

BECOMING FAMILIES:

A STUDY OF SAME-SEX COUPLES' RIGHTS IN THE ANGLO-SAXON COUNTRIES

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without whose love, support, and encouragement none of this would have been possible.

Abstract

The politics surrounding the recognition of same-sex couples has found uneven analysis in the extant literature. While the dynamics in the United States and Western Europe are well-documented, the processes in the Anglo-Saxon countries is less advanced. This oversight is two-fold. First, the empirical record regarding the historical evolution of same-sex couples' rights is wanting. Second, the theoretical framework of morality policymaking is unevenly theorised and therefore ill-equipped in dealing with this set of countries. This set of countries, therefore, is chosen to advance the extant theories regarding the politics of same-sex couples' rights. In short, this thesis aims to add to the empirical evidence and advance the theorisation of morality policy in 'secular' countries; that is countries which do not feature a politically relevant state-church conflict.

The thesis pursues this goal through four cases studies that each rely on qualitative research methods. First, it develops a theoretical framework to show the secularisation and contractualisation of opposite-sex marriage and outlines these processes' importance for same-sex marriage advocacy. Second, it uses the experience of the Anglo-Saxon countries to develop a new judiciary-based mode of international policy transfer. Third, it uses the case of same-sex union recognition in Australia to develop the morality policy framework in regard to secular countries. This analysis expands to the extant understanding of morality policymaking in particular regarding parliamentary democracies of the Westminster type. Fourth, the thesis analyses the *Adoption and Children Act 2002* in England and Wales to understand why same-sex couples were granted joint adoption rights before any form of formal union recognition.

The results of these case studies indicate that the morality policy framework is only partially useful for explaining the politics in Anglo-Saxon countries. In setting the parliamentary agenda, the executive has very strong albeit not absolute control. In the

legitimation of policy, the competition between ‘progressive’ and ‘traditionalist’ frames is confirmed, as is the ability of the executive to reinforce its preferred policy definition in the case of latent morality policies. However, the treatment of manifest morality policy requires the careful analysis of intra-party fractions and vested interests. Further research is required to test the theoretical frameworks built in this thesis and in particular the applicability of the morality policy framework in similar countries.

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1. Introduction[1]

Unlike most of the scholarship on social policy, this thesis does not primary concern the state's actions regarding economic or material wellbeing. Rather, it interrogates how the state interacts with another foundational societal institution: the family. While there is a certain degree of banality to the concept of family in a cursory reading, its complexity comes to the fore once it is interrogated more probingly. In the sphere of social policy, for example, the state invariably makes assumptions about the functions performed by 'the family'. Put differently, there are certain tasks that are assumed to be met by close kin, which renders them beyond the remit of the state. These assumptions regarding the family's role are complemented by a second set of preconceived notions about the family forms. Invariably notions of who makes up a family permeate policy. On one hand, these notions intimate the actors on which the state may or may not rely in constructing policy, on the other hand, notions about family forms inform and police the boundaries of whose families the state deems valid.

The relationship between the family and the state has long occupied scholars' minds. While the interplay between these two social institutions was not interrogated in the discipline's early scholarship, feminist critiques of the field's foundational work brought this important intersection to the fore. Most importantly, these critical analyses made evident that the state had long relied on the legitimated nuclear family to meet its own needs, rather than depending on the state (Lewis, 1992; McGowan, 2016). While this potently foregrounded gendered assumptions, the scholarship still primarily focussed on the heterosexual, patriarchal, and assumedly monogamous family that had been reified since at

[1] The research has received ethical approval from the University of Oxford (SPI_C1A_16_007).

least the Victorian era. Put differently, these early critiques questioned the assumptions of family functions and not family forms.

In a second step, the reification of one family form came under increasing scrutiny. Particularly, the rapid evolution of family forms from the 1960s onwards had to be accounted for. In part, this could be done through tracing changing legislative provision and practices around family: divorce had increasingly become accessible, women had ceased being the property of their husbands, and families and childrearing had become less intertwined. A more recent challenge to the extant assumptions about the forms families take have focussed on their presumed heterosexuality. In questioning this particular assumption, debate has focussed on both the question of same-sex marriage and the ability of same-sex couples' to parent (especially in the case of unrelated children).

While both debates resonate with earlier controversies in family policy, they have an additional complexity given their regard for same-sex couples' rights. As such, they continue a history of regulating intimate relationships and sexuality, which in the case of homosexuality entails a long history of medicalisation and criminalisation. Thus, debates about same-sex couples' access to marriage and ability to adopt as a couple had to overcome not just reified notions of family but also evolve the state's understanding of homosexual couples. Marriage, in addition, has an ecclesiastical background and evokes questions of faith, state and church relationships, and secularism that are often intractable. This creates a complex network of expectations with regard to whether and to what extent same-sex couples can be integrated into the notion of family. This thesis aims to contribute to this question by focusing in particular on the political processes surrounding the inclusion of same-sex couples in civil marriage and joint adoption in the Anglo-Saxon countries.

The thesis therefore touches on the increased valorisation of same-sex relationships but importantly is not a project about queering social policy. The intention is not to outline

the detrimental effects of heteronormative assumptions, which underpin most of social policy. Rather, the analysis focusses on the increased challenge to the heterosexual married couple ideal type underpinning most family policy. More specifically, the thesis interrogates the politics that lead to the inclusion of same-sex family's in the state's notion of family through an investigation of the political processes regarding same-sex couples' rights to civil marriage and joint adoption.

As such, the project sits in the broader scholarship that considers same-sex couples' rights and the politics surrounding their legalisation. It is less concerned with the impact of public opinion (Baunach, 2012; Clements, 2015a; Hayes & Moran-Ellis, 1995; Lax & Phillips, 2009; van den Akker, van der Ploeg, & Scheepers, 2013) or the internal struggles of the lesbian and gay rights movement about its policy goals (Adam, 1987; Broqua, 2015b; Hekma, 2015; Jackson, 2015; Poindexter, 1997; Weeks, 2015). Rather, it follows the strand of literature that engages with the politics of same-sex union recognition more broadly (Kollman, 2013; Paternotte, 2011; Paternotte & Kollman, 2013; Rydström, 2011; M. Smith, 2002, 2008).

In order to outline how the thesis contributes to this debate, the remained of this introduction will present its theoretical background, methodological approach, and outline the rationale for focusing on the Anglo-Saxon countries. In short, the thesis engages with the framework of morality policy and its applicability within the context of so called 'secular' countries (Engeli, Green-Pedersen, & Larsen, 2012, 2013; Heichel, Knill, & Schmitt, 2013; Hurka, Knill, & Rivière, 2018; Knill, 2013; C. Mooney & Schuldt, 2008; C. Z. Mooney, 2001; Mucciaroni, 2011; Studlar, 2001; Tatalovich & Wendell, 2018). Methodologically, the four chapters of the thesis are united by a case-study approach. Thus, all papers engage in qualitative analysis, which is warranted by the emphasis on understanding causal processes. In turn, the universe of the Anglo-Saxon countries is

explored because it offers a set of highly comparable but so far understudied countries in which to apply the morality policy framework. These countries are particularly suited to the thesis' ambition to further the understanding of morality policy making in 'secular' countries. Finally, the introduction concludes with an overview of the individual chapters.

Morality Policy: A Framework in Need of Evolution

The underlying ambition of the thesis is to explain the evolution of same-sex couples' rights in the Anglo-Saxon countries. The focus is on understanding how same-sex couples came to be recognised legally; either through the inclusion in civil marriage or the ability to adopt jointly. In pursuing this analysis, the theoretical framework relies on three interconnected strands of literature: political science, social policy, and public policy. The distinction between these three strands is necessarily artificial as all three literatures interconnect. The distinction nevertheless is helpful in teasing out the theoretical argument. Thus, the literature on the politics of policymaking are vital in defining how policymaking is understood. In turn, the question of social policy – and morality policy in particular – warrants further theoretical elaboration. Given that the morality framework is found wanting in regard to the countries analysed in this thesis, the literature on public policy, which is itself a subset of political science, is called upon to further specify theoretical expectations. In this section, therefore, the broad theoretical background is canvassed and the theoretical puzzle underlying the thesis specified.

To begin with, policymaking as a process is broadly conceptualised in line with the garbage can model of decision making (Cohen, March, & Olsen, 1972) and punctuated equilibrium theory (PET) (Baumgartner & Jones, 2009). As such, the political decision-making process is seen as only partially rational. It is, in part, the skilful manipulation of public attention that challenges the status quo that unsettles dominant policy ideas. Both the public and politicians are boundedly rational (H. A. Simon, 1976) and their attention needs

to be grabbed. Thus, ministers and other decision makers are serial processors, while government at large has delegated decision-making to smaller policy communities; allowing it to be parallel processing problems. While this model was developed in the American context characterised by the separation of powers, its insights regarding bounded rationality and information processing have been found to applicable be more broadly (True, Jones, & Baumgartner, 2007).

Another important building block of PET is Schattschneider's (1960) work on public attention and political conflict. Unlike the early notion of a linear policy process (Lasswell, 1956), the policy process was re-imagined by Schattschneider. At the core was a contest of conflict socialisation and privatisation. Both processes relate to a battle over political attention, but they operate antagonistically. In the former, actions are taken to increase the level of scrutiny, especially by the public. In the latter, attention is minimised so as to allow a more limited set of agents to come to a solution. The dynamics also appeal to different motivations. Those pursuing change will likely attempt conflict socialisation, whilst their opponents will do their best to privatise conflict. Crudely summarised, the conflict is over the extent to which public opinion scrutinises political choices.

How these forces for change and stability manifest, however, is oftentimes structured by the institutional setting in which the policy conflict occurs. While most theory building was done within the American system of separation of powers, there are important insights available for those working on cases regarding majoritarian parliamentary systems in Europe and the Commonwealth, which are often referred to as Westminster systems. While it is artificial to distinguish between agenda setting and policy legitimation it is nonetheless a useful heuristic to structure both thinking and argument. The emphasis in the below, therefore, is on the important institutional features that structure the placing of a policy idea

on the parliamentary agenda (agenda setting), and its course through the decision-making procedure to be implemented or rejected (policy legitimation).

