Recognition of Same-Sex Marriage in the European Community: The European Court of Justice’s Ability to Dictate Social Policy

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Allison R. O'Neill†

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Introduction

On January 30, 2003, Belgium became the second country in the world to allow same-sex partners to marry. The state began processing same-sex marriages in June 2003. This legislation marks a step forward for supporters of same-sex marriages around the globe. Belgium’s actions followed those of the Netherlands, which passed similar legislation in April 2001. The Netherlands’ Act produced immediate results, as 2,400 same-sex marriages took place during the remaining nine months of 2001, followed by approximately 1,900 in 2002. These two countries have begun a trend in family law that some had previously dismissed as an isolated incident in the Netherlands. As the number of same-sex marriages increases in these two countries, the chance that same-sex spouses will seek recognition in another European Union state also increases. This may lead to the European Court of Justice ("ECJ") having to decide whether to recognize these relationships.

Throughout the European Union ("EU" or the "Union"), there are movements towards recognizing same-sex partnerships. Although no other country has adopted legislation allowing marriage, many governments, including those of Sweden, Denmark, and France, have created recognition systems, which often give same-sex partners the same legal rights as married couples. Additionally, many other member states that do not have recognition schemes are currently considering same-sex partnership laws in their parliamentary bodies. Amid this liberalization stands the European Union, a body that began as an alliance aimed at strengthening member states’ economies, but now holds greater social and cultural significance. Today, the ECJ rules on issues concerning social policy, which may in the near future include same-sex marriages. With such rulings, the

1. See Belgium Bill, Belgische Kamer van Volksvertegenwoordigers, 5e Session de la 50e legislature, Doc 59 2165/001, Jan. 30, 2003.
2. See generally Acts of 21 December 2000, Stb. 2001, nos. 9 and 10 (allowing registration that grants similar legal effects as marriage in the Netherlands).
5. The European Court of Justice was set up by the EU to judge conflicts concerning EU law.
7. Id.
8. See H.L. Bill, infra note 8 (noting the UK proposed registered partnership legislation), Danish Act, infra note 41.
9. See, e.g., infra note 59 (noting that the British government is developing a registered partnership scheme).
10. See generally, MacLean, infra note 92 (discussing the ways in which political and social influences impact member states).
11. See infra note 16 (outlining the evolution of the ECJ’s opinions on human rights law in the EC’s member states).
ECJ has created tension among conservative member states that would prefer to continue to act as they see fit.\textsuperscript{12}

Although other member states are moving toward recognizing same-sex relationships, the Netherlands and Belgium are the only states that treat same-sex and opposite-sex partners the same for purposes of marriage.\textsuperscript{13} Changes in the domestic laws of these countries, however, could significantly impact the recognition of same-sex relationships throughout the European Union.\textsuperscript{14} Not only is it possible that the Dutch and Belgian actions will prompt member states to take action domestically,\textsuperscript{15} but it is also possible that their actions could lead to an ECJ decision (whose rulings, traditionally, member states strictly follow) on the subject of same-sex marriages.\textsuperscript{16} While the ECJ may decide to respect the internal affairs of the member states concerning marriage,\textsuperscript{17} issues concerning Article 39 of the Treaty Establishing the European Community\textsuperscript{18} (which calls for the free movement of workers within the European Community) could compel the ECJ to consider whether member states should now recognize same-sex relationships as legal marriages.\textsuperscript{19}

If the ECJ were to find that member states should give standing to same-sex marriages under Article 39, a new issue might then arise as to whether a member state can excuse itself from recognizing these marriages.\textsuperscript{20} An excusal would most likely take the form of an amendment to a European Community ("EC" or "Community") treaty and require a unanimous vote of support by the member states.\textsuperscript{21} In light of the current trend towards recognition of non-traditional unions and the pressures on states to eliminate discrimination, one or more member states might object to

\begin{footnotesize}
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\item \textsuperscript{12} See generally David O'Connor, Limiting "Public Morality" Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union, 22 BROOK. J. INT'L L. 695 (1997) (arguing that Ireland feels internal tensions due to its desire to remain economically tied to the EC but wants to retain its conservative stance on social issues).
\item \textsuperscript{13} See YUVAL MERIN, \textit{EQUALITY FOR SAME-SEX COUPLES} 122 (2002) (noting that the Netherlands has imposed some restrictions on same-sex partners' right to adopt children from foreign countries due to fears that some conservative countries might limit Dutch heterosexual couples from adopting because of concern that the children may eventually find their way into homosexual couples' homes).
\item \textsuperscript{14} See Nicholas Patterson, \textit{The Repercussions in the European Union of the Netherlands' Same-Sex Marriage Law}, 2 CHI. J. INT'L L. 301, 304 (2001).
\item \textsuperscript{16} See generally Elizabeth F. Defeis, \textit{Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights}, 19 DICK. J. INT'L L. 301 (2001) (noting that the ECJ has begun taking the lead in infusing the Community with social and moral standards).
\item \textsuperscript{17} See Patterson, \textit{supra} note 14, at 304.
\item \textsuperscript{18} EC TREATY, \textit{supra} note 15.
\item \textsuperscript{19} Cf. Patterson \textit{supra} note 14 (arguing that the ECJ may be coming closer to having to decide on a case involving same-sex marriage recognition).
\item \textsuperscript{20} EC TREATY, \textit{supra} note 15, art. 300(5) (citing Article 48 of the \textit{TREATY ON EUROPEAN UNION}, which states that if a member state does not want to abide by a ruling, it would need to attempt to be excused).
\item \textsuperscript{21} EC TREATY, \textit{supra} note 15, art. 300(5).
\end{itemize}
\end{footnotesize}
another's petition to amend an EC treaty. This would create a novel predicament for the European Union.

