” in gender neutral terms as “chacun des époux,” meaning “Personne unie à une autre par le mariage”); *Epoux*, LAROUSSE, <http://www.larousse.fr/dictionnaires/francais/époux/30602?q=époux#30516> (last visited Sept. 18, 2015); *Ehegatte*, DUDEN, <http://www.duden.de/rechtschreibung/Ehegatte> (last visited Sept. 18, 2015) (defining the German “Ehegatte” as either a sophisticated term for the male “Ehemann” or as the gender-neutral legal term for “einer der beiden Partner einer Ehe”) *Coniuge*, DIZITALIANO, [http://dizionari.corriere.it/dizionario\\_italiano/C/coniuge.shtml](http://dizionari.corriere.it/dizionario_italiano/C/coniuge.shtml) (last visited Oct. 18, 2015) (defining the Italian “coniuge” in gender neutral terms as the “ciascuna delle due persone unite in matrimonio”). *But see Matrimonio*, DIZITALIANO, [http://dizionari.corriere.it/dizionario\\_italiano/M/matrimonio.shtml](http://dizionari.corriere.it/dizionario_italiano/M/matrimonio.shtml) (last visited Sept. 14, 2015) (defining the Italian word “matrimonio” in heteronormative terms as the official “unione legittima tra un uomo e una donna”).

definitions of marriage that exclude same-sex spouses, even in countries that recognize same-sex marriage.<sup>226</sup>

The recent online dictionary definitions may indicate trends and current ordinary meaning, and the older print definitions may help illustrate the historic intent of the legislators in 2003. Yet, in the end, this dictionary experiment probably reveals less about the plain meaning of “spouse” in multilingual directives than about when, how, and by whom the dictionaries were last edited.

A comparison of the Family Reunification Directive’s text in different languages, however, proves more useful in understanding the word “spouse” as used throughout Article 4 of the directive. A close reading of the text of Article 4 demonstrates that any meaning of “spouse” throughout its six paragraphs must be broad enough to encompass *all* marriages valid under the law of the jurisdiction where they were formalized,<sup>227</sup> the versions in English, French, Spanish, Italian, German and Dutch support this broad view.<sup>228</sup> The text thus seems to implicitly adopt a choice-of-rule law, based on the place of celebration.

The operative provision provides that “the sponsor’s spouse” is a qualifying “family member,” under the first “compulsory” category of Article 4(1), where member states are required to grant these family members immigration rights. Then, “spouse” is also used to reference underage and polygamous “spouse[s]” in the second and third categories for whom entry and residence is optional or even prohibited.<sup>229</sup>

Notwithstanding that polygamous marriages are not legally formalized in any E.U. country, Article 4(4) expressly provides that member states “*shall not* authorise” entry and residence for a “further spouse” if the sponsor “already has a spouse living with him in the territory of the Member State.”<sup>230</sup> Thus, the term “spouse” here encompasses spouses who are not recognized by E.U. member states and even spouses expressly

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<sup>226</sup> OXFORD ENGLISH DICTIONARY 328 (2d ed. 1989) (defining “spouse” as “[a] married woman in relation to her husband; a wife” or “a married man in relation to his wife; a husband”); COMPACT OXFORD-HACHETTE FRENCH DICTIONARY (Marie Hélène Corréard & Mary O’Neill eds., Oxford University Press 1995) (defining “conjoint” as “spouse,” but “conjoints” as “the husband and wife”); DUDEN DEUTSCHES UNIVERSAL WÖRTERBUCH (Dudenverlag 1989) (defining “Ehegatte” by reference to the German word for husband, “Ehemann,” defined as “Mann, mit dem eine Frau verheiratet ist,” i.e., a man who is married to a woman).

<sup>227</sup> If it is valid to assume, as the E.C.J. does, that the E.U. legislator is creating a rationally consistent and complete system in general, it certainly follows that they would use consistent terminology within the same article of the same directive. See *supra* Part III(B).

<sup>228</sup> Equivalents to “spouse” are “le conjoint,” “el cónyuge,” “il coniuge,” “dem Ehegatten,” or “de echtgenoot” respectively.

<sup>229</sup> Family Reunification Directive, *supra* note 3, arts. 4(4)-(5). This is also true in the other language versions described above.

<sup>230</sup> *Id.* (emphasis added). Again, this holds true in each of these language versions.

denied recognition in the directive. If the meaning of “spouse” is so broad as to include spouses in these unconventional and invalid marriages, it is broad enough to encompass same-sex spouses in legal Belgian and Dutch marriages, particularly since the directive does not expressly deny them coverage.

“Spouse” is also used to describe underage married individuals. Article 4(5) permits member states to decide whether or not to “require the sponsor and his/her *spouse* to be of a minimum age.”<sup>231</sup> Here, the directive applies the term “spouse” in the context of marriages that were presumably legal where they were formalized but are conditionally exempt from the directive’s recognition requirements. Again, such a broadly defined term would also cover spouses in legal same-sex marriages, who were not singled out for exceptional treatment under the directive.

Thus, a broad reading of the word “spouse” to include same-sex spouses is the only one possible that is internally consistent throughout the text of the directive. “Spouse” must encompass any legal marriage, valid where it was celebrated, including those for which the directive carves out specific policy-based exceptions (since polygamous marriages are not valid in E.U. member states, the directive is clearly applying the term “spouse” to include marriages not entered into, or generally recognized, in the Union).<sup>232</sup>

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<sup>231</sup> *Id.* art 4(5). Again, this holds true in the other language versions examined.

<sup>232</sup> One might wonder whether this textual argument proves too much. In addition to requiring that all member states recognize same-sex spouses under the directive, it also supports the conclusion that a first spouse in a polygamous marriage *must* be granted entry and residence. While the directive expressly prohibits authorization of a “further spouse” if “the sponsor already has a spouse living with him in the territory of a Member State,” the plain language of Article 4(1)(a) appears to grant a sponsor the right to reunification with *one* of his several spouses if he does not yet have a spouse living in the E.U. There is support for this argument in the directive’s legislative history as well. *See infra* Part IV(B)(3). The E.C.J. has not yet ruled on this question, but it raises some disturbing possibilities. For instance, if a husband could unilaterally decide which of his several wives to sponsor, that would appear to undermine the protection of women, which is an express rationale for Article 4(4) of the directive. *See* Family Reunification Directive, *supra* note 3, recital 11 (justifying “possible . . . restrictive measures against applications for family reunification of polygamous households” on the basis of “the values and principles recognised by the Member States, in particular with respect to the rights of women and of children”). Perhaps, the other methods of interpretation are necessary in order to best interpret the coverage of a first polygamous “spouse” in light of the conflict between the directive’s stated *desiderata* and its operative provisions. There is no such conflict within the directive regarding the marriages of same-sex spouses. The recitals in the preamble actually reinforce a broad interpretation of the term “spouse” in Article 4, which encompasses married same-sex couples, and recognition of lesbian marriages protects “the rights of women” who choose to marry other women in the same way that traditional one-man polygamy arguably undermines those rights. *See id.* recital

Because the Family Reunification Directive is so comprehensive and so detailed (even differentiating among the polygamous spouses and their children), it is logical to infer that same-sex spouses must be covered *somewhere* within its scheme. The choice seems to be between classifying a same-sex spouse either as a “spouse” or as a *de facto* or registered partner. Yet there is no reference to same-sex spouses in the detailed discussion “of unmarried partners . . . in a duly attested stable long-term relationship, or . . . bound . . . by a registered partnership.”<sup>233</sup> This omission suggests that a spouse is still a “spouse,” regardless of the gender of his or her partner. Moreover, the E.C.J. has held that a partner does not qualify as a “spouse” under E.U. provisions even if her status has effects similar to marriage under a member state’s law.<sup>234</sup> The reverse inference applies here – that a “spouse” is not a “registered partner” since each term in the separate provisions of the directive must mean something specific and different.

Finally, the directive’s procedure for adjudicating family reunification cases tends to support the inclusion of same-sex spouses. Article 5(2) states that “[t]he application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Article 4 [defining ‘family members’] and 6 [individual ‘public policy’ exceptions].”<sup>235</sup> There is no reference to proof of the spouses’ sex; it only requires valid documentation of a legal marriage, which would be identical for same- and different-sex spouses. Thus, a host member state cannot object that a spouse is not a “family member” under Article 4(1) so long as the couple presents documentation that they are legally married.<sup>236</sup>

There are some counterarguments under the textual and systematic approaches. The recitals in the preamble of the directive include references to the “proper compliance with the values and principles recognised by Member States” and to the proper refusal of family reunification to a “person . . . [who] constitute[s] a threat to public policy or public security.”<sup>237</sup> These recitals seem to invite member states to refuse permission for same-sex spouses to migrate on the grounds of “values and

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11. Same-sex marriage also supports the rights of the children of same-sex spouses. *See id.*

<sup>233</sup> *Id.* art. 4(3).