Regarding the control of parliamentary agendas, Westminster systems are strongly under the control of the government of the day (Tsebelis, 2002). While institutional peculiarities temper this control (Strøm, Müller, & Bergman, 2003), the general advantage of having control of a majority of Members of Parliament (MPs) and drafting power keep unwanted policy ideas off the parliamentary (if not political) agenda (Rasch, 2014); though this should not be seen in absolute as the judiciary, public referenda, and private members bills (PMBs) all undermine governmental control of the parliamentary agenda (Marsh & Read, 1988). Finally, Westminster systems tend to hinge on the government's ability to command the confidence of the house (Kelso, 2009). While it is hard to anticipate which non-fiscal bills will be deemed a test of this confidence, losing a controversial yet important vote can cost a government the reins of power. Therefore, policy will often be prospectively assessed on its likelihood of surviving the policy legitimation process. Both institutional and partisan veto points (Tsebelis, 2002) need to be considered. The latter refer to the institutional rules of decision-making. As such, this type of veto player always exists, though whether or not it matters is circumstantially determined (Tsebelis, 2002, p. 79). An upper house that can challenge lower house legislation, or the Crown and its ability to veto legislation, are both examples of such institutional veto players. Partisan veto players, in turn, are the players who actually populate these veto locations as a result of political bargaining. They are determined by the decision rules and voting procedures. In illustration, a minority government may face a veto player in the lower house, where a majority government would not. Further, a second chamber under opposition control needs to be considered, while one under government control is likely more supportive of government legislation.

Finally, policy conflict is shaped by the nature of the policy under debate. The default model in political science has long been that of economic redistribution. It found articulation in a classic left-right conceptualisation of politics; where the left advocates for the working class, while the right does so for business. In the 1970s, the argument was proposed that political conflict was moving away from materialism (Inglehart, 1971).Inglehart submitted that those generations socialised under the affluence of the post war years were increasingly disinterested in economic redistribution. Through a protracted academic debate (summarised in Inglehart & Flanagan, 1987) a more complex model evolved: rather than abandon the public's concern for redistributive policymaking, it was tied to economically challenging times. Thus, good times invite post-material policymaking. Moreover, the debate over post-material policy occurs on a secondary axis that is distinct from the canonical left-right one. It distinguishes between those with libertarian and authoritarian views on these value-based policies.

While the above may seem like a disparate set of literatures that might be hard to combine, scholarship has already made significant progress towards unifying some of its insights. Namely, the framework of morality policy combines insights about post-materialist policymaking with those of party-political and institutional realities. The framework, which was developed out of the policy analysis literature, is therefore well suited for the purposes of this thesis. It has indeed already been successfully applied to studies of same-sex marriage and gay rights more broadly (Cravens, 2015; Knill, Preidel, & Nebel, 2014; Schmitt, Euchner, & Preidel, 2013). Nevertheless, the below summary will also highlight its underdeveloped understanding of policymaking in countries with Westminster parliamentary systems like the Anglo-Saxon countries studied here.

The short definition of morality policies is that any policy relating to life, death, reproduction, and marriage should be considered one (Engeli et al., 2013, p. 23). All four

categories are largely post-material in that they focus on moral more so than economic redistribution. Thus, the manner in which morality policy is debated is oftentimes along the liberal-authoritarian cleavage, rather than the left-right one. Despite this apparent conceptual clarity, the idea of morality policy has found four distinct operationalisations (Knill, 2013). First, morality policy has been defined on the basis of its content. As shown above, this suggests that by looking at the content of any proposed policy, we can judge whether it is a morality policy or not (e.g. Engeli et al., 2013; Heichel et al., 2013). Others, however, disagree and see morality policy as a type of policy that needs to be constructed by agents as different from other policies (e.g. economic policy). To be able to construct policy as relating to morality, however, is in some sense proscribed by the policy matter: if the policy problem is clearly and solely materially redistributive this option is unavailable. Nevertheless, a large set of policies can be seen as possibly but not necessarily problems relating to morality. The import of being a morality policy, in turn, has been emphasised in yet another set of theoretical accounts. They submit that it is the politics underpinning a policy's treatment that mark it out as belonging to the category of morality policy. Most apt for this study is the final understanding because it synthesises the insights of the three aforementioned ones (Knill, 2013, p. 315). Thus, morality policies are seen in this thesis as policies that entail a special form of politics, are partially defined by their substance but require clear construction as morality policies.

As indicated, this unique set of policies entail a different set of politics. As morality policy focuses on moral redistribution, it is situated on the liberal-authoritarian axis of policymaking (Inglehart & Flanagan, 1987). In the case of same-sex marriage, for example, it picks up the tension between authoritarian's support for traditional religious values and libertarians' rejection thereof. As Studlar, Cagossi, and Duval (2013, p. 354) highlight, morality policies involve "mass judgements of desirable policies not primarily based on

socio-economic advantage, but based on beliefs about right and wrong, which can trace their origins back to religious concepts." The resonance of this religious component, in turn, separates two worlds of morality policymaking (Engeli et al., 2013). In the 'religious' world, such debates invariably rekindle old debates about the relation between state and church in society. As such, policies will attract broad and public debate. This issue expansion through conflict socialisation (Schattschneider, 1960), in turn, does not occur in the 'secular' world. As no latent conflict between state and church exists, these countries struggle to have large and public debates on moral redistribution and prefer to focus on material redistribution. Of course, secular countries can and do debate morality policies, but their engagement tends to be more sporadic, less controversial, and on balance less acrimonious in the community.[2]

While the model offers promising theories and explanations for the thesis, a closer examination of its extant specification reveals important lacunae. The theory has been developed in a European context, but it has been explored and developed much more fully for religious countries. A mechanism has been theorised to explain why some parties in the religious world would want to put morality policy on the agenda (Kalyvas & van Kersbergen, 2010). The appeal lies in the recent secularisation of Western Europe and the concomitant re-imagination of Christian-Democratic parties. They have developed a public image that backgrounds their religious roots. In forcing these parties to engage with morality policy, however, secular parties can force them to re-articulate their dogmatic policy stances. This, it is submitted, will cost them electorally. A similar theory or mechanism regarding

[2] Countries are classified as belonging to the religious world based on the presence or absence of a religiously tied political party. It is therefore important to emphasise that this classification does not speak to the general population's religiosity. Moreover, belonging to the religious world does not speak the formal relationship between the state and the church either. The only thing this classification is meant to signal is that there is at least one party in the nation's political system that has a religious connection.

agenda setting in the secular world is absent, although recent work by Hurka et al. (2018) has refined the theory with regard to secular countries. In particular, they propose that some countries need to be categorised as 'traditionalist'. In this new world, party politics still dominate despite the lack of an overtly religious political party because of a political cleavage between traditionalist and progressive parties. Despite this evolution, a further problem arises when discussing policy legitimation both in the secular and religious world. The theory remains very tacit with regard to how policy moves along the legitimation process. By policy legitimation, the thesis understands the process through which a policy program or change is defined and approved. As the above discussion of political science has shown, there is ample extant literature to fill in these gaps. What is less clear, however, is to what extent the known politics apply to this different type of policy.

The thesis therefore seeks to evolve the framework of morality policy. In particular, it pursues a further specification of the framework's theorisation of agenda-setting and policy legitimation in the case of so called 'secular' countries. To do so, the analysis relies on comparative case studies that examine the policy case of same-sex couples' rights in the Anglo-Saxon countries.

Methodology and Case Selection

Before discussing the case selection, and justifying why the thesis engages with the case of same-sex couples' rights in the Anglo-Saxon countries, this section engages with the methodological choices underpinning the project. In short, the thesis engages with qualitative case study approaches in all chapters. The precise methods of analysis engaged with in each chapter are guided by the specific research question pursued. However, the overall project is methodologically unified by a targeted use of comparative case study methodologies, which will be discussed below.

Methodology

Fundamentally, a research method has to be chosen from three approaches: experimental, statistical, or a version of case study (Della Porta, 2008b; Lijphart, 1971). An experimental approach is impossible in this instance. This leaves the choice between the statistical method and the case study methodology. Given the research focus on political processes, the case study approach is most appropriate for this thesis.

First, the main focus of the research is on the mechanisms and processes regarding same-sex couples' rights. This ambition squares well with the case study's underlying ontology, which sits "midway between ideographic and nomothetic extremes" (Gerring, 2004, p. 352). As such, the method is not merely interested in describing developments as they happened. Rather, this description is used as a basis for inferring causal arguments. These inferred arguments, in turn, are framed in explicit scope conditions, which negates any nomothetic ambitions. Therefore, both this thesis and case study research should be best understood as "historically interpretative and causally analytic" (Ragin, 2014, p. 35).

Moreover, case studies offer heightened conceptual awareness (Della Porta, 2008b; Lijphart, 1975). Given the high familiarity required for doing case study research, researchers are better insulated against case, data, and conceptual stretching. This also helps sidestep the fallacy of comparing two non-comparable units because of their superficial similarity (c.f. Sartori (1991) 'cat-dogs'). The familiarity required for case studies also allow for better inferences as they are more apt at dealing with complex and contextual causality than statistical approaches. Unlike variable oriented research and its concern for average effects, case-oriented work emphasises the construction of casual chains that link cause and effect. Through the construction of causal chains, issues such as equifinality (i.e. the possibility that substantively different mechanism lead to the same outcome(Della Porta,

2008b) and "conjunctural causation" (Ragin, 2014) where variables' causal impacts are context dependent, can be dealt with and detected more readily.[3]

The specific analytical strategy with which the case study is pursued, however, has to be driven by the research question. In short, the Chapter 2 employs a Comparative Historical Analysis (CHA) that compares the evolution of opposite-sex marriage and same-sex union recognition. This cross-case comparative method is most to the chapters' ambition to find a "historically grounded explanation of large scale and substantively important outcomes" (Rueschenmeyer & Mahoney, 2003, p. 4). Its evidentiary basis relates to both changes in societal practices involving marriage, divorce, and childbearing, as well as tracing in corresponding legal changes. Chapter 3, in turn, applies a plausibility case study (Eckstein, 1992). Given its proposition of a new mode of policy mobility, the chapter uses the empirical evidence available across all cases to test whether a judiciary-based mode of international mobility is plausible and therefore would warrant further time and effort of investigation. In its analysis, it relies on new interview evidence and judicial records. Finally, Chapters 4 and 5 engage in a comparative case study approach (Lijphart, 1971). Through the use of targeted within case comparison, the two chapters can move beyond simple historiography and help develop more generalisable insights into the dynamics of morality policymaking in similar countries. While the specific comparisons are justified within the chapters, the use of comparative methods is also well established in the wider literature on lesbian and gay rights. Both chapters rely on a broad set of documentary evidence, which includes contemporary media coverage, parliamentary records, governmental records, as well as limited interview data.[4]

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[3] An overview of each case is provided in Appendix 1 (on page 178).