This Note argues that if the ECJ were to decide in favor of recognizing the legal rights of married same-sex couples, which is possible due to the legal changes occurring within the EC's member states, some member states might want to seek excusal from the ruling. Furthermore, if these excusals were refused, there would be both political and social backlash within the EC, as member states would not quietly approve restrictions on their sovereignty. Section I will provide the necessary background to this argument by describing the legislation and policies of both member and non-member states concerning same-sex unions. Section II will then illustrate how a member state can attempt to opt out of an ECJ ruling and discuss the Irish Abortion Protocol, in which opting out actually occurred. Section III will analyze this argument using a hypothetical case to show how a claim would make its way through the ECJ and how the European Community could respond to the decision. Finally, Section IV will consider how the issue of recognizing same-sex marriages might affect membership policies within the European Union and how the ECJ's decision reflects on the Union as a whole.

I. The Emergence of Same-Sex Recognition and the Chances of a Member State Opting Out of a European Court of Justice Ruling to Expand Recognition Within the European Community

A. Same-Sex Marriage in the Netherlands and Belgium

In 2000, the Netherlands amended existing family law to give same-sex couples the right to marry and the right to adopt Dutch children.\(^22\) This legislation changed existing law that limited same-sex couples to registering their partnerships. Although registration gave these couples many maintenance and recognition rights, it did not carry the same political and social impact embodied by the recognition of marriage, which carries symbolic and legal implications. Furthermore, registration made it easier to pass the accompanying legislation concerning adoption.\(^23\)

When Belgium's House of Representatives decided in favor of allowing same-sex marriages, the isolated Dutch case began to look like a trend of things to come.\(^24\) The Belgium Bill allows same-sex partners to marry under the same system as opposite-sex partners rather than creating a new process for same-sex marriages.\(^25\) Unlike the Netherlands' system, Belgian

\(^{22}\) Acts of 21 December 2000, *supra* note 2 (Article 1 of the Act amends the existing family law and allows for a registered partnership between two persons of the same sex with the same legal effect as marriage).

\(^{23}\) *See* Kees Waaldijk, *The Latest News About Same-Sex Marriage in the Netherlands (What It Implies for Foreigners)* (Jan. 2003), available at http://www.meijers.leidenuniv.nl (indicating that there was some resistance in allowing same-sex couples the right to adopt children before the marriage law was introduced).

\(^{24}\) Belgium Bill, *supra* note 1, was ratified with a vote of 91 to 22.

\(^{25}\) *Id.*
law only allows same-sex marriages when the national law of each partner would allow the marriage. Thus, when in Belgium, a Belgian can enter into a same-sex marriage only with another Belgian or with a Dutch citizen.\(^{26}\) Furthermore, the Belgium Bill does not allow a same-sex couple to adopt children, nor does it create a presumed parental right for a female in her partner's biological children.\(^{27}\) Belgium's recent legislation raises the question of whether the other member states of the European Union will follow the Netherlands' approach to recognizing same-sex marriages.

**B. Grant v. South-West Trains: Confronting Same-Sex Partnerships in the European Court of Justice Before Same-Sex Marriages Were Recognized**

The ECJ came close to confronting the recognition of same-sex relationships within the European Community in the case of *Grant v. South-West Trains*.\(^{28}\) *Grant* was an employee of South-West Trains and her contract granted concessions to herself, her spouse, her dependents,\(^{29}\) and a common law spouse upon approval.\(^{30}\) South-West Trains refused to grant travel concessions to *Grant*'s girlfriend of over two years, even though the company gave concessions to a male employee's girlfriend.\(^{31}\) The ECJ held that South-West Trains' refusal to grant travel concessions to *Grant*'s same-sex partner was not discrimination and that the concessions could be limited to partners of the opposite sex.\(^{32}\) Aside from finding that there was no discrimination,\(^{33}\) the ECJ also commented that the law in most member states did not treat "stable relationships between two persons of the same sex . . . as equivalent to marriages or stable relationships outside marriage between persons of opposite sex."\(^{34}\) Therefore, the ECJ found that employers did not have to treat a same-sex partnership the same as a marriage or a stable heterosexual relationship outside of marriage.\(^{35}\)

In contrast, the ECJ might handle a claim by a married same-sex couple from Belgium or the Netherlands quite differently today. In *Grant*, the ECJ stated that one of the main reasons employers did not have to treat same-sex partnerships as equivalent to opposite-sex relationships was that most member states did not treat same-sex partnerships equally.\(^{36}\) Over the past few years, however, member states have enacted laws that give legal status to relationships outside of traditional marriage, including the

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27. *Id.* Cf. *supra* note 2.