<sup>234</sup> Case C-59/85, *Netherlands v. Reed*, 1986 E.C.R. I-01283, ¶ 15; *Joined Cases C-122/99 P and C-125/99 P, D. & Sweden v. Council of the European Union*, 2001 E.C.R. I-4319, ¶ 34. *See also* ELSPETH GUILD, STEVE PEERS & JONATHAN TOMKIN, *THE EU CITIZENS DIRECTIVE: A COMMENTARY* 33-34 (2014).

<sup>235</sup> *See* Family Reunification Directive, *supra* note 3, arts. 4, 5(2), 6.

<sup>236</sup> The host member state could, however, still investigate whether a *particular* relationship is a fraudulent “marriage of convenience.” *See id.* art. 16(4). This is also clarified in the second paragraph of Article 5(2).

<sup>237</sup> *Id.* recitals 11, 14.

principles” or “public policy.” Yet the context of these provisions undermines any such reading.

The “values and principles” reference appears in the context of “respect for the rights of women and children” and the restriction of polygamous households “in particular.”<sup>238</sup> It opens the door to non-textual considerations discussed in Subparts (C) and (D) below, but does not change our textual analysis at this point. Although the term “public policy” could arguably affect the categorization of same-sex spouses, the Family Reunification Directive is clearly using it in reference to dangerous individuals, not to categorical groups of eligible family members. Not only does the provision specify that “the person” — not the familial group — “should not constitute a threat to public policy or public security,” but it also lists examples of individual types for public policy consideration, such as a person with a “conviction for committing a serious crime” or a member or supporter of an organization that “supports terrorism . . . or has extremist aspirations.”<sup>239</sup>

In the context of otherwise clear, comprehensive, and detailed legislation, the unqualified classification of “spouse[s]” within the list of family members member states “shall authorise” indicates that legal same-sex spouses should be covered. This interpretation is reinforced by the E.C.J.’s understanding that exceptions “are to be interpreted strictly so that general rules are not negated.”<sup>240</sup> Additionally, same-sex spouses could have been categorized along with polygamous spouses who are denied immigration benefits or with “partners” whose benefits are optional, but because “same-sex spouses” are not discussed in Article 4(3), it makes sense to include them as “spouse[s]” under Article 4(1)(a), rather than to infer their exclusion from the directive’s general recognition.

While the arguments above are confirmed in the six languages examined in this Article, that fact would not be sufficient for the E.C.J. to stop its analysis at the text of Article 4. Because of the principle of multilingual equality, a definitive textual analysis must explore *all* of the official languages of the Union and determine that the textual conclusion follows without ambiguity in every case, a demanding task.<sup>241</sup> Yet multilingual text-based analyses like those above can still be convincing if their conclusions are consistent with those of other methods of interpretation.

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<sup>238</sup> *Id.* recital 11.

<sup>239</sup> *Id.* recital 14.

<sup>240</sup> Case C-346/08, *Comm’n v. United Kingdom*, 2010 E.C.R. I-03491, ¶ 39; Case C-476/01, *Germany v. Kapper*, 2004 E.C.R. I-5205, ¶ 72. Of course, the requirement of spousal recognition would not be entirely negated if same-sex spouses were not included, but reading an *implied* exception into the rule in this case would be a very broad reading indeed.

<sup>241</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 59.

## 2. The Text of the Citizens Directive

The Citizens Directive defines “family member” to include the following:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, *if the legislation of the host Member State treats registered partnerships as equivalent to marriage* and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) the direct descendants [sic] who are under the age of 21 or are dependants [sic] and those of the spouse or partner defined in point (b); [and]
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).[.]<sup>242</sup>

This single category for mandatory recognition includes legally registered partners in an E.U. member state whose relationships are “equivalent to marriage” under the law of the host member state.

The second provision above incorporates a choice-of-law element into the definition of qualifying “registered partner[s],” — which ensures a single, uniform Union-wide rule by deferring to the host member state law in these politically sensitive situations. “[T]he spouse,” by contrast, is simply deemed a qualifying “family member,” without any modifying conditions about a host member state or about a choice-of-law. This silence seems to indicate rejection of a host-state choice-of-law for “spouse(s).” But this omission does not inform us whether to apply a different choice-of-law rule based on the member state of celebration or nationality or to adopt an autonomous E.U. definition.

One view suggests an autonomous heterosexual E.U. definition of “spouse,” relegating same-sex spouses to the separate paragraph covering “registered partner[s]” whose relationships are “equivalent to marriage” in the host member state.<sup>243</sup> Certainly, same-sex marriages are “equivalent to marriage,” but describing a legal marriage as a “registered partnership equivalent to marriage” would reflect bizarre and circular drafting that leads to absurd results: read literally, Article 2(b) would require recognition of same-sex foreign spouses in Germany, which authorizes marriage-like same-sex registered partnerships, but not in Sweden, which recognizes same-sex marriages, but not marriage-like registered partnerships.<sup>244</sup>

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<sup>242</sup> Citizens Directive, *supra* note 3, art. 2(2) (emphasis added).

<sup>243</sup> See *supra* Introduction.

<sup>244</sup> See Joined cases C-122/99 P and C-125/99 P, *D & Sweden v. Council of the European Union*, 2001 E.C.R. I-4319, ¶ 36; see also Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W.VA. L. REV. 205, 300 (2012)

While the legislative history described below supports the view that this text was left intentionally ambiguous, the text actually supports the inclusion of same-sex spouses as “spouse[s].” Here, the interpretive canon of *effet utile* — the rule against redundancy — is useful.<sup>245</sup> The Citizens Directive defines “family member” to include both “the spouse” and the registered partner, if the partnership is based on the legislation of a member state and if the host member state “treats registered partnerships as equivalent to marriage.”<sup>246</sup> If the term “registered partnerships” encompasses marriages, that would apply equally to both same- and different-sex marriages, and any different-sex marriage clearly would be treated “as the equivalent to marriage in all E.U. Member States.” Thus, the provision for “registered partners” under Article 2(2) would provide full recognition of all different-sex spouses as “family members,” and the provision for “the spouse” would be redundant (unless it included same-sex spouses). Of course, this is not the best reading of the directive, but it is the logical extension of classifying any spouse as a “registered partner” rather than a “spouse” when that is an available option.

Finally, the E.U.’s “harmonious interpretation” principle encourages an inclusive reading of the Citizens Directive. Interpreting “spouse” to exclude married same-sex couples would undermine the primary European Treaty guarantees of free movement, the right to marry and found a family, the right to family life, and protection against sex or sexual orientation based discrimination.<sup>247</sup> Thus, the new textual innovations in the Citizens Directive support the same broad definition of “spouse” as the text of the Family Reunification Directive does. This conclusion is amplified by the contextual desirability of a unified meaning for the same term in both directives as discussed below.<sup>248</sup>

### 3. Combining the Directives in a Broader Context

To recap some of the points in Parts I(A) and I(B), two overarching purposes of both Family Migration Directives are to protect the fundamental right to free movement of persons within the E.U. and the right to family unification.<sup>249</sup> The directives were also written to achieve their closely related objectives in similar ways: they each define a class of fam-

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(listing Sweden among those countries discontinuing same-sex-only registered partnerships after adopting marriage equality).

<sup>245</sup> See *supra* Part III(B).

<sup>246</sup> Citizens Directive, *supra* note 3, art. 2(2).

<sup>247</sup> See *infra* Part IV(C). See also Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter Convention for the Protection of Human Rights]; Charter of Fundamental Rights of the European Union, arts. 7 & 9, Dec. 18, 2010, 2010 O.J. (C 364) 1 [hereinafter Charter of Fundamental Rights].

<sup>248</sup> See *infra* Part IV(A)(3).

<sup>249</sup> Family Reunification Directive, *supra* note 3, recitals 2, 3, 6.

ily members, including spouses and dependents, entitled to enter and reside in E.U. member states under certain, fairly liberal conditions, and they define minimum standards for procedural and substantive regulations related to these rights.

Viewed in combination, the closely aligned purposes and regulatory strategies of the two directives lead to the view that they should be interpreted together. When the directives rely on the single undefined word “spouse,” it makes sense to treat the term in the same way unless there is a clear reason not to. In this case, there appears to be no such reason. As described above, textual and systematic analyses of the directives together militate in favor of an autonomous E.U. definition of the word “spouse.” The rest of this Article will utilize the other methods of directive interpretation to determine whether they confirm that conclusion or favor a different rule.