[4] Especially in the case of Chapter 4 on Australia, the collection of interview evidence was hampered by the timing of the fieldwork. The fieldwork was conducted shortly before and during the postal survey regarding same-sex marriage. As such, repeated and persistent efforts to reach out to

In order to overcome the limited generalisability of case-study work, a substantial strand of literature uses targeted comparison to develop more theoretically nuanced and abstracted arguments (Lijphart, 1971, 1975). In the case of studies on same-sex couples' rights, comparative studies frequently group countries on the basis of geographic proximity. Studies have compared and contrasted experiences in Scandinavia (Rydström, 2011), continental Europe (Knill et al., 2014; Paternotte & Kollman, 2013), North America (Pierceson, 2014) and globally (Paternotte, 2015). What has been underexplored so far is the highly comparable set of countries that comprise the Anglo-Saxon world (Castles, 1993). This set of countries not only offers a highly comparable set of case countries but also is well suited for the thesis' theoretical ambition of better understanding morality policymaking in 'secular' countries.

Case Selection

To develop the morality policy framework, the thesis requires a universe of cases that can speak to the theoretical lacuna. The Anglo-Saxon countries offer an ideal environment to do so. They are highly comparable because they share a common legal heritage and system but differ in their processes of legalising same-sex marriage and joint adoption by same-sex couples. Moreover, their adherence to the Westminster system makes their political processes broadly comparable and theoretically predictable. There is a well-established scholarship on the politics of policymaking in such parliamentary democracies that can be called upon to further develop the morality policy framework. As the morality policy framework highlights the unique nature of such policymaking in 'religious' countries, the thesis uses the case of same-sex couples' rights to test whether such differences can also be

policymakers met with limited success. Most politicians declined to be interviewed or ignored repeated requests for interview. Some insightful evidence could nevertheless be gained from the interviews that did occur.

found in ‘secular’ countries (as understood in the model proposed by Engeli et al., 2012). This section therefore outlines both the comparability of the Anglo-Saxon countries and underlines their adherence to the ‘secular’ world as proposed by Engeli et al. (2012).

While a more in-depth account of each case country is offered in Appendix A, the comparability regarding the case countries is summarised in Table 1 (on page 15). The table summarises not only the political institutions but also compares the major milestones regarding the recognition of homosexual individuals and same-sex couples.

In regard to institutional parameters, the countries are unified in their use of a Westminster system. There are, however, certain distinctions. The first relates to the mode of government: while Canada and Australia are federal states, Ireland and New Zealand are unitary ones. The United Kingdom, in turn, occupies a halfway point. While it is institutionally a unitary state, there has been significant devolution of competencies to regional administrations. The governments in Stormont and Edinburgh, however, are less established and powerful than provincial and state governments in Canada and Australia respectively. The second marks out New Zealand as the only unicameral system. All other countries have bicameral systems at the federal level. Most subnational governments are also bicameral, though some exceptions exist. Third, the electoral systems are varied. Only in Australia is the federal upper house directly elected through a form of proportional representation. The country’s lower house, in turn, is elected through a majoritarian system. In Canada and the United Kingdom, the upper houses are unelected. The lower chamber in each is elected through a first past the post system. Ireland and New Zealand, in turn, use forms of proportional representation for each of their chambers.

Table 1 Comparative Table of Case Countries

	AUS	*CAN*	*IRE*	*NZL*	*UK*
Political System					
Mode of Government	Federalism	Federalism	Unitary State	Unitary State	Unitary State with devolution[5]
Legislature	Bicameral	Bicameral	Bicameral	Unicameral	Bicameral
	Both elected	Unelected Upper House	Both elected		Unelected Upper House
Electoral System	House of Representatives: Instant Runoff Voting	House of Commons: First Past the Post	Single Transferrable Vote	Mixed-Member Proportional Representation	First Past the Post
	Senate: Single Transferable Vote				
Legislative Authority					
Marriage	Commonwealth	Federal Government			Devolved Administration
Non-marital Union	States	Provinces			Westminster (Pre-devolution)
Adoption	States	Provinces and Territories			Devolved Administration
Artificial Reproduction Technology	States	Federal Government			Westminster
Legal Recognition					
Decriminalisation of Homosexuality	All states between 1975 and 1997	Federally since 1969	1988	1986	England and Wales (1967), Scotland (1980), Northern Ireland (1982)
Non-marital Union Recognition	Federally since 1975 Formal schemes in TAZ (2004), SA (2006), VIC (2008), NSW (2010), ACT (2012), and QLD (2016)	Formal schemes in NS (2001), QC (2002), and MN (2004)	Civil Partnerships in 2010	Civil Unions in 2004	Civil Partnerships in 2005
Marital Union Recognition	Federally since 2017	Federally since 2005	2015	2013	England and Wales (2013), Scotland (2014), Northern Ireland (2019)
Second Parent Adoption for Same-sex Couples	All states and territories between 2002 and 2018	Legalised in all provinces between 1995 and 2004	2015	2015	2002
Joint Adoption for Same-sex Couples	All states and territories between 2002 and 2018	Legalised in all provinces between 1995 and 2004	2015	2015	2002

[5] In the wake of devolution, most of the subject matter at hand has been a devolved competence. Due to the transfer of significant powers to Edinburgh and Belfast in 2002 and 2007, respectively, the constituent nations have developed differently, especially in regard to adoption and marriage policy.

A related distinction concerns the legislative authority for marital and non-martial union recognition, as well as adoption policy. In unitary New Zealand and Ireland all policy issues are a competency of the central government. In the federal countries and the United Kingdom, things are less straight forward. Marriage is a federal competency in Australia and Canada. In the UK, marriage used to be a Westminster competency until devolution in 2002 and 2007 respectively. Thus, Northern Ireland and Scotland have some autonomy in this regard. Equally, they gained power of non-marital union recognition. This, however, occurred after civil partnership had already been nationally legalised. In Australia and Canada, in turn, non-marital union recognition is a shared competency. While Canada's federal government recognises same-sex 'common law' marriages since 1999, Australia's Commonwealth government recognises same-sex 'de facto' unions since 1975. In both countries, provincial and territorial governments had the prerogative to legislate formalised non-martial union schemes. In the case of Canada, the provinces of Nova Scotia, Quebec, and Manitoba did so. In Australia, almost all states had formalised non-marital union recognition schemes by the mid-2010s. Finally, adoption policy was changed unitarily in New Zealand, Ireland and the United Kingdom. In Canada and Australia, the regulation of adoption was a sub-national prerogative and thus occurred in a piecemeal fashion as indicated in Table 1 (on page 15).

The final point of communality relates to the countries' classification as secular. As has been highlighted above, the Two World model of morality policymaking distinguishes between countries that are classed as 'secular' or 'religious'. The terminology is unique to the model, in that it is not concerned with the broader religiosity of the country. That is, the concern is less with how religious the electorate are and more with the extent to which a state-church conflict (Manow, 2009) finds expression in the party system. In religious countries, such a conflict is represented either through a conservative party with traditional links to the church or through a Christian-democratic party (Engeli et al., 2012). In secular

countries, in turn, the theory assumes no politically relevant state-church conflict, which in turn means that morality policies are less contentious. In short, debates of morality policies which often relate to dogmatic considerations do not incite the fundamental debate surrounding the church's place in modern and secular society in the same way that they do in religious countries.

The electoral system, in turn, helps to explain the party-political realities in each Anglo-Saxon country. In Australia, Canada, and the UK the lower houses are elected through a form of majoritarian representation. This creates two dominant umbrella parties with some minor third parties. These large umbrella parties further create a system dominated by one economically centre-left and centre-right party. As illustrated by the Scottish Nationalist Party in the UK and the New Democrats of Canada, there are occasional third parties. These are often strongly geographically contained (e.g. the Bloc Quebecois or the SNP) or focus on single-issue voters (e.g. the Greens). In the instances where a form of proportional representation exists, the party landscape is more fractured. Despite the more diverse party systems in the Australian Senate, the Irish Dáil, and the New Zealand parliament, none of these countries have Christian-Democratic parties in their party-political landscape. Further, none of their conservative parties are overtly associated with the Church. Thus, all these countries meet the definition of a 'secular' country as understood by Engeli et al. (2012). Thus, all of the Anglo-Saxon countries comply with the understand of 'secular' countries as proposed by the morality policy framework.

The Case of Same-Sex Couples' Rights in the Anglo-Saxon Countries

Given the theoretical ambition to expand and further develop the morality policy framework by exploring its applicability in the 'secular' countries, the thesis must be both thematically and geographically contained. This section will argue that a thematic focus on same-sex couples' rights and a geographical focus on the Anglo-Saxon countries offers such limitations.

In regards to a thematic focus, same-sex couples' rights offer a timely and relevant policy issue with which to engage. Same-sex families as a concept challenge deeply held notions about the family in both policy and public discourse. In particular, the inclusion of same-sex couples in civil marriage and their ability to adopt unrelated children jointly offers a challenge to the extant morality of the family as captured in public policy. It was assumed that a family was necessarily based on a heterosexual dyad. In the last three decades, however, same-sex dyads have found increasing recognition as couples. This recognition, which continued a previous process of decriminalisation and individual recognition of lesbian and gay citizens, stopped short of marital recognition for a long time. While the first non-marital unions were created in 1989, same-sex couples were included in civil marriage only in 2001. Furthermore, the ability to adopt non-related children was proscribed for a long time; even in cases where same-sex marriage had been legalised (e.g. Belgium). Thus, the following section will outline how the evolution of same-sex couples' rights as couples offers a fitting policy area in which to further develop the theory of morality policy.

Recognising the Dyad: The Issue of Same-Sex Marriage

An initial hurdle to studying same-sex marriage within the discipline of social policy is that marriage has rarely figured prominently in studies of welfare states. Since the foundational work of Esping-Andersen (1990), the family has been backgrounded and with it the institution of marriage. In *The Three Worlds of Welfare Capitalism*, for example, Esping-Andersen assumes both a (heterosexual) nuclear family and a gendered division of labour that Lewis (1992) came to label the 'male breadwinner model'. This is to say that the original analyses of welfare states assumed that a family was a unit comprising a husband, a wife, and their biological children. Furthermore, scholars regularly assumed that the caring work was done for free by the woman, while the man left the domestic realm to earn a living in the market economy.

The implication of this initial 'oversight' has been replicated throughout the literature: union status is rarely foregrounded in social policy research, despite the fact that states valorise and reward different relationship models through their social policies (Sánchez Gassen & Perelli-Harris, 2015a). Marriage, at the apex of that hierarchy, has been rewarded and supported by governments since at least the Victorian era. The institution has also become imbued with a notion of morality and public good (e.g. childrearing and social reproduction) (van Acker, 2016). This moral valorisation, in turn, is used to justify the pecuniary reward and the special treatment many bureaucratic processes have afforded to married couples. While most states have moved to also recognise non-marital unions in response to changing social practices (Kiernan, 2001; Sánchez Gassen & Perelli-Harris, 2015b), there remains a clear hierarchy, with married heterosexual couples with children at its apex (Rubin, 1999).