29. *Id.* at I-623.

30. *Id.*


32. *Id.*

33. Case C-249/96 (finding no gender discrimination because the rule applied equally to same-sex partnerships involving both men and women).

34. *Id.* at I-648.

35. *Id.* at I-652.

36. *Id.* at I-648.
recognition of same-sex partnerships. Although member states have not developed identical or, in some cases, similar legal recognition schemes, many now acknowledge same-sex partnerships as being legally analogous to marriage or heterosexual cohabitation and, in the case of the Netherlands, equal to heterosexual marriage.

C. Evolution of Same-Sex Relationship Recognition Within the European Community and Nations Outside the European Community

In 1989, Denmark became one of the first European countries to give same-sex partners the same political rights as heterosexual spouses. This legislation experienced initial delays due to fear that recognizing same-sex partnerships would produce domestic hostility. In addition, lawmakers were worried about foreign perceptions regarding whether Denmark would expect general recognition of its legalized same-sex partnerships by outside states. The legislature, however, overcame these concerns and passed the Danish Act. For Danish recognition of a same-sex partnership, the partners must register their relationship with the government. Under this system, the same legal requirements apply to same-sex partnerships and conventional marriages; for instance, age requirements, prohibitions against sibling unions, and prohibitions against registering without the dissolution of previous partnerships.

In 1995, Sweden introduced a registered partnership model that is both factually and legally similar to a marriage but uses different terminology. The Swedish requirements are similar to those of the Danish Act, but the Swedish Act only applies to partnerships after two years and is limited to same-sex partners (unlike the Danish Act where the partnership can be an opposite-sex couple), although they do not have to be homosexuals. Registered partnerships in Sweden have almost all of the consequences of a marriage, including financial support. There are many in Sweden who would like to see same-sex partners receive more rights and

37. See, e.g., Danish Act, infra note 41; French Registered Partnership Act, infra note 53.
38. Acts of 21 December 2000, supra note 2; see also Hunt, supra note 5.
41. Danish Act, supra note 39. The Danish Act was passed in 1989.
42. Cf. Nygh, infra note 46 (explaining that this registration consists of filing papers, which declare the intention to have the relationship recognized and provides partners with certain rights and obligations similar to those of a marriage, while in other nations, legal recognition of the relationship comes after a set amount of time).
43. See id. There is a difference, demonstrated by the fact that a same-sex partnership does not receive the solemnization of a marriage.
44. Danish Act, supra note 39.
47. Id. Under the 1995 Swedish Act, a same-sex couple cannot adopt children, one partner alone cannot adopt, and artificial reproduction is not allowed. If custody issues arise over biological children from prior relationships, the same-sex partner can be seen
there is similar support to pass formal marriage laws. Swedish registered partnerships are not currently recognized in countries with similar legislation, such as Denmark and Norway.

France is another EU member state that adopted legislation allowing two persons of the same sex to enter into a registered partnership. The purpose behind the legislation, as put forth by French officials, was to allow partners to organize their lives together better. Registered partners receive the rights and obligations of marriage, including tax benefits and property rights. However, there are differences between registered partnerships and traditional marriages, such as inheritance rights, rights concerning children, and methods of dissolution. Prior to passage, the French government experienced some difficulties in gaining political support for the partnership system; many French officials worried that registered partnerships would harm the institution of marriage and some did not believe that the state should support relationships other than marriage. The drafters thought that a bill that applied to everyone could gain more support than a bill singling out same-sex partners. In light of this conflict, France decided to include both homosexual and heterosexual partners in the legislation.

In the United Kingdom (UK), traditionally one of the more conservative EU member states, there are currently plans to implement civil partnership legislation. The movement towards equal rights for same-sex couples in the UK had a breakthrough with legislation proposed in the House of Lords that would have allowed same-sex partners to enter into civil partnerships. The Civil Partnerships Bill would have allowed for as a stepparent, as if the partnership were a marriage. Swedish officials claim this is not discrimination because Swedish law does not recognize the right to have a child.

48. Id. However, some financial benefits such as widow's pensions are not given to the partners.
50. Id. (noting that the rights available to same-sex married partners in Sweden are not available to those partners who move to a foreign country).
53. French Registered Partnership Act, supra note 53.
54. E.g., Steiner, supra note 52 (noting that a same-sex partner will not have a clear right to the partners' children).
55. Id.
56. Id.
58. See Low, infra note 78 (describing the United Kingdom as a nation with church-state relations).
the registering of unions, thereby allowing same-sex partners to enjoy many of the benefits and obligations given to married spouses, such as property rights, inheritance rights, and bereavement damages. The Civil Rights Bill was withdrawn from consideration after the UK government announced that it would be introducing its own civil partnership legislation. This action, although creating controversy within the UK, is consistent with the state's efforts to accept and integrate the Human Rights Act. The recent announcement by the British government that it would begin to allow civil partnership registration in the near future is a development occurring sooner than activists originally expected.