### B. *Historical Analysis: “Constructive Ambiguity” as Legislative Intent*

European legislators should have been aware that the unqualified term “spouse” could incorporate same-sex couples legally married in E.U. member states when they enacted the Family Migration Directives in 2003 and 2004, soon after Belgium and Ontario, Canada, had joined the Netherlands in recognizing marriage equality for same-sex couples.<sup>250</sup> In Belgium, in particular, where the Family Reunification Directive was signed by the Council President, same-sex marriage was a prominent topic in the news.<sup>251</sup> In this context, the Commission, Council, and Parliament must have been aware that the word “spouse” included same-sex husbands and wives in two E.U. member states.<sup>252</sup>

The legislative history below indicates that legislators were indeed aware of the increasingly inclusive meaning of marriage, given the lively debates on this issue, but both directives are silent on this point. The only clear conclusion is that legislators “agreed to disagree,” accepting constructive ambiguity as a way to conclude their work on the directives and leaving the gaps in the directives for the E.C.J. to fill at a later date.

#### 1. E.C.J. Case Law Preceding Enactment of the Family Migration Directives

The position that the drafters of the Citizens Directive intended to exclude married same-sex couples from the term “spouse” seems to be

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<sup>250</sup> See *supra* note 221 and accompanying text.

<sup>251</sup> See, e.g., *Homohuwelijk in Staatsblad*, DE STANDAARD (Mar. 1, 2003), [http://www.standaard.be/cnt/dst01032003\\_018](http://www.standaard.be/cnt/dst01032003_018) (describing the publication of the new law and the wait to see who will be the first same-sex couple to marry in Belgium).

<sup>252</sup> Thanks to Kees Waaldijk for pointing out this timeline during a session of the Rights on the Move Conference in Trento, Italy.



based, in part, on the E.C.J.'s prior case law on this subject.<sup>253</sup> According to this argument, the Commission relied on E.C.J. case law indicating “that marriage did not cover persons of the same-sex” as shown by its initial report on the directives, which relied heavily on the Court’s case-law in “other areas of E.U. law – such as employment law and E.U. staff [r]egulations – which concerned non-marital partnerships.”<sup>254</sup> Yet the Commission did not cite any of the E.C.J. cases to define the meaning of “spouse,” let alone to exclude same-sex spouses.<sup>255</sup> This comparative omission indicates that the proposal was not specifically incorporating any E.C.J. definition of “spouse.”

Considering, however, that the Commission was likely aware of E.C.J. case law when it drafted the directives, a review of the meaning of “spouse” in case law is an important reference point. Yet it is also important to note that the cases were all decided before same-sex marriage gained traction in many member states, and none of these cases regard the status of legally married same-sex spouses. This jurisprudence only clearly confirms one point: the need for a uniform E.U. treatment of “spouses.”<sup>256</sup>

The notable E.C.J. case of *D and Sweden v. Council* involved a European official in a limited same-sex Swedish registered partnership,<sup>257</sup> who

<sup>253</sup> GUILD ET AL., *supra* note 234, at 35-36; Jorrit Rijpma & Nelleke Koffeman, *Chapter 20 - Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?*, in SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS 455, 468 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014).

<sup>254</sup> Rijpma & Koffeman, *supra* note 253, at 468.

<sup>255</sup> *Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States*, COM(2001)257 Final (May 23, 2001) [hereinafter *Original Citizens Directive Proposal*].

<sup>256</sup> Opinion of the Advocate General, Case C-59/85, *Netherlands v. Reed*, 1986 E.C.R. I-01283 (“all the parties agree that the term ‘spouse’ has a *specific meaning in Community law*”) (emphasis in original); *id.* at Judgment, ¶¶ 13, 15; Joined Cases C-122/99 P and C-125/99 P, *D. & Sweden v. Council*, 2001 E.C.R. I-4319, ¶11. These cases have sometimes employed a comparative approach to member state and Union law, see Case C-59/85, *Netherlands v. Reed*, 1986 E.C.R. I-01283, ¶13 (because “an interpretation given by the Court . . . has effects in all of the [M]ember [S]tates . . . any interpretation of a legal term on the basis of social developments must take into account the situation in the whole community”), but textual, historical and teleological methods may be more important in interpreting the Family Migration Directives. See Joined Cases C-122/99 P and C-125/99 P, *D & Sweden v. Council*, 2001 E.C.R. I-4319, ¶ 11 (“reference to the laws of the Member States is not necessary where the relevant provisions of the Staff Regulations are capable of being given an independent interpretation”).

<sup>257</sup> Joined Cases C-122/99 P and C-125/99 P, *D & Sweden v. Council*, 2001 E.C.R. I-4319, ¶ 3 (a “registered partnership shall have the same legal effects as a marriage, subject to the exceptions provided for”).

demanded the monetary household allowance specifically granted to “married official[s]” under the Staff Regulations of Officials of the European Communities (the “Staff Regulations”).<sup>258</sup> As an initial matter, the Court stated that “according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex”<sup>259</sup> — a statement that came only one month after the Netherlands authorized the modern world’s first legal same-sex marriages.

However, the E.C.J. also pointed out that “[i]t is equally true that since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition in various forms of union between partners of the same sex or of the opposite sex” with some of “the same or comparable [effects] to those of marriage.”<sup>260</sup> At that point in time, the Court’s description of the heterosexual meaning of marriage was merely a statement of fact, not a legal, autonomous definition for the E.U. Even if the E.C.J. had intended such a definition, its statement would have been non-binding *obiter dicta*, since it was unnecessary to decide that question.

In light of these two considerations, the E.C.J. found “that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner.”<sup>261</sup> In this case, “registered relationships . . . [were] regarded in [Sweden] as being distinct from marriage.”<sup>262</sup> Staff Regulations granted a household allowance “only to married couples,” not to relationships or “situations distinct from marriage.”<sup>263</sup> Therefore, the holding in *D and Sweden* was that same- or different-sex “registered partners” were not included within the meaning of “spouse” under the Staff Regulations.<sup>264</sup>

Another seminal case was *Netherlands v. Reed*.<sup>265</sup> Similar to *D and Sweden*, *Reed* concerned the distinction between marriages and other legally recognized forms of partnerships, not the distinction between same- and different-sex couples. In *Reed*, the E.C.J. held that absent “any indication to the contrary in the regulation, . . . the term ‘spouse’ in [a worker migration regulation superseded by the Citizens Directive] refers to a marital relationship only.”<sup>266</sup> “Spouse” need not cover a dif-

<sup>258</sup> *Id.* ¶ 4.

<sup>259</sup> *Id.* ¶ 34.

<sup>260</sup> *Id.* ¶ 35.

<sup>261</sup> *Id.* ¶ 47.

<sup>262</sup> *Id.* ¶ 36 (understandably failing to consider the new Dutch marriage regime, which only came into effect a month before the decision was published).

<sup>263</sup> *Id.* ¶¶ 37, 40.

<sup>264</sup> *Id.*

<sup>265</sup> Case C-59/85, *Netherlands v. Reed*, 1986 E.C.R. I-01283.

<sup>266</sup> *Id.* ¶15.

ferent-sex unmarried and unregistered cohabitant in a stable relationship.<sup>267</sup>

A case that did focus on the difference between same- and different-sex unmarried *de facto* partners, however, was *Grant v. South-West Trains Ltd.*, an employment case.<sup>268</sup> In *Grant*, the E.C.J. concluded that the European Community Treaty and the directive on equal pay for men and women did not require equal benefits for unmarried same- and different-sex couples in stable relationships.<sup>269</sup> While *Grant's* justification for discrimination initially appears to be a promising precedent for defining “spouses” to exclude same-sex married couples, it is not persuasive for several reasons.

Not only is *Grant* not on point since it did not pertain to “spouses” of either gender, but it has also been undermined by subsequent E.C.J. decisions and other legal advances.<sup>270</sup> Only two years after *Grant* was decided, the E.U. adopted its Charter of Fundamental Rights (“Charter”), which expressly prohibits “any discrimination based on any ground such as sex . . . or sexual orientation.”<sup>271</sup> The Lisbon Treaty of 2009 also amended the primary E.U. treaties to make the Charter binding and to expressly prohibit discrimination on the basis of sexual orientation.<sup>272</sup> In addition, the Lisbon Treaty commenced a process for E.U. accession to the European Convention on Human Rights, which mandates equality for same-sex couples under non-marital partnership schemes for different-sex couples.<sup>273</sup> The recitals in the Family Migration Directives simi-

<sup>267</sup> *Id.* ¶ 16. In the end, the E.C.J. recognized a right to join the migrant worker in *Reed* under other provisions of the 1968 regulation and the European Community Treaty because member states must provide the unmarried companions of migrant workers covered by the treaty with social advantages equal with those provided to the companions of their own nationals. *Id.* ¶¶ 28-30.

<sup>268</sup> Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-621, ¶ 35.

<sup>269</sup> *Id.*

<sup>270</sup> See, e.g., Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.J. I-01757 (requiring survivor benefits to registered life partner where partner legally comparable to spouse).