This hierarchy, however, is far from stable. Even though marriage is often presented as pre-political and 'natural', its construction and the award of special rights to this form of union are political processes. The debates surrounding same-sex couples' access to civil marriage bring the processes to the fore. When debating same-sex marriage, actors usually engage in a discourse that is rooted either in equality or in notions of the desirable and traditional morality (van Acker, 2016). While the former relates to a rights-based understanding of (secular) marriage, the latter emphasises the symbolic and moral (religious) component (Yenor, 2011a). While the focus in the thesis is on the political iteration of this moral debate, it is clear that the lesbian and gay rights movement itself contains various points of view that have historically waxed and waned (Richardson, 2005): on one hand, some foreground the social justice and equality implications of homosexuals being excluded from marriage (Chauncey, 2004; Nussbaum, 2010), while on the other hand, some challenge the desirability of marriage equality on its assimilationist logic (Ammaturo, 2014; Duggan, 2002; Walters, 2001).

The political struggle over same-sex marriage has itself spawned a vibrant field of academic research. While early work focussed on individual case studies, researchers have increasingly sought to detect larger patterns. In this process, several analytic approaches have crystallised: some focus on public opinion (Baunach, 2012; Clements, 2015a; van den Akker et al., 2013), others foreground the creation of a supranational norm (Ayoub, 2014, 2015; Fernández & Lutter, 2013; Kollman, 2013). Given the thesis' goal of contributing to the theoretical framework of morality policy, its analytical focus necessarily falls on the domestic political process. This fits well with a third strand of literature on lesbian and gay rights, which focussed on the domestic political processes that lead to policy change (Knill et al., 2014; Kollman & Waites, 2011; Pierceson, 2014; Rydström, 2011). In fact, same-sex couples' rights have been analysed through the morality policy framework (Cravens, 2015; Schmitt et al., 2013) as it relates to moral rather than economic redistribution (Engeli et al., 2012, 2013; Heichel et al., 2013; Knill, 2013; Knill et al., 2014; Studlar et al., 2013). However, the analyses that use the morality policy framework to discuss same-sex marriage as a political issue have not yet systematically done so within the context of 'secular' countries; that is to say countries which have no political representation of a state-church conflict.

Beyond the Dyad: Same-Sex Couples' Parenting

The moral component in same-sex couples' recognition, however, is far from limited to the question of whether marriage can accommodate the idea of same-sex spouses. In particular, marriages' close connection with childrearing and social reproduction (van Acker, 2016) has often proven politically controversial when associated with same-sex couples. While financial and administrative privileges associated with marriage were readily extended to same-sex couples when granted access to civil marriage, the question of same-sex couples achieving legal parenthood contained in itself a moral maze that inspired spirited political debate.

The first notable point is that the routes to parenthood differ for same-sex male and female couples by virtue of their biological realities. For gay men, the routes to parenthood are primarily through surrogacy or adoption, with co-parenting agreements being a third option. Lesbian couples, in turn, often conceive children through donor insemination or in-vitro fertilisation (Tasker & Patterson, 2008). Each of these pathways also generate their own regulatory responses. Adoption has long been practised across the West and is therefore the least politically controversial (Department of Economic and Social Affairs, 2010) even though the idea of same-sex couples being able to adopt jointly has proven more controversial (Goldberg, Kinkler, Richardson, & Downing, 2011; Perry & Whitehead, 2015; Stychin, 2008; Sullivan & Harrington, 2009). The debate surrounding artificial reproduction technologies, however, expands beyond the concerns regarding the morality of same-sex parentings and the impact on children raised by same-sex adoption. Surrogacy in particular has led to moral and ethical debates that are distinct. Access to in-vitro fertilisation, donor insemination, and surrogacy, therefore, is conditioned by factors that are indirectly linked to the issue of same-sex couples' recognition.

Thus, the ability for same-sex couples to achieve legal parenthood is significantly moderated by the legal framework surrounding union recognition. This moderation occurs in one of two ways: either marriage is a barrier to access, or the lack of same-sex union recognition means an incomplete recognition of parentage (Bernstein, Naples, & Harvey, 2016; Chauveron, Alvarez, & van Eeden-Moorefield, 2017). Adoption illustrates both points. In particular, joint adoption by same-sex couples illustrates the close association between marital status and joint adoption rights well, Since the 1967 European Convention on the Adoption of Children[6] adoption across Europe has been limited to individual applicants or married couples, which barred same-sex couples from adopting jointly given

[6] The Convention was amended in 2008 to allow the extension of joint adoption rights to those in registered partnerships. (Commissioner for Human Rights of the Council of Europe, 2011, p. 118)

their lack of marriage rights. Even with the advent of same-sex union recognition in 1989, these non-marital unions did not entail access to joint adoption.

The right to adopt jointly was first granted with the admission of same-sex couples to marriage itself in the Netherlands in 2001. However, the link between same-sex marriage and joint adoption rights was not always automatic: both Belgium and Portugal initially barred same-sex married couples from jointly adopting. However, an increasing number of countries have adjusted their adoption laws to allow same-sex couples in formalised non-marital unions to adopt jointly (e.g. Denmark, Austria, and Iceland), which has reduced the importance of marriage as a barrier to access.

In regard to a lack of union recognition leading to incomplete parentage, the lack of 'second-parent adoption' foregrounds the consequences of lacking full parental recognition. In this type of adoption, one member of the same-sex dyad has full legal parentage, while the other does not.[7] In the absence of second-parent adoption, the second adult has no way of being recognised as the child's parent. This situation can have severe consequences for both the child and the unrecognised parent in the case of divorce, separation, the legal parent's death, or any situation in which only a legal parent may carry out parental responsibility (Commissioner for Human Rights of the Council of Europe, 2011, p. 120). In both cases, therefore, the type of recognition available and the rights accorded to these types of union recognition are essential to understanding how states recognise same-sex families beyond the adult dyad.

While the political debate is often fought on first principles, , researchers have put much effort into understanding same-sex parenting practices and outcomes for children parented by same-sex couples in part in response to the concerns of those opposing joint adoption and childrearing by same-sex couples (Allen, 2015; Patterson, 2014; Tasker &

[7] This occurs in cases where one parent is biologically related to the child while the other is not. This may occur in the case of informal donor insemination in a lesbian dyad, or in the case of children conceived in previous heterosexual unions for gay dyads.

Patterson, 2008). The broad consensus in this strand of the literature is that children parented by same-sex couples do just as well as those parented by opposite-sex parents, and there is no evidence that non-traditional families are less successful at parenting. Despite this evidence, there remain biases against same-sex couples amongst some elements of the public and, at times, in social work (Sullivan & Harrington, 2009). Overall, however, there seems to be a similar normalisation of the public's perception of same-sex parenting and same-sex couples adopting as has been the case with regard to homosexuality more broadly (ISSP Research Group, 1990, 1997, 2016). Whether and how this change in public attitudes and empirical evidence manages to shift political conflict over same-sex couples' rights, however, remains underexplored.

Thesis Outline

To conclude this introduction, the following offers a brief overview of the individual chapters that constitute the empirical analysis of the thesis. The first two papers present studies that include all five case countries: Australia, Canada, Ireland, the United Kingdom, and New Zealand. The first paper presents a comparative historical analysis of heterosexual marriage in the Anglo-Saxon countries. It argues that marriage as an institution had to evolve from a 'dogmatic' to a 'contractual' ideal to enable the consideration of same-sex marriage. Through the twin processes of secularisation and contractualisation, opposite-sex marriage moved away from its sacramental origin and increasingly morphed towards a secular institution. This, in turn, is shown to be vital to understanding the claims of lesbian and gay rights activists in recent years. The second paper submits a new mode of policy transfer that has so far been underappreciated in the literature. In particular, the analysis shows that the evolution of marriage law in Canada reverberated through the Anglo-Saxon countries via the judiciary. The analysis marshals court documents, media articles, and primary interviews to show that individuals pursuing legal challenges were instrumental in spreading the policy idea of same-sex marriage from Canada to the other Anglo-Saxon countries. This supports

the claim that the courts and individuals can – under certain circumstances – combine to create a unique avenue for policy mobility. Furthermore, the paper adds additional nuance to the morality policy argument, which at times struggles to conceptualise the genesis of policy ideas beyond an instrumentalist political logic.

The second set of studies, in contrast, comprises individual case studies. First, the thesis analyses the politics surrounding same-sex marriage in Australia. The country offers a rich and important case study for testing morality policymaking in secular countries. It is the country that struggled for the longest among the case countries with same-sex marriage, only legalising it in 2017. This protracted engagement with same-sex marriage, moreover, stands in sharp contrast to the easy passage of another piece of policy: the reform of de facto recognition of same-sex couples. This policy – unlike same-sex marriage – passed easily and without controversy, even though it substantively upgraded the rights and recognition enjoyed by same-sex couples. To investigate why this set of reforms passed easily while marriage was so hard to reform, I compare the political discourses of the 2008 reforms to those of the 2012 attempts at legalising same-sex marriage. The comparative case study develops a theoretical model based on the extant knowledge of both morality policy and the wider political science literature. It then engages with the written record of parliamentary debates, policy documents, and interviews with legislators to test the model's applicability to the two policy episodes. The final paper complements the above work by shifting the focus away from the Antipodes and towards Europe. The United Kingdom is an interesting case study because of its unusual sequencing of same-sex couple's rights: adoption rights were granted to same-sex couples before they could register their relationships, and artificial reproduction technology become accessible before same-sex marriage was legislated. This final paper, therefore, seeks to explain the unusual granting of joint adoption rights to same-sex couples prior to any formal relationship recognition scheme. It analyses contemporary parliamentary debates, news media, and government documents to establish the problem

definition and causal stories advanced by the executive. It illustrates the institutional advantage of Westminster governments in framing policy initiatives and refines our understanding of manifest and latent morality policy dynamics in a secular country.