While member states are beginning to reform domestic same-sex partnership policy, pressure towards liberalization is also coming from outside the European Union, as other nations create laws that recognize and protect same-sex relationships. Countries such as Canada, Australia, New Zealand, and Norway have started to adopt progressive same-sex partnership reforms affecting property and maintenance law. While the legal rights given to same-sex partners vary among the different Canadian provinces and Australian territories, both countries, in addition to New Zealand and Norway, have developed laws recognizing same-sex partnerships. The countries' recognition methods range from Norway's practice of granting property rights for de facto partners—regardless of whether there is a conjugal relationship—to Australia's overhaul of civil law to grant same-sex couples a bulk of the rights given to married couples. Indicative of the ever-changing nature of these recognition schemes, appeals courts in...

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60. Id.
64. Clare Archbold, Family Law Making and Human Rights in the United Kingdom, in MAKING LAW FOR FAMILIES 186 (Mavis MacLean ed., 2000). Once the Act is integrated, there will be more pressure on the government to comply with the European Convention on Human Rights and to make the political process more public allowing equality issues to be openly addressed.
65. Supra note 61.
66. See infra notes 68 and 69.
67. Id.
68. Compare New South Wales legislation (The Property (Relationships) Legislation Amendment Act 1999 No. 4), with Tasmania (The De Facto Relationship Bill 1999), which does not give rights to same-sex partner. Compare also Quebec's An Act to Amend Various Legislative Provisions Concerning De Facto Spouses, R.S.Q., ch. 14 (1999), with Alberta's Marriage Act, R.S.A., ch. M-5 (2000), which states that marriage is "between a man and a woman" and declares that Alberta will stand by this definition regardless of whether the Supreme Court of Canada decides differently.
69. Compare Norway's Law on Joint Households (allowing property to be taken over by non-owning cohabitants if they have been living together for two years or have a mutual child, and not requiring a conjugal relationship), with New Zealand's Property (Relationships) Act (including not only same-sex partners in the definition of de facto partnerships, but also including a conjugal element as of 2002).
70. See New South Wales legislation (The Property (Relationships) Legislation Amendment Act 1999).
three Canadian provinces have recently decided that traditional definitions of marriage violate the rights of same-sex couples and now require the provincial governments to enact laws allowing same-sex marriage. 71

II. Ability of a Member State to Opt Out of a Decision of the European Court of Justice and an Examination of the Irish Abortion Protocol

If the ECJ follows the emerging trend towards recognition, member states would be compelled to follow the decision. 72 Consequently, a major issue may arise as to whether or not a member state can excuse itself from recognizing a marriage that occurred in the Netherlands or in Belgium. If a member state wants to opt out of an ECJ interpretation of EC law—so that it may continue to follow a legal regime that is inconsistent with the law applied to the other member states—the EC Treaty 73 requires an amendment to a European Union treaty. Article 300(5) of the EC Treaty states that if the Council of the European Union ("Council") plans to amend the EC Treaty, it must follow Article 48 of the Treaty on European Union (TEU): 74 Any member state can propose an amendment to the treaty, allowing the Council to convene a conference where representatives from each member state review the proposals. 75 However, according to Article 48, "amendments shall enter into force after being ratified by all the member states." 76 Thus, if any member state objects to the proposed amendment, it will fail. 77

Although requesting protocols to treaties is an unusual way for a country in the EU to retain some sovereignty, 78 countries such as the United Kingdom, France, and Denmark have all engaged in making protocols. 79 Therefore, given the conservative standpoint of some member states, some of those states may attempt a form of opting out. Furthermore, if a nation's request for a protocol to amend a treaty is not allowed, it is possible that the nation may threaten to veto a treaty or even to withdraw from the Community altogether. 80

The European Union faced a situation comparable to the same-sex marriage debate when an amendment resulted from a disagreement over

71. Three cases were brought in different Canadian territories all of which reached different decisions. See EGALE Canada Inc. v. Canada (Attorney General), Hendricks and Leboeuf v. The Attorney General of Canada (Court File No. 500-05-059656-007), and Halpern v. The Attorney General of Canada, Ontario Superior Court of Justice (Divisional Court), Court File No. 684/00.
72. Defeis, supra note 16 (member states traditionally are influenced by and follow ECJ opinions, which are binding on the member states).
73. EC Treaty, supra note 15, at art. 300(5).
74. Id. at art. 300(5) (which cites Article 48 of the Treaty on European Union).
76. Id.
77. Id. This is indicated in the text of Article 48.
79. Id.
80. Id.
the Irish Abortion Protocol ("the Protocol") of 1992. In 1989, the ECJ ruled on a case concerning Irish students who were disseminating information on abortion clinics located abroad. The ECJ ruled that the students could not distribute the information and relied heavily on the provisions of the EC Treaty, which state that member nations should be allowed to control legislation in areas affecting moral matters in their societies. During the Maastricht Treaty ratification in 1992, the Irish government used this ruling to obtain Protocol 17, an amendment that stated that no provision of the EC Treaty would affect the domestic application of the Irish Constitution's prohibition on conducting and assisting abortions.