<sup>271</sup> Charter of Fundamental Rights, *supra* note 247, art. 21(1).

<sup>272</sup> See *The First International Treaty Banning Sexual Orientation Discrimination Comes Into Force Today*, ILGA EUROPE (Jan. 12, 2009), [http://old.ilga-europe.org/home/news/for\\_media/media\\_releases/the\\_first\\_international\\_treaty\\_banning\\_sexual\\_orientation\\_discrimination\\_comes\\_into\\_force\\_today\\_the\\_treaty\\_of\\_lisbon](http://old.ilga-europe.org/home/news/for_media/media_releases/the_first_international_treaty_banning_sexual_orientation_discrimination_comes_into_force_today_the_treaty_of_lisbon).

<sup>273</sup> See *Vallianatos & Others v. Greece*, App. Nos. 29381/09 & 32684/09, Eur. Ct. H.R. (2013); *Schalk & Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. (2010). The European Court of Human Rights has held that sexual orientation based discrimination is subject to heightened scrutiny under the European Convention on Human Rights, requiring “particularly serious reasons” as justification. *Karner v. Austria*, App. No. 40016/98, Eur. Ct. H.R., ¶ 37 (2003).

larly instruct implementation without discrimination on the basis of sexual orientation.<sup>274</sup>

The Commission has been inconsistent in its interpretation of the word “spouse.” It clarified that it would not recognize married same-sex couples as “spouse[s]” in enforcing the laws that preceded the directives.<sup>275</sup> Then, regarding the Citizens Directive, the Commission first indicated that it was intended to cover same-sex married couples as “spouse[s],” but later indicated it did not, at least temporarily.<sup>276</sup> The Commission seemed clear on three points though: that the E.U. requires a uniform rule or definition of “spouse,” that the E.C.J. had not yet settled the question, and that the subject area has been in flux and is subject to change.<sup>277</sup>

## 2. Shifting Legislative Procedures Required to Enact Each Directive

Determining the specific intent of the enacting legislator requires particular attention in the case of the Family Migration Directives, because the E.U. and its legislative processes changed dramatically while they were being debated and enacted. The European Community had become the European Union, and the Union expanded its membership from fifteen to twenty-five member states in October 2004. In anticipation of this expansion, the Treaty of Nice divided the responsibility and changed the relevant process from the exclusive domain of a unanimous Council to a shared decision, requiring assent of the Parliament and a qualified majority of Council votes.<sup>278</sup> The Commission retained control of proposing and drafting legislation.

Accordingly, the 2003 Family Reunification Directive was enacted under the former process, and approved by the Council alone, by unanimous vote, after the proposal by the Commission and consultation with

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<sup>274</sup> See Family Reunification Directive, *supra* note 3, recital 5; Citizens Directive, *supra* note 3, recital 31.

<sup>275</sup> *Communication from the Commission: Free movement of workers – Achieving the Full Benefits and Potential*, COM(2002)694 Final 8 (Dec. 12, 2002) [hereinafter *Communication on Worker Movement*].

<sup>276</sup> See *infra* notes 295-96 and accompanying text (describing the Commission’s original understanding that same-sex spouses were covered as “spouse[s]”). See also *infra* notes 313-14 and accompanying text (describing the Commission’s later position).

<sup>277</sup> See *Communication on Worker Movement*, *supra* note 275, at 8; *Amended Proposal for a Directive of the European Parliament and of the Council on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States*, COM(2003)199 Final 3 [hereinafter *Commission’s Response to Parliament’s Proposed Amendments*].

<sup>278</sup> HELEN TONER, PARTNERSHIP RIGHTS, FREE MOVEMENT, AND EU LAW 61, 69-70 (2004).

the Parliament and other E.U. actors.<sup>279</sup> On the other hand, the Citizens Directive, which was enacted only seven months later, was enacted by both the Council and the Parliament, but with lower thresholds for approval.<sup>280</sup> The legislative histories below reflect these shifting procedural requirements and explain their implications on the political realities for the various European institutions.

### 3. Legislative Intent Behind the Family Reunification Directive

The Commission's initial draft of the Family Reunification Directive broadly encompassed same- and different-sex couples, whether they were married, registered partners, or simply living in marriage-like unregistered *de facto* partnerships.<sup>281</sup> This early draft would have required member states to "authorize entry and residence" of "the applicant's spouse, or an unmarried partner living in a durable relationship with the applicant, if the legislation of the Member State concerned treats the situation of unmarried couples as corresponding to that of married couples."<sup>282</sup> As in the final version of the directive, the language in the initial draft did not expressly delineate whether same-sex spouses would be covered automatically as spouses or would be covered only in member states that "treat unmarried couples" as "corresponding to" spouses.<sup>283</sup> The term "unmarried" in the initial draft nevertheless set up a dichotomy in which same-sex spouses could not aptly fall under the latter category.

The Commission's report on the initial draft of the Family Reunification Directive ("Report") did not directly address the issue of same-sex spouses. It merely described the operative provision concerning "the applicant's spouse, or his unmarried partner (who may be of the same sex)."<sup>284</sup> In light of the comma before "or" and the omission of a parallel reference to "spouse[s]," of the same-sex, the Commission did not appear to have contemplated the possibility of same-sex marriage in E.U. member states. This is unsurprising since the Report was drafted two years before the Netherlands became the first country in the world to authorize same-sex marriage.<sup>285</sup> In that context, the Report shows that the Commission intended equality of same- and different-sex couples with regard to existing institutions.

Equal treatment of same-sex spouses is also supported by more general comments in the Report. For instance, the Report emphasized that it is "indispensable" for legal residents to be united with their families "if these people are to lead a normal family life and [this] will help them to

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<sup>279</sup> *Id.* at 70.

<sup>280</sup> *Id.* at 61-62.

<sup>281</sup> *Id.* at 70-71.

<sup>282</sup> *Council's Family Reunification Proposal*, *supra* note 17, at 26.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 14.

<sup>285</sup> *See* Wet openstelling huwelijk, Stb. 2001 (Neth.).

integrate into society in the Member States.”<sup>286</sup> Lesbian, gay or bisexual spouses would seem no less able than other legal residents to be without family support to lead a normal family life in their new home, especially in societies that are less than welcoming.

As previously discussed, the Commission also expressed two goals for harmonizing member state legislation on family reunification for legal residents: (1) that non-citizens should “be eligible for broadly the same family reunification conditions, irrespective of the Member State in which they are admitted for residence purposes”; and (2) that immigrants’ choice of a member state in which to reside should not be based on the member state’s laws and its “more generous terms offered.”<sup>287</sup> As the Commission stated, both of these goals serve “to establish a right to family reunification that can be exercised in accordance with common criteria in all Member States” and to “improve certainty as to the law for third-country nationals.”<sup>288</sup>

Both of these rationales support the conclusion that the Commission originally intended Union-wide recognition of valid same-sex marriages. Though later versions of the directive expressly rejected mandatory harmonization regarding unmarried partners, the underlying intent for “spouse[s]” remained intact. The Commission was so concerned with the importance of family unity that it even wanted to cover polygamous marriages in some contexts. Although it found such marriages were “not generally compatible with the fundamental principles of the Member States’ legal orders,” it explained that an “absolute prohibition on family reunification” for polygamous spouses “would have the effect of depriving the spouse residing in a Member States of the possibility of leading a normal family life.”<sup>289</sup> This observation justified the directive’s prohibition of “reunification of several spouses” but not “the reunification of one spouse and her children.”<sup>290</sup>

When it consulted with the Council on this draft, the Economic and Social Committee clearly understood the directive to be “designed . . . to establish a harmonised framework for exercising” the right to family reunification, and “determin[e] to whom the right would apply” among other things.<sup>291</sup> The Committee applauded the extension of rights to unmarried couples and suggested that the Commission monitor the implementation of the directive to ensure that “[r]estrictive interpreta-

<sup>286</sup> *Council’s Family Reunification Proposal*, *supra* note 17, at 9, ¶7.2.

<sup>287</sup> *Id.* at 9, ¶7.4.

<sup>288</sup> *Id.* at 11, ¶ 9.3.

<sup>289</sup> *Id.* at 15.

<sup>290</sup> *Id.* The referenced section of the draft survived substantively intact in Article 4(3) of the final directive.