Finally, the conclusion of the thesis brings the insights of all four studies together. It re-engages with the Anglo-Saxon countries more broadly and shows the relevance of each study for the wider framework of morality policy. In particular, the conclusion highlights the theoretical and empirical contributions made. In part, the present study completes the historical record by adding important empirical evidence with regard to the evolution of same-sex couples' rights. While much of this has been canvassed in this introduction, the individual chapters add empirics in order to conduct their analyses. Moreover, the analyses undertaken advance theoretical thinking with regard to same-sex couples' rights by theorising a new method of policy diffusion, suggesting new necessary but insufficient conditions for same-sex marriage advocacy, and advancing the theoretical framework underpinning the morality policy literature. While this adds to the extant literature in important ways, the conclusion also draws on the insights of the thesis to suggest a future plan of research with regard to same-sex couples' rights and the politics surrounding them.

2. Contextualising Same-Sex Marriage: The importance of opposite-sex marriage's secularisation and contractualisation

Advocates for the legalisation same-sex marriage often rely on a particular construction of marriage. They see it as a secular, egalitarian union of two consenting adults. Marriage, however, could not always be constructed in this way. Through a comparative historical analysis this paper traces the secularisation and contractualisation of marriage in the Anglo-Saxon world. Both processes are operationalised and tested against legal and social changes in all five case countries. The analysis finds that the evolution of marriage from its dogmatic ideal to a contractual one is necessary but insufficient for the legalisation of same-sex marriage. This contractual notion of marriage, however, enables rights claiming by lesbian and gay advocacy groups that are key in bringing about the legalisation of same-sex marriage.

Marriage has become one of the cornerstone institutions of western society. In fact, it reached its zenith in the 1950s and 1960s, when much of social life revolved around getting married and being married. However, marriage dates back much further, with its origins pre-

dating Christianity; which eventually took to regulating the institution across much of Europe. Thus, it may be surprising that marriage was not legally defined in the United Kingdom (UK) until the late 1860s. In fact, the pronouncement by Lord Penzance in 1866 that marriage 'as understood in Christendom, may (…) be defined as the voluntary union for life of one man and one woman, to the exclusion of all others' was not legally binding but has come to underpin subsequent legal thinking and jurisprudence with regard to marriage. Marriage as it was defined by Lord Penzance, however, is not necessarily the marriage of modern-day Britain. Nuptials can be dissolved, people may have several marriages over the course of their life, and the practice of marriage has increasingly moved away from the church. While the ban on polygamy has stayed in place, the heterosexual nature of marriage and its limitation to one man and one woman has increasingly been challenged. Especially since the 1980s, there have been increased calls for same-sex couples to be admitted to civil marriage that have led to the legalisation of same-sex marriage (SSM) in over 28 countries to date.

This embrace of same-sex couples has garnered particular public attention. Since the first relationship-recognition schemes in Denmark in 1989, Western states have increasingly started to recognise same-sex couples as couples. While the recognition was initially non-marital, a concerted push by lesbian and gay rights activists has led to increasing numbers of states who offer same-sex couples the option of marrying. Oftentimes the SSM legalisation stands at the end of a long path of lesbian and gay rights activism which sought to overcome a legal heritage that was hostile to sexual minorities (Ayoub, 2016; Waaldijk, 2007). Advocates were especially highly attuned to the lack of social rights and relationship recognition during and after the HIV/AIDS epidemic (Broqua, 2015a; Rayside & Lindquist, 1992). This combined with an increasingly internationally connected advocacy effort (Kollman, 2007; Paternotte, 2015) to zero in on the question of same-sex marriage as an

important movement goal.[8] The success of the movement is evidenced in the increased spread of both marital and non-marital union recognition from the 1980s onwards.

The recent scholarly interest in SSM has done much to further our understanding of lesbian and gay (LG) advocacy, its strategies, and its political impact. Most of these studies, however, focus on either the advocacy done by lesbian and gay rights groups or the diffusion of an increasingly accepted soft norm regarding union recognition for same-sex couples. Both are indispensable explanatory factors and often combine with important domestic political realities to explain the diffusion of SSM observed. What is less often questioned is why the idea of same-sex marriage has even become politically feasible or imaginable. In the United States, for example, a gay couple in Minnesota had sued for the right to marry as early as 1970 and was dismissed by the country's courts for making an essentially preposterous demand. More recently, legal challenges to bans on SSM were mounted in Australia, the UK, and Ireland, all of which failed even though all countries have since legalised same-sex marriage.[9] To make sense of the recent success of demands for marital union recognition for same-sex couples, this paper submits that one important but so far backgrounded explanatory factor is the metamorphosis of heterosexual marriage itself.

More specifically, marriage has drastically evolved from the version defined by Lord Penzance. On one hand, the legal framework regulating marriage has been altered and re-worked in the last quarter century to a situation where little of the original definition still applies. On the other, society's engagement with and expectations of marriage have shifted drastically. Against this backdrop, this paper argues that both the secularisation and the contractualisation of heterosexual marriage are necessary but insufficient conditions for the

[8] The embrace of SSM as a movement goal was not unchallenged and continues to be questioned. Both feminist and queer voices within the LGBTQ+ community reject marriage as an oppressive, patriarchal, and assimilationist institution.
[9] Same-sex marriage is not legalised in Northern Ireland.

success of the push for same-sex marriage. Thus, the paper complements the extant scholarship by foregrounding the shifts in marriage that are frequently backgrounded in scholarship on SSM that focuses on social movements, human rights, politics, or international norm diffusion.

In doing so, the analysis relies on the highly comparable universe of the Anglo-Saxon world – and the UK and its former colonies in particular. The UK, Ireland, Australia, Canada, and New Zealand are unified by their jurisprudence and cultural similarity at the time of Lord Penzance's prescription. Since the 1860s, however, each country has developed increasingly idiosyncratic norms and rules around the institution of marriage. Nevertheless, all five countries have legalised same-sex marriage by the time of this writing, which allows for a focused comparison of the evolution of marriage and its potential connection to same-sex marriage. To establish whether and to what extent each nation secularised and contractualised marriage, the empirical section traces the historic evolution of marriage's relation to religious doctrine, its indissolubility, its centrality for relationship organisation, and its connection to sexuality. These developments over the *longue durée* will be ultimately linked to recent demands for same-sex marriage.

In undertaking its analysis, the paper proceeds in the following steps. First, it offers a theoretical discussion of the institution of marriage to show the malleable nature of marriage as an ideal type and an object of state policy. This is followed by a summary of lesbian and gay rights and their history in the case countries. Next, the theoretical framework and methodological approach of the paper are outlined. Finally, the paper presents the findings on each element of secularisation and contractualisation before concluding by showing the relevance of the presented changes for LG advocacy for same-sex marriage.

Marriage – A Malleable Institution

The union of two individuals has played an important part in human life since prehistoric times. In its earliest forms, marriage was an important tool for extending kinship networks and pooling resources across families. Over time, however, the rules and meanings of marriage became more complex. Especially with the agrarian revolution, marriage transformed increasingly into a tool for the preservation and transmission of wealth and societal status (Coontz, 2006, pp. 45-46). It is only with the advent of individual rights in the Enlightenment and the increased introduction of romantic ideas that marriage became central for the couple itself. In fact, by Victorian times, marriage in Western Europe had evolved in a unique manner. Unlike in other contemporaneous cultures, marriage was considered indissoluble, bigamy was illegal, concubinage had no legal standing, and the married couple was expected to form an independent household after the completion of the nuptials (Coontz, 2006, p. 145).

This legal framework for marriage was deeply rooted in Christian doctrine, which understood marriage to be a permanent and monogamous union that channelled sexuality in acceptable ways. Put differently, marriage was a procreative union that expected female fidelity, recommended male fidelity, and did not recognise lovers or illegitimate offspring (Abbott, 2011, p. 37). The Roman Catholic Church itself became interested in the regulation of marriage only in the 16th century but subsequently became a driving force behind marriage's standardisation in Europe. In England, the church gained the power to enforce legal and formal rules for the validation of marriage in 1753 (Coontz, 2006, p. 106), a power which remained unchallenged until the Reformation and its more secular understanding of marriage (Abbott, 2011, p. 56). In particular, the rejection of marriage's secularity and the subsequent acceptance of divorce meant Protestantism presented a radical rethink of marriage (Phillips, 1991, p. 24). While many Protestant countries moved to codify this

thinking in divorce law, England uniquely held on to the notion of marital indissolubility despite the establishment of the Anglican Church (Phillips, 1991, p. 36).

The broader implication of the Reformation was a new three-way competition for the regulation of marriage among Catholics, Protestants, and the state (Abbott, 2011, p. 60). While the rift between Protestants and Catholics centred on the correct biblical interpretation of marriage, its secular definition was far from straightforward. Two influential strands within this debate are illustrated by Lock and Rousseau. In particular, their differences in regard to the voluntary or contractual nature of marriage, the relations within the adult dyad of a marriage, and marriage's importance for the larger society are key to understanding the subsequent regulation of civil marriage (Yenor, 2011b, pp. 19-55). What they share, however, is a deeply patriarchal and heterosexual notion of what a family is (and ought to be).

Thus, marriage or the union of two adults has proven to be remarkably consistent throughout history and an enduring and vital social institution (Lauer & Yodanis, 2010). While the label of 'marriage' has endured from the Middle Ages on, the societal norms and practices described by it have continued to evolve. Marriage became standardised through the homogenising influence of the church. It also became formalised, with various religious and secular bodies seeking primacy in its regulation. Through both the Reformation and the Enlightenment, ideas and rules regarding consanguinity, divorce, remarriage, and the rights and obligations of spouses continued to proliferate. At the same time, this regulation occurred in a rich social environment that continually reimagined the purpose of marriage. While it was initially just an economic unit, marriage has changed into an increasingly emotional and individual decision that has little in common with the strategic family decision of yesteryear (Coontz, 2006, p. 178). What this leaves us with is a rich sociolegal

history in regard to marriage, which in its most recent iteration has come to contemplate whether or not to include same-sex couples under its auspices.

Marriage and the Lesbian and Gay Community

The inclusion of same-sex couples in marriage has become an increasingly contested issue in Western politics, especially since the legalisation of SSM in the Netherlands. However, the idea that same-sex couples could or would want to marry is a relatively new development. Indeed, homosexuality itself was criminalised and vilified by both church and state from at least 1,000 AD (Jordan, 1997). England, for one, codified its illegality as an unnatural sexual practice through the *Buggery Act 1533*, which made homosexual intercourse a capital offence.[10] This criminalisation was challenged only during the Enlightenment, when an emphasis on individual rights and privacy came to dominate. Given the consensual and private nature of the act, most Enlightenment thinkers came to regard it as a victimless crime beyond the regulatory remit of the state. This idea was spread across Europe through the Napoleonic occupation of the continent, which maintained this permissive approach pioneered by earlier French revolutionaries.