Public sentiment towards the Protocol changed while the government shaped the amendment. In a case, later known as the X case, the court denied an endangered 14-year-old girl pregnant with her rapist's child of the right to travel abroad to receive an abortion. On appeal, the Irish Supreme Court held that a mother could obtain an abortion if childbirth would endanger her life. Thus, the court lifted the injunction prohibiting the young girl from obtaining an abortion. This decision required the Irish government to ensure that an endangered woman could travel abroad to procure an abortion.

In light of the X case, the government feared that the Irish people would not ratify the Treaty with the Protocol. The government sought to amend the Protocol, but the other European states refused to reopen the issue. Instead, the states created the Solemn Declaration, which stated that the Protocol did not intend to limit the freedom of travel between member states or to limit the flow of information allowed under Irish law. The Declaration stated that the Maastricht Treaty permitted the X Case decision, and Ireland finally ratified the Treaty in 1992. The inclusion of extra provisions in the Maastricht Treaty shows how Irish public sentiment shaped the EU, which raises the question of how the EU should

83. Id. (citing EEC Treaty, arts. 36, 56, and 66).
84. IR. CONST. art. 40.3.3 (1937).
85. G. Diane Lee, Note, Ireland's Constitutional Protection of the Unborn: Is it in Danger?, 7 TULSA J. COMP. & INT'L L. 413, 426 (2000) (explaining that the EU is given potential jurisdiction over social and cultural activities within its territory). The European Union countries intended the Maastricht Treaty to further unity and involved a reduction in each state's sovereignty.
87. Id.
88. Lee, supra note 85, at 431.
90. Buckley, supra note 89, at 289 (citing the Solemn Declaration).
91. See RICHARD B. FINNEGAN, THE EUROPEAN UNION AND THE MEMBER STATES: COOPERATION, COORDINATION, AND COMPROMISE 180 (Eleanor E. Zeff & Ellen B. Pirro eds., 2001) (explaining that the vote of the people for the Treaty may show a preference for the EU over certain social policy issues).
defer to the preferences of individual member states.\textsuperscript{92}

III. The Consequences of a Same-Sex Couple's Recognition Claim in the European Court of Justice

A. Challenge to the Refusal to Recognize a Same-Sex Marriage

The growing number of same-sex couples in the EU and the rise in same-sex marriages in Belgium and the Netherlands increases the likelihood that a same-sex married couple will move from these countries to another EU member state. If this hypothetical family unit moves, the spouses may want to transfer their rights and obligations from the Netherlands or Belgium to the other country, which may not grant them the same entitlements as given to heterosexual couples. The spouses could then sue in the local court system, or Belgium or the Netherlands could sue the other member state in the ECJ, to enforce the spouses' rights.\textsuperscript{93}

1. The Freedom of Movement Provision in the European Community Treaty

If the ECJ hears such a challenge, it could analyze the case under the Free Flow of Workers and the Freedom of Movement provision of the EC Treaty.\textsuperscript{94} This provision seeks to encourage movement in the EU and guarantees that citizens of a member state enjoy the same rights in other member states. Article 39(1) of the EC Treaty gives workers the freedom of movement,\textsuperscript{95} and Article 39(2) assures workers equal treatment regarding working conditions and social benefits.\textsuperscript{96} This provision prohibits measures that would disadvantage individuals more than they would be disadvantaged in their home state.\textsuperscript{97} Article 39 indicates that the ECJ will take great measures to promote the charter's goal of unity by declaring restrictions on the free movement of EU citizens illegal.

To encourage movement and restrict discrimination against citizens traveling between member states, the governments must respect social


\textsuperscript{93} See Anthony Arnulf, The European Union and Its Court of Justice 40 (1999) (noting that an action can be brought to the ECJ by many different parties but it is often difficult for individuals to be granted standing). However, an individual could possibly bring an action in a member state's local courts and seek a preliminary ECJ ruling.

\textsuperscript{94} MacLean, supra note 92, at 540 (explaining that the ECJ's main purpose is to "ensure the four freedoms").


\textsuperscript{96} Id.