<sup>291</sup> Opinion of the Economic and Social Committee on the ‘Proposal for a Council Directive on the Right to Family Reunification,’ 2000 O.J. (C 204) 40, 40.

tions are . . . avoided.”<sup>292</sup> Thus, the Commission’s intent here, combined with the Committee’s approval, supports the broad reading of “spouse” in the directive to include all couples whose marriages were valid where celebrated.<sup>293</sup>

#### 4. Legislative Intent Behind the Citizens Directive

The Commission’s original draft of the Citizens Directive encompassed a fairly broad understanding of family. Article 2(2) defined “family member” to include “(a) the spouse; [or] (b) the unmarried partner, if the legislation of the host Member State treats unmarried couples as equivalent to married couples.”<sup>294</sup> The Explanatory Memorandum accompanying the original draft stated that the directive was “broadening the definition of ‘family member,’” presumably referring to the inclusion of “unmarried partners” as well as “spouses.”<sup>295</sup>

The drafters originally intended to treat married same-sex couples as “spouses,” not as “*unmarried* partners,” as clarified during the first reading of that draft to the responsible committee in the Council. At that time, the Italian representative specifically asked whether “a homosexual couple legally married in the M[ember] S[tate] of origin would . . . be regarded as a spouse (point (a)) or as an unmarried partner (point (b)) in the host M[ember] S[tate].”<sup>296</sup> The Commission representative responded, “this case would be covered by point (a).”<sup>297</sup> Thus, the Commission initially believed same-sex spouses were covered as “spouse[s]” under Article 2(2)(a).

The Explanatory Memorandum further indicated the Commission’s awareness that the draft “intended not only to accommodate the case-law of the [E.C.J.] and acknowledge changes in the law of the Member States, but also to facilitate the free movement of Union citizens by eliminating any possibility of family reunification reasons having a negative influence.”<sup>298</sup> As discussed in Part IV(C) below, this explanation supports the Commission’s original intent to recognize a liberal understanding of “family member” which included same-sex “spouse[s]” under Article 2(2)(a), and also demonstrates that the Commission was consciously going beyond the E.C.J.’s understanding of family in its original draft of the directive.

The Council’s Working Party on Free Movement of Persons conducted a second reading of the draft directive in mid-2002. Five members of the

<sup>292</sup> *Id.* at 42.

<sup>293</sup> *See supra* Part IV(A).

<sup>294</sup> *Original Citizens Directive Proposal, supra* note 255, at 29.

<sup>295</sup> *Id.* at 4, ¶ 2.4.

<sup>296</sup> Council of the European Union, Interinstitutional File 2001/0111 (COD), No. 15380/01, 7 n.5 (Dec. 18, 2001).

<sup>297</sup> *Id.*

<sup>298</sup> *Original Citizens Directive Proposal, supra* note 255, at 4, ¶ 2.4.

working party then lodged scrutiny reservations to Article 2(2)(a), asserting that “a homosexual spouse should only be admitted to the host M[ember] S[tate] on that basis if the host M[ember] S[tate]’s legislation provided for such marriages.”<sup>299</sup> Nine members recorded reservations to the reference to “unmarried partner” in the original draft of Article 2(2)(b).<sup>300</sup> In response, the Commission representative promised to work on the wording that governed partners in subparagraph (b).<sup>301</sup>

In deciding where to place same-sex spouses, “[i]t was suggested either that reference be made in [subparagraph](a) to the host M[ember] S[tate]’s law or . . . to heterosexual spouses only and homosexual spouses be dealt with in [subparagraph](b).”<sup>302</sup> The Commission and several delegations expressed a preference for the latter alternative, of placing same-sex spouses under the “partnership” category, but neither suggestion made its way into the text of subparagraph (a), which remained unchanged throughout the legislative process.

The Union Presidency tried to resolve outstanding issues after the second reading and posed specific questions to the working party, including the linguistically tortured query of whether “same-sex spouses [should] be covered by the concept of spouses.”<sup>303</sup> After discussing this issue further, “[a] large number” of delegations wanted to leave the issue up to national law.<sup>304</sup> The Commission representative suggested a revision to “delete reference to ‘unammarrried’ [sic] partners [in subparagraph (b)], in order to clarify that this point include[s] all other partners besides heterosexual spouses, and with a reference to the host M[ember] S[tates]’ national legislation regarding the recognition of the couples (including homosexual partners).”<sup>305</sup> Two delegations suggested an alternative of including “a separate point relating to homosexual registered partnerships and . . . spouses.”<sup>306</sup>

In the Parliament, things went differently. The responsible committee rejected its chairman’s proposed amendment, which relied on *D and Swe-*

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<sup>299</sup> Council of the European Union, Interinstitutional File 2001/0111 (COD), No. 10572/02, 11 n.15 (July 10, 2002), <http://register.consilium.europa.eu/doc/srv?l=en&f=st%2010572%202002%20INIT> (Germany, Greece, Spain, Ireland and Italy) [hereinafter *Council Doc. Dated July 10, 2002*].

<sup>300</sup> *Id.* at 11 n.16 (Belgium, Germany, Greece, Spain, France, Ireland, Netherlands, Portugal and Austria).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 11 n.5.

<sup>303</sup> Council of the European Union, Interinstitutional File 2001/0111 (COD), No. 10571/02, 2 (July 4, 2002), [http://www.europa-nu.nl/9353000/1/j4nvg5kkg27kof\\_j9vvj9idsj04xr6/vi7jgstawnyh](http://www.europa-nu.nl/9353000/1/j4nvg5kkg27kof_j9vvj9idsj04xr6/vi7jgstawnyh).

<sup>304</sup> Council of the European Union, Interinstitutional File 2001/0111 (COD), No. 12519/02, 4 (Sept. 30, 2002), [http://www.europa-nu.nl/9353000/1/j4nvg5kkg27kof\\_j9vvj9idsj04xr6/vi7jgstjz9xp](http://www.europa-nu.nl/9353000/1/j4nvg5kkg27kof_j9vvj9idsj04xr6/vi7jgstjz9xp).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* (Spain and the Netherlands).



den to clarify the still unclear language of Article 2(2) by limiting the definition of “spouse” to different-sex spouses.<sup>307</sup> Instead, the committee, and later the Parliament, adopted an affirmative position paper returning the directive with an amendment to clarify that “family member” includes a “spouse” or “registered partner” “irrespective of sex, according to the relevant national legislation” and “the unmarried partner, if the legislation or practice of the host and/or home Member State treats unmarried couples . . . and married couples in a corresponding manner.”<sup>308</sup>

The Commission did not accept the Parliament’s broad definition of “family member,” leaving Article 2(2) as it was after the Council’s last changes.<sup>309</sup> The final version defines “family member” to include “(a) the spouse; [or] (b) the partner *with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage.*”<sup>310</sup> Subparagraph (a) was left entirely unchanged from the original draft, but subparagraph (b) underwent several changes. Most significantly, the final text replaced “unmarried partner” with “partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State,” and replaced “unmarried couples as equivalent to married couples” with “registered partnerships as equivalent to marriage.”

The two deletions of “unmarried” could be read to extend the meaning of “partners” in subparagraph (b) to also cover same-sex spouses. Yet such an intent is not obvious in this regard, as these deletions also were clearly necessary to accomplish other intended objectives. In particular, they served to reduce the obligation of member states to “facilitate” under Article 3(2)(b), for “unmarried partners,” an even more controversial category of relationships, and to also ensure that only registered partnerships “contracted” in E.U. member states, not third countries, would

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<sup>307</sup> TONER, *supra* note 278, at 64.

<sup>308</sup> *Id.* at 64-65. Position of the European Parliament Adopted at First Reading on 11 February 2003, file EP-PE\_TC1-COD(2001)0111, (Feb. 11, 2003) at 10, 42, 46. Although the amendment included no express choice-of-law to determine the “relevant national legislation,” the Commission clearly understood the reference here to be to the member state of celebration or registration. *Commission’s Response to Parliament’s Proposed Amendments, supra* note 277, at 3 (“Parliament’s amendments would recognise as family members the spouse of the same sex in the same way as the spouse of a different sex, the registered partner in accordance with the legislation of the [Member State] of origin, and the non-married partners in accordance with the legislation or practice of the host or home [Member State].”).

<sup>309</sup> *Commission’s Response to Parliament’s Proposed Amendments, supra* note 277, at 3.

<sup>310</sup> Citizens Directive, *supra* note 3, art. 2(2) (emphasis added to indicate additions to the original draft).

be covered.<sup>311</sup> If the reformulation of Article 2(2)(b) was meant to include same-sex spouses as the Commission indicated at one point,<sup>312</sup> that intent was lost on the Parliament, including the conservative committee chair who subsequently, unsuccessfully tried to clarify the exclusion of same-sex spouses.<sup>313</sup>

In rejecting the Parliament's amendment to liberalize the treatment of registered and unmarried partners as well as same-sex spouses, the Commission described the final language as "an equitable solution" that avoids "imposition on certain Member States of amendments to family law legislation" while allowing "for a possible change in interpretation in the light of developments in family law in the Member States."<sup>314</sup> The explanatory report recognized the intentional ambiguity and the resulting flexibility of the final wording of Article 2(2), whose meaning could one day change if there was a sufficient Union-wide trend of legal recognition of marriage equality (or possibly even of marriage alternatives).<sup>315</sup> Yet the Commission seemed reconciled for the time being with an interpretation of "spouse" that effectively excluded migrating same-sex couples — an interpretation which was not clear, even to the Parliament.