After its decriminalisation came the medicalisation of homosexuality. Féray (1849 in Hekma, 2015) pioneered the idea that same-sex attraction was a pathology, which renewed attempts at its regulation. While this meant renewed scrutiny for lesbian and gay people, the medicalisation brought with it the powerful concept of homosexuality's innateness. In the late 1800s, the idea that people were born with same-sex attraction started to gain ground, which in turn was instrumental for the genesis of a broader gay identity. The power of this reconceptualization of homosexuality is especially found in the early gay

[10] The term 'buggery' was much more multifaceted than just referring to same-sex male intercourse. Rather, it covered any sexual act that was deemed 'unnatural'; so, while it primarily was enforced with regard to gay men, it also included masturbation or bestiality in medieval times.

advocacy groups, which focused on the unique experience of lesbian and gay individuals. Thus, this is also the era when gay rights activism has its origins. Sigusch (2000), for example, pinpoints Karl Heinrich Ulrich as one such pioneer, because Ulrich published a pamphlet that sought to prevent the criminalisation of homosexuality in the recently unified Germany.

Two World Wars and the Great Depression, however, wiped out much of these early LG movements, which only re-emerged in the 1950s. This second homophile movement had very similar goals to the pioneers of the late 1800s: they wanted to carve out a niche for homosexual men and women to live in by connecting lesbians and gays to one another and their culture (Meeker, 2006). The moralist mood of the era meant that activism was limited and centred on changing elite opinion towards tolerance rather than on broad sweeping societal change (Jackson, 2015, pp. 34-35). In fashioning a space for lesbian and gay people, the homophile movement was key in reconstituting and strengthening the gay identity in the 20th century. By the 1970s, however, same-sex rights advocacy grew much more assertive (Weeks, 2015, p. 47). The radicalised gay liberation movement campaigned for the abolition of 'homosexual' as a category (Altman, 2012) because it was inseparably linked to a history of insidious policing of lesbians and gays by the state (Adam, 1987). This early movement also rejected SSM categorically because it was seen as a further attempt to heterosexualise same-sex relationships. This opposition softened, however, in the wake of the HIV/AIDS epidemic. In fact, the entire movement transformed: it changed to a community mobilisation strategy and focused on censoring governmental inaction in regard to HIV/AIDS (Altman, 1994; Brown, 1997). It later shifted towards advocating same-sex relationship rights, because the epidemic made evident the tenuous and legally insecure position of same-sex partners.

This new form of activism greatly increased the visibility of same-sex relationships (Adam, Duyvendak, & Krouwel, 1999), while also leading to important policy change. Denmark pioneered this legal change by legalising formalised union recognition for same sex couples, an idea that quickly became a new goal of the LG movement (Kollman, 2007, 2013). As relationship recognition spread, it also evolved from non-marital to marital recognition. The Netherlands was the first country to change its laws to allow same-sex marital unions. Underpinning this legal change was a concerted activist effort to seek recognition by the state which also became increasingly transnationally organised. This created an international LG rights movement that connected previously disparate national movements and allowed the sharing of political strategies (Ayoub, 2014; Kollman, 2013; Paternotte & Kollman, 2013). The outcome of this coordinated advocacy is evidenced by 28 nations moving to include same-sex couples in civil marriage by the time of writing.

Integrating Marriage and LG Activism

Despite their shared interest in marriage and the regulation of private relationships, the literatures on marriage and on LG activism remain somewhat disconnected. The literature on same-sex relationship recognition has broadly focused on individual case countries or comparative work to understand how change has come about (Knill et al., 2014; Paternotte, 2011; Pierceson, 2014; Rydström, 2011; M. Smith, 2007). What is less explicitly done, however, is to embed the evolution of same-sex rights activism within the broader shifts in opposite-sex relationship regulation. In particular, the extant literature on same-sex marriage rarely discusses how marriage itself has evolved drastically.

While some of the historical record on LG campaigning around same-sex marriage can be explained by the evolution of the lesbian, gay, bisexual, and transgender (LGBT) movement itself, this is insufficient as an explanation. Attempts at realising same-sex marriage happened as early as the 1950s, but only succeeded from the 2000s onwards. While

other factors such as international norms, increased human rights discourses, and the genesis of internationally coordinated gay rights movements all play an important and documented part, the paper posits that the evolution in opposite-sex marriage constitutes a vital additional piece of the puzzle. As Abbott (2011, p. 273) highlights: 'the spirited, often bitter debates, inspired by the advent of same-sex marriage have centred on determining the nature of marriage'. This begs the question whether the nature of marriage had to shift in a particular way for it to be amenable to the inclusion of same-sex couples.

The underlying argument to be made is that heterosexual marriage itself had to overcome its 'dogmatic' heritage and become 'contractual' to be able to conceptually accommodate the idea of same-sex marriage (see Table 2 on page 60). The dogmatic iteration of marriage is that which dominated during the Victorian era: marriage was lifelong, monogamous, heterosexual, indissoluble, and the locus of socially acceptable reproductive sexuality. To reify this unique status, concubinage had no legal standing, bigamy was criminalised, and illegitimacy had societal and legal disadvantages. In the portrayal of LG rights activists, marriage is fundamentally different. In its contractual iteration, marriage is far less constraining. For one, the union has become dissoluble and is not concerned with the sexes making up the dyad. The primary purpose of marriage has evolved away from societal reproduction and increasingly offers a way of state recognition for the couple. This also means that reproductive sex is less constrained to marriage and occurs inside as well as outside of marriage. In fact, in its contractual form, marriage is but one of several ways in which couples can seek state recognition.

In making sense of the evolution in the nature of marriage, this paper suggests its secularisation and contractualisation are necessary but insufficient conditions for successful rights-based LG advocacy (see Figure 1 The Causal Pathway on page 55). In this model, secularisation refers to the creation of a distinct and state-administered institution of civil

marriage. This form of marriage is not explicitly bound to any religious doctrine and is an explicitly human construction, which makes it more malleable than any divinely ordained iteration. Once secularisation has occurred, marriage has to be increasingly contractualised to become accessible for same-sex couples. A major step in this evolution is the legalisation of divorce and remarriage for divorcees. At the same time, marriage's primacy as a tool for relationship recognition also decreases during contractualisation. Societal reproduction becomes detached from marriage, its rights and privileges become less unique to it, and the social importance of marriage declines as the stigma associated with alternative living arrangements decreases.

The combined effect of secularisation and contractualisation is the reimagination of the nature of marriage. It moves away from a divinely ordained institution and becomes increasingly mundane. This reimagination of marriage as a contract concomitantly creates the basis on which most successful SSM advocacy is based. The changes brought on by contractualisation offer a track record of changes to the institution of marriage, which allows the portrayal of SSM as just one more change. In fact, the reimagined concept of marriage combines with the increased acceptance of lesbian and gay individuals to make it increasingly difficult to justify the exclusion of same-sex couples from civil marriage. It is this evolution of marriage and the enabling effect of these changes on SSM advocacy that form the crux of this paper. The paper, therefore, does not offer a detailed analysis of LG advocacy or the evolution of human rights discourses, but rather it focuses on the evolution of heterosexual marriage in the Anglo-Saxon countries to underline that what marriage is has changed as much as LG advocacy has. These changes to marriage, further, are presented as necessary but insufficient conditions for a successful challenge to same-sex couples' exclusion from it. There is, therefore, no presumption of a functionalist causality because it is clear that the ability to achieve the legalisation of SSM also requires the presence of an

LG rights movement with an ability to influence the legislative process. The ambition is to underscore the astounding evolution of marriage as a socio-legal institution and the link to the recent success in LG rights campaigning.

Methods and Data

As the mechanisms of secularisation and contractualisation are theoretically derived, the paper employs a comparative historical analysis (CHA). This method is ideally suited to establish historically grounded explanations of socially important outcomes (Rueschenmeyer & Mahoney, 2003) because it combines an interest in macro-configurational explanations that are based in real cases with an important mechanistic and temporal sensitivity (Mahoney & Thelen, 2015). While the ultimate outcome of interest is that of same-sex marriage, the paper does not attempt to find the entire 'causal package' (Ragin, 1981) for this particular outcome. Rather, it focuses on testing whether the proposed changes to heterosexual marriage are observable and if they can at all be linked to the advocacy effort surrounding same-sex marriage.

In testing the processes outlined above and depicted in graphic form in Figure 1 (on page 55), the paper employs process-tracing as its mode of analysis. The use of process tracing is closely associated with CHA (Mahoney & Thelen, 2015) and is the method best suited to the paper's ambition of understanding the processes that link different causal factors to the final outcome. While methodological guidelines have been open to debate (Beach & Pedersen, 2013), the approach chosen here is guided by the theory-testing pursued. Thus, Table 2 (on page 61) specifies the causal process observations (CPOs) associated with contractualisation and secularisation (Collier, 2011; Mahoney, 2012). The use of CPOs also guides the evidence base which is found in academic and non-academic literatures and demographic statistics. There are two important caveats to mention. First, the process tracing relies on rather weak tests (i.e., straw-in-the-wind) because of the long duration under

analysis and the historical nature of most of the processes (Van Evera, 1997). Nevertheless, to strengthen the case advanced, the paper traces processes comparatively across Canada, Ireland, the UK, Australia, and New Zealand. This set of Anglo-Saxon countries (Castles, 1993) share a legal heritage and close cultural comparability. In fact, during imperial times they all followed British jurisprudence, and Lord Penzance's definition of marriage has featured in legal cases in Australia, Canada, and the UK. Second, the paper targets the analysis to test the validity of each step in the causal chain, rather than mount a sweeping historical review of each case. Thus, the analysis is more akin to that performed by a detective rather than a statistician (Blatter & Haverland, 2012, pp. 157-158).

Finally, the paper utilises two types of evidence: legal and societal. The first refers to changes to the institutional framework underpinning marriage. Examples thereof are the legalisation of divorce or the abolition of the status of illegitimacy. This evidence shows the legal evolution of marriage and is closely linked to the politics of marriage. At the same time, the paper employs broad demographic data to explore to what extent legal changes equated to societal changes. It would be myopic to assume that legal changes perfectly correlate. For example, cohabitation may find legal recognition only long after a substantive portion of the population engages in non-marital cohabitation. In turn, divorce legislation may make access to dissolving a marriage appear much more accessible than what is shown by divorce statistics. Thus, both types of evidence are combined to offer as robust an analysis of secularisation and contractualisation as possible. It is, however, important to stress that this paper cannot and does not attempt to untangle the causal relationship between societal and legal change. Rather, it explores and compares the sociolegal evolution in all five countries.