\textsuperscript{97} Andrew Evans, A Textbook of European Union Law (1998). This opposes the idea that the prohibition is against denying national treatment to persons moving between member states or simply not being denied access to employment. This tendency of the Court of Justice is cited here as emerging in part from Case C-19/92 Dieter Kraus v. Land Baden-Wurttemberg, 1993 E.C.R. I-1663, and the Opinion of Advocate General Capotorti in Case 55/77 Maris v. Rijksdienst voor Werknemerspensioenen, 1977 E.C.R. 2327, at 2338.
rights like the right of a worker's spouse to receive government or employer support.\textsuperscript{98} The unavailability of spousal benefits, such as insurance, could discourage movement between countries. Thus, the ECJ could find that a state's failure to recognize same-sex marriage obstructs freedom of movement and violates the EC Treaty.\textsuperscript{99}

2. \textit{How Should the European Court of Justice Define "Spouse"?}

Before the ECJ finds that same-sex marriage restrictions violate Article 39, it must decide how to define the term "spouse," an issue with which it has previously struggled.\textsuperscript{100} Part Three, Title III of the Treaty Establishing the European Community states that "freedom of movement for workers shall be secured within the Community."\textsuperscript{101} The Council's regulations clarify this provision. One regulation states that for a worker to enjoy the freedom of movement he must be able to be "joined by his family."\textsuperscript{102} No clear established definition of "family" or "spouse" exists, and the ECJ has never directly confronted the issue of whether a homosexual union qualifies as a family. The ECJ encountered the issue on one occasion but declined to review it for procedural reasons.\textsuperscript{103} In the \textit{Grant} case, the ECJ considered the issue of same-sex partners' rights, but drew a clear line between same-sex relationships and marriages.\textsuperscript{104} The ECJ found that member states did not recognize same sex partners as spouses and therefore did not require states to give same-sex partners employment benefits.\textsuperscript{105} In \textit{Netherlands} v. \textit{Reed}, the ECJ held that the term "spouse" only included an individual in a marital relationship.\textsuperscript{106} In 2001, the ECJ distinguished registered partnerships and announced that it would no longer require states to treat them the same as marriages.\textsuperscript{107} Although the ECJ previously decided that same-sex partners were not "spouses," the legislation in the Netherlands and Belgium has changed the circumstances.\textsuperscript{108} Moreover, many member states now recognize same-sex partnerships and give them rights similar, and at times identical, to married couples. The

\textsuperscript{98} EC \textsc{Treaty}, supra note 15, at art. 39.
\textsuperscript{100} See infra notes 106-108, where the court has looked at same-sex partners.
\textsuperscript{101} EC \textsc{Treaty}, supra note 15, art. 39.
\textsuperscript{102} Council Regulation 1612/68 of 15 October 1968 Freedom of Movement for Workers Within the Community (EEC).
\textsuperscript{103} Joined Cases C-122/99 & C-125/99 Sweden v. Council of the European Union, 2001 E.C.R. 1-4322 (arguing that depriving persons registered under the Swedish partnership legislation of "rights associated with their status under national law" was an "obstacle to the freedom of movement for workers." \textit{Id.} at 20-21. However, the court found that this was a fresh plea brought up during the appeals stage and was therefore not admissible. \textit{Id}.
\textsuperscript{104} Case C-249/96, Grant v. South-West Trains Ltd., 2 E.C.R. I-621 (1998).
\textsuperscript{105} See \textit{id}.
\textsuperscript{106} Case 59/85, Netherlands v. Reed, 1986 E.C.R. 1283, at ¶ 15.
\textsuperscript{107} Case C-122/99. This was an employment benefits case in Sweden where the court found that the employer did not have to treat the partnership as a marriage.
ECJ may now have to decide whether same-sex partners are "spouses" in light of their legal marriage.

3. Possible Outcomes of the European Court of Justice Ruling

The Treaty's freedom of movement provisions encourage and accelerate integration, but member states have treated same-sex partners in a way that undermines the provisions. The ECJ will further the goal of social and political integration if it requires member states to recognize a marriage from Belgium or the Netherlands and thereby grants same-sex married couples equal rights. The ECJ will not require state recognition if the Amsterdam Treaty justifies the restriction on the freedom of movement. The Amsterdam Treaty protects sexual orientation and says that EU member states should combat discrimination in that area. While member states may have internal difficulties constructing valid policy reasons against recognition, the ECJ should consider the broader problems for the EU, as a whole, if member states fight over recognition. Political influences within the EU may cause the ECJ to retreat from the issue. The ECJ may not want to confront the majority of the member states, who may not be ready to recognize same-sex marriages. However, if the recent liberal expansion of recognition laws is an indication of how member states would respond to an ECJ ruling, many member states may not oppose recognizing same-sex relationships.

If the ECJ declines to recognize same-sex rights, the Netherlands or Belgium could bring a fundamental rights claim with the European Human Rights Court. Although a ruling from this court would compel member states to give rights to the same-sex couples, the court likely would not find a human rights violation. While the court has considered acting against discrimination based on sexual orientation, it has usually left this initiative to national legislators. Although the member states would comply with a court order to recognize same-sex relationships, the court is not likely to reach this decision because the ECJ has already decided against recognition.