In conclusion, the legislative history does not demonstrate a single legislative intent regarding the meaning of "spouse" in the Citizens Directive. Although many member state delegations in the Council did not want to recognize same-sex spouses or same- or different-sex unmarried partners even for the limited purpose of accompanying migrating E.U. citizens, they were unable to amend the directive to establish a definite, exclusively heterosexual definition of "spouse." As both the Council and the Parliament were required to enact this directive, the latter of which held the opposite, broader and more flexible view of "spouse" the text appears to have been left intentionally ambiguous — reflecting the institutions' willingness to "agree to disagree" (or perhaps, their desire for finality and reluctance to restart negotiations on this directive to include

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<sup>311</sup> See *Council Doc. Dated July 10, 2002, supra* note 299, at 11 (indicating that more states objected to the language of subparagraph (b), which was amended to move unmarried couples to the nonobligatory provision in Article 3(2)(b) relating to partners with whom Union citizens have "durable relationship[s], duly attested," than to that of subparagraph (a)).

<sup>312</sup> See *supra* note 305 and accompanying text.

<sup>313</sup> See *supra* note 307 and accompanying text.

<sup>314</sup> *Commission's Response to Parliament's Proposed Amendments, supra* note 277, at 3. Here it appears to assume member states can only recognize married same-sex couples from other member states as "spouse[s]" under the directive if they amend their family law. This, of course, would be false if the Union adopted an autonomous E.U. meaning of "spouse" in the Family Migration Directives.

<sup>315</sup> This definitional approach seems to borrow from the "margin of appreciation" idea employed by the European Court of Human Rights when determining what rights are fundamental based on the common constitutional traditions of European countries.

the ten new member states<sup>316</sup>), and leaving the final decision on this point to the E.C.J. and other courts.

C. *Teleological Analysis: Furthering the Purposes of Equality, Family Unity, and Free Movement Within a Borderless Union*

Many of the same primary goals underlie the Family Reunification Directive, the Citizens Directive, and their predecessor legislation from the early 1960s, as well as the E.U. constitutional order: freedom of movement within a borderless Union territory, protection of family and respect for family life, and equality, now including prohibitions of discrimination on the bases of sex and sexual orientation.

According to Article 26 of the consolidated Treaty on the Functioning of the European Union (“T.F.E.U.”), a fundamental goal of the Union is to ensure “the free movement of . . . persons” by developing an area “without internal frontiers,”<sup>317</sup> thus it established a common E.U. framework for “asylum, immigration, and external border control” policy and law.<sup>318</sup> Article 79 requires adoption of measures regulating the conditions and standards for long-term visas, admission, and residence permits of third-country nationals, specifically “including those for the purpose of family reunification.”<sup>319</sup> It also implicitly reinforces the scope of the E.U. authority over family immigration policy, providing that “[t]his Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to work, whether employed or self-employed.”<sup>320</sup> It follows that, apart from the express exception for volume of direct work-based immigration of third-country nationals to an E.U. member state, family-based immigration *should* be regulated by Union law.

The nexus between the dual goals of freedom of movement and family reunification underlying the Family Migration Directives was well established long before the Lisbon Treaty clarified and extended them in 2009.<sup>321</sup> The 1961 regulation, first providing for free movement of workers, extended migration rights to the worker’s spouse and minor chil-

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<sup>316</sup> TONER, *supra* note 278, at 62.

<sup>317</sup> T.F.E.U., *supra* note 16, art. 26 (“The internal market shall comprise an *area without internal frontiers in which the free movement of goods, persons, services and capital is ensured* in accordance with the provisions of the [t]reaties.”) (emphasis added).

<sup>318</sup> *Id.* art. 67(2).

<sup>319</sup> *Id.* arts. 79(1)-(2).

<sup>320</sup> *Id.* art. 79(5).

<sup>321</sup> Gavin Barrett, *Family Matters: European Community Law and Third-Country Family Members*, 40 COMMON MKT. L. REV. 369, 376 (2003). “Family reunification” was not referenced in the Treaty of Rome initially establishing the E.E.C., the early predecessor of the E.U.

dren,<sup>322</sup> and the rationale for the rule was based on the reality that workers would not be willing to move to another country without their families; without providing these rights to family members of workers, any entitlement to worker mobility would have probably failed.<sup>323</sup> Therefore, the 1961 regulation treated family reunification as a necessary prerequisite for the worker's freedom of movement, the primary goal.<sup>324</sup>

The derivative nature of these family benefits was reinforced in the important 1968 regulation on freedom of movement for workers within the European Community, which explained that "the right of freedom of movement, in order that it may be exercised . . . in freedom and dignity, requires that . . . obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family."<sup>325</sup>

Although the early free movement regulations were limited to workers who were nationals of E.U. member states, the regulation made no nationality-based distinctions among the workers' family members. Third-country national spouses and children were treated the same as member state citizen family members. This equal treatment exhibits the derivative nature of family members' rights — rooted in the interests of the migrating E.U. workers, not of the accompanying family members.<sup>326</sup>

The original goal of supporting free movement for the sponsoring primary beneficiaries has persisted beyond the context of worker migration.<sup>327</sup> When the Commission introduced the Family Reunification Directive in 1999, it reiterated that the "integration of the family in the host country" has been called "the *sine qua non* [i.e. absolutely necessary] for the exercise of free movement in objective conditions of freedom and dignity."<sup>328</sup> The Commission also emphasized that "[t]he rights of family members are derived rights flowing from those enjoyed by the Union citizen [or legal resident] enjoying the right to free movement," and the E.C.J. continues to refer to family-based immigration rights under the

<sup>322</sup> Regulation No. 15 on Initial Steps to Provide Freedom of Movement for Workers within the Community, 1961 O.J. SPEC. ED. (57) 1073, arts. 11-15 (author's translation of German original) [hereinafter Regulation No. 15]. See also Kees Groenendijk, *Family Reunification as a Right Under Community Law*, 8 EUR. J. MIGRATION & L. 215, 215 (2006).

<sup>323</sup> Barrett, *supra* note 321, at 376.

<sup>324</sup> Regulation No. 15, *supra* note 322.

<sup>325</sup> Council Regulation No. 1612/68 on Freedom of Movement for Workers within the Community, 1968 O.J. (L 257/2). recital 5 (EC).

<sup>326</sup> Barrett, *supra* note 321, at 376-77.

<sup>327</sup> Daniel Thym, *EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook*, 50 COMMON MKT. L. REV. 709, 711 (2013) (In E.U. law, "[l]ike in geology, earlier layers influence the outline and orientation of new sedimentation.").

<sup>328</sup> *Council's Family Reunification Proposal*, *supra* note 17, at 6 (description in the European Commission's Explanatory Memorandum accompanying its original draft of the Family Reunification Directive).

Family Migration Directives as “derivative rights.”<sup>329</sup> As described in Part IV(A)(3) above, the recitals in the preambles of the Family Migration Directives incorporate these goals as well.

The Citizens Directive recognizes the “fundamental freedom of movement of persons” within the Union and extends parallel rights to family members, regardless of nationality.<sup>330</sup> The Family Reunification Directive seeks to grant legal residents rights and obligations comparable to those of citizens and recognizes the concurrent “right to family reunification.”<sup>331</sup> It also sees that these measures relate to “the obligation to protect the family and respect family life enshrined in many instruments of international law,” particularly fundamental rights and “the principles . . . in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union,”<sup>332</sup> whose rights apply to E.U. citizens as well.

The history of these two interconnected purposes, which can be traced from the first European Economic Community regulations up to the most recent E.U. legislation, supports an inclusive understanding of the term “spouse” in the Family Migration Directives. Under the goals of family reunification and free movement, a derivative family member’s right is largely based on the interests of the sponsor. There is no reason to believe that a sponsoring E.U. citizen or legal resident has a lesser interest in leaving behind her spouse or stepchildren if her spouse is female; there is no reason to imagine that she loves or feels less responsible for them. Her duties as a spouse and as a mother are the same as those of a heterosexual spouse. Thus, recognizing her family’s right to migrate along with her is as necessary to the *sponsor’s* freedom of movement as it is to the sponsor of a different-sex spouse.