The analysis proceeds in two steps. First, the paper explores the secularisation of marriage. Temporally, secularisation has to occur prior to contractualisation, because a

break with religious doctrine offers the leeway needed to alter marriage's legal framework. By making marriage a matter of secular regulation, the institution becomes more malleable at the hands of politicians than any divinely ordained institution ever could be. Once the reduction in religious authority over marriage has been tested, the paper moves on to examine the evidence with regard to contractualisation. This second process is deemed to be constituted by three separate processes (see Figure 1on page 55). Each of these processes has been further specified into related hypotheses and case-specific CPOs (see Table 2 on page 61). The evidence gathered through the CHA is then discussed in relation to the broader theoretical claim and the connection to SSM advocacy.

Secularisation of Marriage

Unlike present-day marriage, early modes of 'marrying' were informal processes that showed a strong regional variation. This variation started to be reduced as states increasingly standardised custom, but the biggest driver in its standardisation was the church. Given the strong moral power exerted by the church, its grip on marriage was firm and consequential for its increased standardisation (Coontz 2006). In fact, secular authorities frequently deferred entirely to the church when it came to the rules regarding matrimony. In England, as an example, this transfer of power went so far that through the *Marriage Act 1753* the state recognised only marriages that were contracted in accordance with either Anglican, Jewish, or Quaker rites (Coontz, 2006). Thus, before marriage could be secularised, it was standardised and homogenised through the control of the church over its administration.

The power of the Anglican Church endured for a century after the passing of the *Marriage Act 1753*. By 1836, however, the British parliament passed legislation to offer an alternative to religious marriage ceremonies in the form of civil marriages (Coontz, 2006; L. Stone, 1990). Marriages of this new form were performed by secular registrars rather than religious officials and occurred in state offices and not churches. This presents the

institutional secularisation of marriage in the sense that a non-religious mode of contracting a marriage became available. In fact, since the *Marriage Act 1836*, England has operated a two-track system for marriage: one option is a sacred ceremony involving a minister and a place of worship; another occurs through a secular contract concluded in an office by a state official (L. Stone, 1990).

The effect of this secularisation was felt far beyond England, however. Given the centralised structure of the British Empire at this stage, the two-tier system was 'exported' across all cases under consideration here. Thus, marriage was indeed secularised in all countries under analysis. Nevertheless, civil marriage as a mode of contracting matrimony was slow to be embraced by people. In the case of the UK, fewer than 3% of marriages contracted in 1844 occurred in a civil ceremony (Ghosh, 2019). It is not until after World War II that practices shift: by 1960 roughly one in three marriages occurs at the registry office, and by 2018 the majority of nuptials do (Ghosh, 2019). Indeed, the share of marriages that start with a secular ceremony exceeds 50% in Australia (de Vaus, 2004) and New Zealand (Baker & Elizabeth, 2012), while just over six in ten weddings in Ireland take place in churches (Central Statistics Office, 2019a).[11]

The secularisation of marriage, therefore, occurred in two distinct steps. Its legal genesis occurred through the *Marriage Act 1836*, which gave people the option of marrying outside of church. This civil version of marriage, however, was not initially popular, with fewer than 10% of couples choosing it. Since the end of World War II, however, practice has shifted significantly. Increasing numbers of couples choose to get wed outside of church, thereby making evident that marriage no longer represents a purely religious institution. This

[11] While this high number sets Ireland apart, it still attests to a reduced popularity of religious wedding ceremonies. In 2001, for example, over eight in ten weddings had been religious ones (Central Statistics Office, 2019b). No comparable data are available for Canada.

legal shift, however, was also consequential in enabling the contractualisation of marriage, because it moved control over civil marriage to the state. This meant that it was possible for politicians to change the rules underpinning the institution, which they did frequently.

The Contractualisation of Marriage

Once marriage had moved into the remit of political and legal authorities, its evolution sped up. In fact, marriage policy continued to evolve, oftentimes in response to the perceived need of marriage to adapt to societal pressures. As the paper argues that the net effect of this shift has been a move away from a dogmatic type of marriage towards a contractual form, this section explores the three main drivers of this transformation (summarised in Table 2 on page 60). While marriage's dissolubility marks a major break from its dogmatic form, the decreased centrality of marriage for family formation and thus societal reproduction has further demoted the dogmatic ideal. In fact, marriage has ceased to have primacy over the state's regulation of intimate relationships and now presents but one option for seeking state validation of one's relationship. Thus, this section argues that both institutional change through legal evolution and shifting societal practice with regard to marriage have further moved marriage towards a contractual understanding.

Dissolubility of Marriage

One of the first breaks with dogmatic thinking on marriage occurred when divorce became increasingly available in the UK. While annulments were available in church courts, the first secular body responsible for dissolution of marriages was the British parliament. This changed with the *Matrimonial Causes Act 1857*, which made divorce a matter for the courts, in part because it was impractical to devote parliamentary time to an increasing number of divorce petitions (Finlay, 1999). While the act's passing led to a spike in divorce applications, the courts saw an average of 200 divorce cases a year in the first decade after 1857, and that rate increased largely in proportion with population growth (Urquhart, 2013).

This number also underscores the greater degree of accessibility when it is compared with the total of 314 divorces granted in the 150 years prior to the *Matrimonial Causes Act 1857* (The Houses of Parliament, 2019). One of the biggest drivers of change was the new accessibility of divorce to women: while it was almost impossible for a woman to file for divorce prior to the act, women made up two-fifths of all petitioners between 1860 and 1910 (Urquhart, 2013). Nevertheless, divorce remained expensive and scandalous, which meant that most people engaged in informal divorces or abandoned their spouses to escape their matrimonial bond. This informal mode of separation also explains why the rate of formal divorce was so much lower than modern numbers (Phillips, 1991).

Unlike the *Marriage Act 1753*, the *Matrimonial Causes Act 1857* did not automatically propagate across the Empire. Initially, only Australia and New Zealand followed the British example. In Australia, all six colonies passed divorce bills akin to the UK's bill between 1858 and 1873 (Finlay, 1999; Urquhart, 2013). Similarly, New Zealand passed its first divorce bill in 1867 (Christie, 1927). Canada and Ireland, in turn, were exempted from the English act, and judicial divorce remained inaccessible for its citizens. Canada legislated for it when it gained control over domestic affairs in 1867 (Urquhart, 2013), but its federal structure meant that the last parts of the country followed suit only in 1968 (Paetsch, Bala, Bertrand, & Glennon, 2004). Ireland, in turn, maintained its parliamentary divorce model until after the creation of the Free State in 1922, when it outlawed divorce entirely in 1937 (Urquhart, 2013). While parliamentary divorces remained technically available until the ban on divorce, the Dáil Éireann had no mechanisms for tabling such bills, making them practically unavailable (Burley & Regan, 2002). It was only in 1989, in the wake of the first divorce referendum, that the country legalised legal separation through the *Separation and Family Law Reform Act 1989.* This allowed legal separation similar to divorce without allowing legally separated individuals to remarry

(Burley & Regan, 2002). Full judicial divorce would not arrive in Ireland until 1996, when a second divorce referendum approved the necessary change to the constitution (Burley & Regan, 2002).[12]

What unifies the evolution of divorce law across all case countries is that once divorce was introduced, its accessibility increased over the years. Three common steps in this process were the abolition of a gendered double standard for accessing divorce, the expansion of the grounds for divorce, and ultimately the move away from a fault-based system (see Table 3 on page 62). The first attempt at equalising the grounds on which men and women could seek divorce occurred in the late 1800s in the Antipodean colonies but was blocked by Westminster (Finlay, 1999). Nevertheless, New Zealand broke ground by legislating an egalitarian basis for seeking divorces and abolishing gendered grounds for seeking a divorce in 1898 (Christie, 1927). Australia, in turn, abolished the double standard in 1959, when the Commonwealth harmonised divorce legislation in the entire country (Weston & Qu, 2013). Canada's rather late *Divorce Act 1925* equalised the grounds of divorce across sexes, but this equality was only implemented nationally through the 1968 evolution of the same law (Paetsch et al., 2004). Ireland, in turn, immediately embraced gender-equal grounds for divorce when it legalised divorces in 1996 (Burley & Regan, 2002), while England changed its law only in 1937 (Urquhart, 2013).

Divorce's accessibility also increased because countries kept adding to the list of grounds that could justify permanent legal separation. The inclusion of additional grounds for divorce was often driven by a realisation that the social reality required a legal evolution, even though the official justification was usually the ambition to protect vulnerable women and children. Three grounds in particular were added across all case countries: physical

[12] A 2019 referendum further simplified the Irish divorce law, by supporting a reduction in the mandatory waiting period before couples can divorce through separation.

violence, desertion, and mental incapacity (Bissett-Johnson & Barton, 1999; Fink, 2000; Finlay, 1999; L. Stone, 1990). Ultimately the list of offences that could justify a divorce grew so long that countries moved away from requiring grounds at all. New Zealand again was a pioneer in this regard when it moved to a no-fault system in 1920 (Webb, 1965). Australia adopted the same policy only in 1975 when it made major changes to its family law system, while Canada established the policy in its 1968 reform of divorce legislation (de Vaus, 2004; Fairbairn, 2019; Qu & Weston, 2013). In Ireland, again, separation was a sufficient ground from divorce's legalisation in the late 1990s. The most complex situation presents itself in the UK. While Scotland has a no-fault system, England and Wales require proof of marital breakdown, which means the bulk of applications cite unreasonable behaviour or adultery (Fairbairn, 2019). However, this is often done to avoid the two years separation required to prove marital breakdown for consensual divorces or the five years required in the case of contested divorce petitions.

The net effect of this increased liberalisation of divorce law can be seen in Figure 2 (on page 56). There is a broadly congruous pattern across all cases, with divorce rates increasing from modest beginnings, peaking in the wake of both World Wars, and stabilising in the late 1990s (Coontz, 2006; Paetsch et al., 2004). While this attests to the increase in divorces, it has also become acceptable for divorcé(e)s to remarry. In the UK, for example, the share of divorcees among all grooms and brides went from 5% in 1960 to one-quarter and one-fifth, respectively (McLaren, 2014). Very similar numbers are reported for Australia (Australian Bureau of Statistics, 2018), Canada (Statistics Canada, 2019), and New Zealand (StatsNZ, 2019). In Ireland, this number is much lower, with only one in ten new marriages including at least one divorced spouse (Central Statistics Office, 2019b). Nevertheless, divorce is more socially acceptable across all cases and has ceased to be an impediment for remarriage, especially for women. This attests to the transformation of

marriage away from a lifelong and indissoluble union towards a union that is entered and exited freely and perhaps multiple times within a lifetime.