110. See Spackman, supra note 31, at 1088.
111. See Hunt, supra note 6, at 649.
112. See EC Treaty, supra note 15, at pt. 1, art. 13; Hunt, supra note 6, at 649.
113. Patterson, supra note 99, at 304.
114. See supra notes 1, 41, 48, and 53 (describing member states' legislation supporting same-sex relationships).
115. See Patterson, supra note 99.
116. Id. at 305.
117. Id. at 320–22.
118. Cf. supra note 72 (explaining that the member states would respond with deference similar to that given to the ECJ).
B. Attempt to Opt Out of a European Court of Justice Ruling

If the ECJ decides to recognize same-sex relationships, Article 5 of the EC Treaty would oblige member states to adopt the ECJ ruling. Some member states, however, might seek to excuse themselves from the ruling. This excusal could resemble Ireland’s Abortion Protocol. Just as Ireland pressured other member states to vote unanimously for the Protocol, a few member states might desire a similar vote to opt-out of the ECJ’s ruling. A country with a conservative stance towards same-sex partnerships, such as Ireland, may seek to enforce its sovereignty and request an exemption. To receive an exemption, the other member states must unanimously approve the excusal. In light of the current trend of member states legislating to help same-sex partners, a few member states will likely disapprove of excusals. The more conservative member states might then retaliate and refuse to ratify the next major treaty or otherwise obstruct the Community’s progress. Nations such as the Netherlands and Belgium have a great interest in having their laws respected, and as the number of same-sex marriages increases, many citizens might oppose bending on this issue in order to placate other countries. Furthermore, EU pressure on the Netherlands or Belgium might encourage these nations to withdraw from the EU.

As laws increasingly accept homosexual relationships, more Europeans will consider same-sex relationships a part of everyday society. Accordingly, more states will accept the legal responsibilities of recognition and adopt corresponding legislation, and European countries and their citizenry will also become more inclined to recognize all married spouses within their borders and less inclined to allow exceptions. The Netherlands and Belgium already recognize same-sex marriages. Sweden and Denmark have also developed progressive reforms over the last few years. The governments and citizens of these countries may not want to make exceptions that allow some countries to refuse recognition of same-sex marriages. Finally, as some Canadian provinces grant same-sex couples a constitutional right to marry, the EU member states will have one more political obstacle to conquer if they want to deny recognition

120. EC TREATY, supra note 15, art. 5.
121. Supra text accompanying note 78.
122. Supra note 75 and accompanying text. To pass the amendment, all member states had to agree.
123. Supra note 78 and accompanying text.
124. EC TREATY, supra note 15, art. 48 (stating that the member state would need to pass through the provisions of Article 48 without objection).
125. Supra note 114 (referencing member states’ legislation supporting same-sex partnerships).
126. See supra note 3.
127. MERIN, supra note 13, at 94 (discussing the development of Swedish law and the evolution of society’s way of thinking about homosexuals).
128. The start of this trend can be seen through developing legislation. For example, see supra notes 1, 2, and 65.
129. See Belgium Bill, supra note 1; Acts of 21 December 2000, supra note 2.
130. See Danish Act, supra note 41; see Nygh, supra note 48.
rights. Other countries that allow same-sex marriage may sufficiently pressure the ECJ and other member states into giving marriage rights to same-sex partners. Thus, with many member states under pressure to continue reforming their policies on same-sex partnerships, there would be considerable pressure to oppose an excepting amendment to the ECJ ruling.

A disagreement between member states over protocol possibilities could create many problems for the EU. Although the ECJ would likely want to "promote the supremacy of EU law and its uniform application to all member states," it might hesitate to pressure states for fear that they might attempt to withdraw from the EU. The ECJ rulings concerning Ireland limited the state's sovereignty and its attempts at domestic abortion policy. The ECJ was willing to restrict Ireland's sovereignty but might not be willing to restrict other member states. Ireland and countries in a similar economically dependent situation have less political leverage. These countries have prospered extensively under the EU system and would not willingly withdraw and abandon this prosperity. However, economically-independent countries, such as the United Kingdom, could more easily act on withdrawal threats. Although a nation's threat to withdraw would not preclude the ECJ from conceding rights to same-sex partners under particular circumstances, the ECJ may not want to lose member states and may therefore avoid any decision that states might consider extreme. However, if the Court were to guide its analysis of EC law around the preferences of particular member states, it would be acting contrary to the goals of the EU by emphasizing politics over legal analysis.

131. EGALE Canada Inc. v. Canada (Attorney General), Hendricks and Leboeuf v. The Attorney General of Canada (Court File No. 500-05-059656-007), and Halpern v. The Attorney General of Canada, Ontario Superior Court of Justice (Division Court), Court File No. 684/00; see supra note 66 and accompanying text (noting that the EC may feel pressure to liberalize as the rest of the world begins to reform in order to escape appearing as if the EC does not promote human rights).

132. Cf. CRAM, supra note 95, at 47 (explaining that the Maastricht Treaty declares a commitment by member states to promote the EU social policy, including quality of life standards and solidarity among the member states).

133. See id.

134. Lee, supra note 85, at 432.

135. Low, supra note 78, at 192 (noting that the United Kingdom is an example of a member state that continually threatens to withdraw from the EU).

136. See O'Connor, supra note 12, at 701-02 (noting that this occurred even though Ireland is a highly religious society where issues such as abortion produce much public emotion).