A discriminatory reading of the term “spouse” not only undermines the sponsor’s rights of free movement and family reunification but contravenes the objective of nondiscrimination on the bases of sex and sexual orientation under the Union’s Charter of Fundamental Rights and the preambles of the Family Migration Directives.<sup>333</sup> A heterosexual Belgian

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<sup>329</sup> *Id.* at 7 (describing family-based rights related to E.U. citizens in the context of introducing the original version of the Family Reunification Directive); Case C-456/12, *O. v. Minister voor Immigratie, Integatie en Aseiel and Minister voor Immigratie, Integatie en Aseiel v. B.*, 2014 E.C.R. 135, ¶ 36 (reiterating that “[a]ny rights conferred on third-country nationals by provisions of EU law on Union citizenship are rights *derived* from the exercise of freedom of movement by a Union citizen”) (emphasis added).

<sup>330</sup> Citizens Directive, *supra* note 3, recitals 2, 5.

<sup>331</sup> Family Reunification Directive, *supra* note 3, recital 3.

<sup>332</sup> *Id.* recital 2. *See also* Convention for the Protection of Human Rights, *supra* note 247, art. 8; Charter of Fundamental Rights, *supra* note 247, arts. 7, 9.

<sup>333</sup> Charter of Fundamental Rights, *supra* note 247, art. 21(1) (“Any discrimination based on any ground such as sex . . . or sexual orientation shall be prohibited.”);

citizen or resident could marry and benefit from the right to move with her husband to any other E.U. member state. Yet if her sister married another woman, she and her wife would only be able to move together to member states that chose to recognize their relationship, unless they would be “spouse[s]” within the meaning of the Citizens Directive. A non-inclusive interpretation of “spouse[s]” in the directive would clearly result in discrimination on the bases of sex and sexual orientation. It would also undermine the married gay citizen’s freedom of movement, effectively creating barriers in a supposedly “borderless” E.U. This result coerces her choice of member state residence, an outcome that the Family Migration Directives were meant to prevent.<sup>334</sup>

In the end, a teleological analysis tends to support an understanding of the term “spouse” which covers same-sex spouses, regardless of whether one focuses on the narrow goals of the directives alone, the broader goals of the Treaty provisions on which they were based, or the meta-teleological goals underlying the E.U. system as a whole.

#### D. *Comparative Analysis: Balancing Evolving Family Forms and Resistant Member State Approaches*

As described in Part III(E) above, the E.C.J. sometimes employs comparative analysis of member state laws as one tool in its interpretation of Union law. With regard to the term “spouse,” there are trends in both directions, but the stronger current seems to favor the progressive recognition of marriage equality for same-sex couples. Yet the fact that some member states have strongly embraced anti-gay definitions of marriage raises the questions of whether and how the E.U. should balance the strong policy objections of these member states against the Union’s interests in favoring an inclusive definition of marriage as discussed above.

##### 1. Trends and Countertrends in Same-Sex Couple Recognition

E.U. constitutional jurisprudence relies on the comparative constitutional values of member states and evaluates important trends to establish previously unrecognized fundamental E.U. rights.<sup>335</sup> The trends towards marriage equality for same-sex couples have been on the rise, particularly among longer-term E.U. member states in the western and northern parts of Europe. Ten member states have already decided to

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Family Reunification Directive, *supra* note 3, recital 5 (“Member States should give effect to the provisions of this [d]irective without discrimination on the basis of sex . . . or sexual orientation.”); Citizens Directive, *supra* note 3, recital 31 (“In accordance with . . . the Charter [of Fundamental Rights], Member States should implement this [d]irective without discrimination between the beneficiaries of the [d]irective on grounds such as sex . . . [o]r sexual orientation.”).

<sup>334</sup> See *supra* Parts IV(B)(3) and IV(C).

<sup>335</sup> Lenaerts & Gutiérrez-Fons, *supra* note 121, at 16-19.

legally authorize same-sex marriages.<sup>336</sup> Finnish and Slovenian legislatures have also recently passed bills that would soon recognize same-sex marriage.<sup>337</sup> Moreover, several additional member states grant entry and residence rights to the spouses or registered partners of E.U. citizens on the basis of partnership recognition.<sup>338</sup>

On the other hand, the countertrends, against same-sex marriage, are evident in changes to the constitutions or laws of at least nine countries: Bulgaria, Croatia, Estonia, Hungary, Romania, Latvia, Lithuania, Poland, and Slovakia.<sup>339</sup> At least eleven states, including some of the aforementioned, have implemented the Citizens Directive in ways that are either unfavorable or unpredictable for same-sex spouses.<sup>340</sup> In some of these countries, same-sex spouses may be recognized for the purposes of derivative immigration, but not under the category of “spouse[s].” Several

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<sup>336</sup> See Kees Waaldijk, *Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe*, 1 GENIUS 42, 44 (2014) (listing Denmark, Sweden, Netherlands, France, Belgium, Luxembourg, Spain, United Kingdom — except for Northern Ireland — and Portugal as nine E.U. countries authorizing same-sex marriage); Stephen Collins et al., *Gay Marriage May be Legal by September*, IRISH TIMES (May 24, 2015), <http://www.irishtimes.com/news/politics/same-sex-marriage-may-be-legal-by-september-1.2224563> (describing Irish referendum to amend Ireland’s Constitution to allow same-sex marriage and the likelihood of early legislation to complete that change).

<sup>337</sup> The Slovenian Parliament voted to enact marriage equality legislation in March 2015, and the Finnish legislature will soon vote again on whether to reaffirm its 2014 vote in favor of marriage equality, but some legal hurdles remain in each country. Joe Morgan, *Finland President Signs Gay Marriage Law*, GAYSTARNEWS (Feb. 1, 2015), <http://www.gaystarnews.com/article/finland-president-signs-gay-marriage-law-couples-will-have-wait-get-married-until-2017200215#sthash.36qpQ4wW.dpuf>.

<sup>338</sup> See F.R.A. REPORT, *supra* note 1, at 84 (listing Austria, the Czech Republic, Finland, Germany, Hungary, Latvia, Malta, Slovenia, and Slovakia).

<sup>339</sup> EUROPEAN AGENCY FOR FUNDAMENTAL RIGHTS, *HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY: COMPARATIVE LEGAL ANALYSIS – 2010 UPDATE* 46–47 (2010), <http://fra.europa.eu/en/publication/2012/homophobia-transphobia-and-discrimination-grounds-sexual-orientation-and-gender> (referencing laws in Bulgaria, Estonia, Romania, and Slovakia); see also Alina Tryfonidou, *Same-Sex Marriage: The EU is Lagging Behind*, in EU LAW ANALYSIS: EXPERT INSIGHT INTO EU LAW DEVELOPMENTS n.iii (June 29, 2015), <http://eulawanalysis.blogspot.com/2015/06/same-sex-marriage-eu-is-lagging-behind.html> (referencing constitutional same-sex marriage bans in Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia).

<sup>340</sup> F.R.A. REPORT, *supra* note 1, at 82-83 (listing Bulgaria, Cyprus, Greece, Hungary, Latvia, Poland, and Slovakia as refusing to recognize married same-sex couples as “spouse[s]” although some grant them rights as partners, and describing the situation in Estonia, Lithuania, Croatia, and Romania as “unclear or developing”).

additional states may not recognize spouses or partners under the Family Reunification Directive.<sup>341</sup>

On the whole, the stronger trend seems to be the recognition of same-sex marriage and of same-sex couples for immigration purposes within the member states, but the pattern is not entirely clear. The E.C.J. does not merely tally the number of countries or look solely to trends among member states when it conducts a comparative analysis. Rather, under its evaluative method, the E.C.J. is also mindful of the approaches most in line with the objectives of the E.U. Treaties.<sup>342</sup> Here the twin objectives of family reunification and freedom of movement clearly favor broad recognition of same-sex spouses. More importantly, the comparative method is not required in order to discover a new, implied fundamental right in this case of directive interpretation. It should be enough that interpretation of the directives does not raise a sufficient basis among member state laws to establish a countervailing right or reason to reject the results of the textual, systematic, historical and teleological analyses above.

## 2. Balancing Union Goals with Member State Interests

In an article from 2010, E.C.J. Vice President Lenaerts opined that the best reading of the Citizens Directive might be one resulting in a “state of origin” rule, relying on the law of the place where the marriage occurred.<sup>343</sup> In light of the E.U. legislators’ agreement to leave the issue to the judiciary, however, he advised that this might require a “case-by-case analysis,” giving each objecting member state an opportunity to “invoke overriding reasons of general interest in order to deny . . . legal recognition” of the marriages.<sup>344</sup> This proposed piecemeal approach however would arguably violate the general principle of equal treatment of E.U. citizens from various member states, which in turn would create legal uncertainty and unnecessary litigation.<sup>345</sup>

A more holistic approach to balancing E.U. interests and member state interests may be more appropriate and effective than an individual one. Focusing on member state law and on the balance between strong individual state policies and the goals of the Union as a whole is not normally a part of interpreting the text of a directive when no new implied funda-

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<sup>341</sup> *Id.* at 88-89 (listing Bulgaria, Cyprus, Croatia, Estonia, Greece, Italy, Latvia, Lithuania, Poland, Romania, and Slovakia).