137. Id.

138. See Low, supra note 78, at 191 (discussing how the United Kingdom, Northern Ireland, France, Denmark, and Portugal have all been able to secure Protocols similar to Ireland's Abortion Protocol, yet none of these countries are particularly economically dependent on the EC).

139. See id.

140. Id. at 191-92.

141. See Patterson, supra note 99, at 307.

142. See Note, supra note 109 and accompanying text.
IV. Effects on the European Union

The ECJ must create an atmosphere of "harmonious development" in which the member states can grow economically with little division. To achieve this atmosphere, which is one of the main goals of the EU, the ECJ must create a community that has "real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community." For the EC to function, the member states must accept that, inevitably, ECJ rulings may occasionally limit their sovereignty and conflict with their social policy.

In light of the possible emergence of a decision recognizing same-sex couples, the issue of true integration within the EU becomes relevant. As member states make protocols to treaties and some countries become more politically and economically powerful than others, there appears to be a division between those who hold power within the EU and those who follow. The United Kingdom wields a great deal of power within the EU and can effectively veto any EU social measures. If the European Union is meant to help protect the fundamental rights of citizens, there may need to be a limit to the amount of exceptions it will make for individual countries.

The EU or the ECJ will most likely consider an individual member state's public interests when deciding how much to defer to that state. The European Human Rights Convention allows states to protect their sovereignty under certain circumstances using a margin of appreciation approach, which considers local public sentiment when making legal determinations. Once issues such as public order and opinion have been taken into account, those member states who do not wish to abide by the rulings of the ECJ can stretch this concept indefinitely. Continued acceptance of state defiance and amendments to treaties may call into question the effectiveness of the EU as an integrated body. Instead, the EU may appear more like a loosely organized attempt at creating a federalized

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143. EEC TREATY, supra note 95, at art. 2; see also O'Connor, supra note 12, at 714 (citing EEC TREATY art. 2).
145. See id. at 528 (giving the example of the EC's opposition to abortion and its impact on Irish sovereignty).
146. See Low, supra note 78, at 191–92 (comparing the strong influence of the United Kingdom against the status of Ireland).
147. CRAM, supra note 92, at 59.
149. EC TREATY, supra note 15. Currently, there is no limitation to the exceptions.
150. See Low, supra note 78, at 193.
151. Id.
152. Supra note 78 (noting the United Kingdom's church-state relations as an example).
153. See Low, supra note 78, at 193.
The EU is generally viewed as a progressive body set on developing a system of non-discrimination. However, if the EC is compelled to defer to the individual wishes of conservative member states, it may create laws that, in reality, do not protect such individual citizens as same-sex spouses. The ECJ or the collective member states may necessarily limit amendments or agree that member states cannot opt out when basic human rights are concerned. Limiting excusals would ensure that the entire EU respects these rights and further the EU's goals of promoting the fundamental rights of its citizens.

Since the birth of the EU, member states have slowly transferred power to the EU. The number of member states in the European Community has gradually increased. This increase has created the problem of having many different forms of social policy and many different viewpoints on social issues. The lack of recognition of same-sex marriages currently affects only a few individuals, which may allow the ECJ to defer to the laws of the sovereign member states that do not recognize same-sex marriages. The increase in same-sex marriages, however, will pressure the ECJ to favor individual rights over state sovereignty. Although there may be backlash from the more conservative member states, the ECJ may have to make progressive changes to achieve greater Community unity and political stability.

Conclusion

The laws of the Netherlands and Belgium that allow same-sex marriages began a series of reforms that may lead to new rights for same-sex partners. Not only did the Netherlands and Belgium grant domestic rights, but as members of the EU, they may have also carved a path for same-sex partners' rights throughout Europe. If the ECJ hears a case, several member states would likely support a ruling favorable to the recognition of same-sex marriages throughout the EU. The Netherlands and Belgium could convincingly argue that the ECJ cannot permit a state to restrict one of the four freedoms and refuse to recognize a marriage.

155. See Carolan, supra note 148, at 405.
156. Id. at 395.
157. MacLean, supra note 92, at 536.
158. See Statistics Netherlands, supra note 3 (noting that only 10 per cent of same-sex couples are married).
159. See Kristen L. Walker, Evolving Human Rights Norms Around Sexuality, 6 ILSA J. INT'L & COMP. L. 343, 345 (2000) (discussing the varying success that homosexuals have had in invoking the right to equality).
160. See Low, supra note 78, at 191 (describing the commitment to greater unity laid out in the Treaty Preamble).
161. See Vandamme, supra note 154, at 148-50; Carolan, supra note 148, at 395.
Even as this ruling promotes political and social integration, it may inevitably stress relations between member states. If more member states request amendments and exceptions to agreements, the Community may need to restrict states that bargain out of treaty provisions and judicial decisions. The EC will have to decide whether the goals of economic and social unity merit restricted deference to the public policies of member states. Regardless of whether the EC decides to restrict deference, the Community must continue to develop systems of recourse, short of allowing protocols, to remain a functioning body that is progressing. Without progression, the EC will not be prepared to handle the political fallout that issues such as the recognition of same-sex marriages could cause among an ideologically diverse union.