<sup>342</sup> *See supra* Part III(E).

<sup>343</sup> Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 *FORDHAM INT’L L.J.* 1338, 1356, 1360 (2010).

<sup>344</sup> *Id.* at 1360-61.

<sup>345</sup> Jorrit Rijpma & Nelleke Koffeman, *Chapter 20 - Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?*, in *SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS* 455, 471-72 (Daniele Gallo et al. eds., 2014).



mental right is asserted. Yet it may be a wise exercise here, especially in the interest of institutional legitimacy.

The Union's interests include protecting families and establishing a uniform interpretation of the Family Migration Directives, including the word "spouse," and the freedom of citizens and legal residents to migrate within the E.U. without having to leave their families behind. The Union also aims for E.U. law to be implemented in a non-discriminatory manner on the basis of sex or sexual orientation. The primary interest of the member states, on the other hand, is to maintain family laws that reflect their particular cultural norms and prevent any erosion of their primary jurisdiction over family law through the route of harmonized E.U. migration policy.

As the diagram below illustrates, there is only one type of rule that balances the institutional interests of the Union and member states in the two-tiered E.U. system: a generalized version of a state-of-origin rule like that suggested by Vice President Lenaerts. An independent new Union-wide definition of marriage, whether a D.O.M.A.-style different-sex definition of marriage or an independent definition of "spouse" that includes same-sex couples, would subvert every member state's primary competence for determining familial status. The choice-of-law rules, however, would respect one or both member states' authority over family law (depending on whether they coincide or conflict).

A choice of the host state's law clearly fails to meet the E.U.'s goal of uniform interpretation of the Family Migration Directives. Under that rule, the directives would mean something different with regard to *the same* couple depending on the host member state. For example, if a Spanish man married an Argentinean man in Spain, the Spaniard would have a right under the Citizens Directive to bring his husband with him if he moved to France, but not if he moved to Cyprus. This coerced choice between member states has been long rejected under E.U. law and again in the Family Migration Directives.<sup>346</sup> This is the European equivalent of the situation that troubled the U.S. Supreme Court and led it to strike down the definition section of D.O.M.A. in *United States v. Windsor*.<sup>347</sup>

	Respects some Member State's family law	Does not respect any Member State's family law
Establishes uniformity	<i>Definition of Home Member State (Member State of Celebration or Nationality)</i>	Autonomous E.U. Definition
Does not establish uniformity	Definition of Host Member State	

<sup>346</sup> See *supra* Part IV(C).

<sup>347</sup> See *supra* notes 100-101 and accompanying text.

As shown in the diagram above, the only option that results in both uniformity throughout the Union and respect for member states' competence over familial status is a choice-of-law rule based on either the member-state-of-origin or the home-member-state — that is, the member-state-of-celebration or the member-state-of-nationality. Under this rule, the couple described above would be entitled to immigrate to any E.U. country, while also respecting the Spanish family law.

A focus on the state-of-celebration might sometimes mean that a lesbian Cypriot could marry in Spain and then claim a right to sponsor her wife under the Citizens Directive in Cyprus.<sup>348</sup> That possibility would be eliminated by a choice-of-law rule based on the sponsor's member state of nationality (or legal residence, in the case of the Family Reunification Directive), but such a rule could lead to the sort of discrimination on the basis of nationality that has been anathema under E.U. law for decades.<sup>349</sup>

The E.U. member-state-of-celebration rule described above is somewhat more limited than the *place-of-celebration* rule followed in the United States. To the extent that it includes marriages celebrated outside of the Union, a place-of-celebration rule would not fulfill the same balancing interest regarding member state competence for family law. Yet the textual, systematic and teleological arguments would still support a place-of-celebration rule, and such a rule would also provide unified Union-wide treatment.

#### CONCLUSION

In the context of family-based immigration, the E.U. and its Family Migration Directives are far ahead of the U.S. and its immigration laws in recognizing partnerships, informal couples, and other important relationships. Yet the implementation of the directives has been inconsistent throughout the Union, particularly with the treatment of same-sex spouses, compromising its goal of creating a “Union without borders” and its longstanding principles of uniformity and autonomy, freedom of movement, and family reunification.

In the area of marriage, on the other hand, the E.U. has fallen behind and stands at a crossroads closely resembling one faced by the U.S. back

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<sup>348</sup> See, e.g., *Ordinanza del Trib. di Reggio Emilia (civil law section), sez. I civ., 1401/2011 (13 February 2012)* (recognizing Spanish marriage of Italian citizen in Italy under the Citizens Directive); *but see F.R.A. REPORT, supra note 1, at 82* (describing a Cyprus Supreme Court decision finding no current obligation to recognize such a marriage).

<sup>349</sup> Titia Loenen, *Indirect Discrimination: Oscillating Between Containment and Revolution*, in *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES* 195, 196 (Titia Loenen & Peter R. Rodrigues, eds., 1999) (noting that the E.C.J. views “discrimination on the basis of nationality” as “the ultimate sin” in the context of interstate movement within Europe).

in 2013, when the Supreme Court struck down the definition of “spouse” in the Defense of Marriage Act. Some E.U. member states recognize same-sex marriage and registered partnerships while others do not. With varying member state definitions of the term “spouse,” the E.C.J. (or the E.U. legislator) eventually will have to resolve disputes among home member states and host member states when married binational same-sex couples migrate from one state to another. Like U.S. decision makers before it, the E.C.J. will face several options: an autonomous E.U. definition of “spouse” or a choice-of-law rule selecting the definition of either the host member state, the place or member state of celebration, or the member state of nationality.<sup>350</sup>

An autonomous E.U. definition of “spouse” that excludes legally married same-sex couples would be inconsistent and unsupported by nearly all of the approaches above, and it is highly unlikely to occur. Under the teleological and comparative approaches, such an autonomous definition would no longer be appropriate in an E.U. where a rapidly increasing number of member states are recognizing same-sex marriage for general and immigration purposes. Nor would it be consistent with the broader E.U. principles of free movement, respect for family, and nondiscrimination. It would also subvert the laws of member states that do recognize same-sex marriage. Moreover, it would be inconsistent with the most faithful textual and systematic interpretations of the Family Migration Directives.

Historical analysis of the Family Migration Directives may lend some support to such a restrictive reading of “spouse,” but it would not be conclusive. If the legislative intent behind the directives was to refuse recognition to same-sex spouses, the directives are poorly drafted to effectuate this intent. At least in the case of the Citizens Directive, there was no clear “meeting of the minds” among members of the Parliament, the Council, and the Commission. Instead, the legislative history as a whole reflects the legislators’ willingness to agree to disagree on the contentious definition of “spouse.”

An autonomous E.U. definition of “spouse” that includes same-sex couples would be fully supported by the textual, systematic, and teleological analyses above. The texts of the two directives and the normative system under which they operate rely on a broad meaning of “spouse,” which even addresses marriages expressly rejected from their coverage. In the general texts, “spouse” has no modifiers or conditions, and if there are no express exceptions, the E.U. directives should not be read restrictively. The inclusive, autonomous definition also would support the goals of free movement and family reunification as well as the principles of uniformity and nondiscrimination in the directives and the treaties upon which they are based.

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<sup>350</sup> See *supra* Part II(B).

However, a rule respecting the family law of the member state where the marriage was celebrated might serve those goals even better. Similarly supported by the textual, systematic and teleological approaches above, a member-state-of-celebration rule would respect member states' interests and governance of family law, better comporting with the Union-member state balance suggested in Part IV(D)(2) above.

Although a member-state-of-nationality rule would also strike this balance, it would raise serious problems with discrimination on the bases of nationality, sex, and sexual orientation, all prevalent concerns of the E.U. Alternatively, an autonomous definition recognizing same-sex spouses might be required under these non-discrimination requirements as well as European fundamental rights regarding family and family formation.<sup>351</sup> Except as relevant under the "harmonious interpretation" principle,<sup>352</sup> however, that discussion is beyond this paper's focus on legislative interpretation.

As forewarned at the outset, this rigorous academic exercise does not accurately reflect the E.C.J.'s practice of directive interpretation. A real case will come with real facts and real emotional, national, and institutional concerns. It is difficult to say which of the methods and arguments the E.C.J. will employ and find persuasive. However, this comprehensive analysis demonstrates that the best possible E.C.J. interpretations of the term "spouse" in the Family Migration Directives would be an inclusive, autonomous E.U. definition of "spouse" or a place- or member-state-of-celebration rule. In the end, the success of a place-of-celebration rule in the United States and recent U.S. Supreme Court caselaw may augur well for the future recognition of same-sex spouses in Europe.

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<sup>351</sup> See *supra* Parts IV(A)(3) & IV(C).

<sup>352</sup> See *supra* Part III(B).