Changing Practices Regarding Marriage, Children, and Family Formation

While the increased accessibility of divorce meant a radical rethink of marriage's very nature, people's evolving attitude towards marriage's connection to childbearing and -rearing further changed the institution. While the church had already imbued marriage with the privilege of being the sole legitimate locus for people's procreation, the state reified this connection in civil marriage. In England and the Empire at large, illegitimate children were severely disadvantaged by the late Victorian era: neither parent had any legal obligation towards them, and they had no hope of being legitimised because it was impossible to do so after the fact (Sackville & Lanteri, 1970).

The first changes to this system were made in New Zealand, where the legitimation of ex-nuptial children was allowed in 1894 (Sackville & Lanteri, 1970). This was far ahead of all other countries: England moved to allow after-the-fact legitimation in 1926 (Fink, 2000), Australia in 1968 (Sackville & Lanteri, 1970), and Ireland in 1987 (Burley & Regan, 2002). With the advent of more widespread childbearing outside of marriage, however, these initial reforms were expanded upon. The UK, for example, increased the financial protection of illegitimate children and made post-birth legitimation easier in the 1950s (Fink, 2000). Ultimately, the child came to be seen as blameless for its parents' immoral life, and the value of its protection was placed above the idea of punishing parental nonconformity with societal norms (Fink, 2000). This means that the status of illegitimate child has become virtually meaningless in all cases, although procedural distinctions may remain (e.g., fathers are not automatically recognised as such if the child is born ex-nuptially in the UK (Bissett-Johnson & Barton, 1999)).

While policy change started in the early part of the 20th century, the increase in ex-nuptial births occurred only in the 1960s (see Figure 4 on page 58). The most rapid increase in the percentage of children born to unwed parents is observed in Ireland, where only 3% of children were born out of wedlock as late as 1960 (Burley & Regan, 2002; McGowan, 2016), but more than a quarter of all children were born to unwed parents by 1997 (Kiernan, 2001). Similarly, in Australia the share of ex-nuptial children rose from less than one in ten in 1960 to over a third in 2005 (Weston & Qu, 2013). It is, however, not just practice that has changed; people's opinions regarding the link between marriage and childbearing have also shifted significantly. In the mid-1990s, one in ten people in Australia, Canada, and the UK felt it was 'always wrong' to have an ex-nuptial child, while in Ireland the opinion was shared by more than a third of respondents (Treas, 2004). Since then, however, the idea that childbearing should only occur within marriage has lost support (see Figure 5 on page 59).

The weakened connection between marriage and children further moves the civil version of marriage away from its dogmatic counterpart. Not only do people divorce more, they also are less concerned about whether their children are born in wedlock. While part of this new pattern correlates with the increase in cohabitation to be discussed next, it also shows the further separation of marriage from its Judeo-Christian roots. With this weakening link, the purported essential nature of marriage also begins to shift. The increase in ex-nuptial parenting casts doubt over notions of marriage that see it as essential for successful child-rearing, which ultimately contractualises it even more.

Diverse Families - Diverse Union Recognition

The evolution of marriage's place in society, however, is not just confined to childbearing. The precipitous fall in marriage rates (see Figure 3 on page 57) has coincided with a rise in cohabitation in all case countries (Paetsch et al., 2004). Indeed, the decline in marriage's popularity has created problems for the state and its administration of ostensibly private

family life. The state and the welfare state in particular had long relied on the legitimated nuclear family to meet its own needs before it relied on the state (McGowan, 2016), which meant that these new family forms were ignored by the state, just as they ignored the prescribed form of family formation (Barlow, 2004, p. 58). As the prevalence of non-marital unions grew, however, states moved to recognise these previously unusual and penalised forms of living.

The legal recognition of non-marital unions began in the last quarter of the 20th century (Barlow, 2004; Paetsch et al., 2004). The degree to which the country cases recognise cohabitation without formal registration, however, varies significantly. In the UK, legislation in England and Wales recognises opposite-sex cohabitants only on an ad hoc basis (Barlow, 2004), while Scotland has a more formalised approach (Tobin, 2013). The only formal kind of non-marital union available across the kingdom is the civil partnership legalised for same-sex couples in 2004. While originally only accessible to same-sex couples, a Supreme Court ruling forced the government to make the institution available to opposite sex couples too (Tobin, 2013). While Ireland also opened its civil partnerships only to same-sex couples in 2010, it has a more formalised method of recognising opposite-sex cohabitants than the UK had (McGowan, 2016). Ireland recognises cohabitation retrospectively in instances where a separation has financial consequences for at least one party, or there was a child in the relationship. If either situation applies at the point of breakup, couples can address the court to regulate property and child-care matters akin to the court's role with married couples (McGowan, 2016).

In contrast to Ireland and the UK, the Antipodean cases and Canada offer automatic rights and recognition to all cohabiting couples. In Australia,[13] the institution of de facto relationships was created through the *Family Law Act 1975*, and it recognises cohabitants who live in a marriage-like relationship on a genuine domestic basis. The recognition endows the qualifying couple with most of the rights and obligations of married couples (The Law Society of New South Wales, 2017). In New Zealand, 'marriage-like' relationships received formal recognition through the *Property (Relationship Act) 1976* (Baker & Elizabeth, 2012; Elizabeth & Baker, 2015; Ministry of Justice, 2019). A more formalised non-marital union was created through the *Civil Union Act 2004,* which offered non-marital formal recognition to same-sex and opposite-sex couples and mirrored the rights and obligations found in the country's marriage act. Canada differs slightly from the other two countries in that civil unions never played a major part in its common law tradition (Bailey, 2004).[14] Rather, the country's recognition of non-marital unions evolved through constitutional litigation, which led to landmark decisions proclaiming that marital status was an invalid ground on which to discriminate rights and obligations (Alderson & Lahey, 2004b; Bailey, 2004; Davies, 2008; Hiebert, 2002). Initially, only opposite-sex couples were recognised (Alderson & Lahey, 2004b, pp. 74-75), until the Supreme Court found that the exclusion of same-sex couples from common-law marriages was unconstitutional (Wintemute, 2004).

Partially driving this increased recognition of non-marital unions was the declining marriage rate (see Figure 3 on page 57), which coincided with an increased rate of

[13] Non-marital union recognition is a state competence in Australia. Thus, formalised recognition schemes vary sub-nationally. Such schemes have been legislated in New South Wales, the Australian Capital Territory, South Australia, Victoria, and Queensland.

[14] Between 2001 and 2003, Alberta, Manitoba, Nova Scotia, and Quebec introduced civil union schemes. However, these were often created to recognise same-sex couples short of full marital recognition. The scheme in Quebec, however, stands out for its availability to opposite- and same-sex couples.

cohabitation across all case countries (Paetsch et al., 2004). While the marriage rate behaved remarkably similarly across all case countries (Heard, 2011), the pattern of cohabitation was more varied. While data on cohabitation are less readily available than those on marriage, New Zealand, Canada, and Ireland offer illustrative examples: Ireland saw a fourfold increase in cohabitation between 1996 and 2006 (Lunn & Fahey, 2011), Canada registered around one fifth of its couples as common law in 2016 (Statistics Canada, 2017), while over a quarter of never-married New Zealanders were unwed but cohabiting in 2006 (Heard, 2011). At the same time, this rise in cohabitation has not spelled the end of marriage. In fact, especially in younger cohorts, couples cohabit premaritally. In the UK, more than eight in ten marriages were preceded by cohabitation (McLaren, 2014), with a similar number reported in Australia (Qu & Weston, 2013) and Ireland (Lunn & Fahey, 2011).

The net effect of these changes is that marriage is no longer the sole option for couples seeking to create a family. While it remains at the apex of the relationship recognition schemes (van Acker, 2016), it is now but one of the options available to couples. This evolution further moves marriage towards a contractual ideal, as it is now one of several options to be contemplated. In fact, couples no longer only decide whether to exit marriage through divorce, but they also have to first actively choose to get married. In particular, in countries such as Canada and New Zealand where no legal distinction can be made between marital and non-marital state recognition, it becomes clear that to wed has gone from automatic life stage to conscious decision.

The Link to Same-Sex Marriage Debates

As the above analysis of marriage has shown, the institution has proven malleable over the centuries. What this final section aims to do is to underline the importance of these changes to the ultimate push for same-sex marriage. While it is beyond the scope of this paper to trace the evolution of SSM advocacy in each country in detail, it is important to show

whether and to what extent the processes of secularisation and contractualisation had an impact on the demand for SSM.

The import of secularisation is the easier argument to make. With the bifurcation of marriage into civil and religious institutions that co-exist, the space was created to evolve marriage beyond the scriptural understanding. In particular, the legalisation and liberalisation of divorce procedures has done much to reimagine marriage beyond a heterosexual institution. This change was also referenced in many arguments for same-sex marriage. In Canada, for example, the court-based strategy of the lesbian and gay rights movement relied heavily on the idea that marriage was a secular institution, and that the exclusion of same-sex couples from it represented unfair discrimination (Alderson & Lahey, 2004b; Davies, 2008; Wintemute, 2004). In fact, the argument was first applied in regard to non-marital union recognition before being successfully invoked in regard to marriage in 2005. Other legal challenges, however, were unsuccessful. Australia's, Ireland's, and the UK's high courts all agreed that the respective governments were under no legal obligation to recognise same-sex marriage but would be within their rights to legislate for such recognition. This, in turn, shifted advocacy towards a political strategy.

In pursuing same-sex marriage as a political goal, advocacy oftentimes focused on the societal shifts that helped change marriage. The contractualisation of marriage was thereby also embedded in the late and postmodern shift in attitudes and behaviours more broadly (Beck & Beck-Gernsheim, 1995; Giddens, 1992). In this argument, an increased individualisation, the erosion of marriage's economic and religious basis, and a shift from a family-based sex-for-reproduction model to an individually based sex-for-pleasure model (Beck & Beck-Gernsheim, 1995; Frank & McEneaney, 1999) made the question of same-sex marriage one of equality. In short, both marriage and sex were understood as having evolved to meet individual emotional needs (Beck & Beck-Gernsheim, 1995), which made

the exclusion on the basis of sexual orientation an issue. While those with strong religious beliefs still object to SSM more strongly (Baunach, 2012; Clements, 2015b; Lax & Phillips, 2009; van den Akker et al., 2013), the advocacy increasingly zeroed in on themes of equality, recognition, and unfair discrimination (see for example Nussbaum, 2010).

In Australia, the idea that 'marriage as an institution has proven to be flexible in reflecting the social norms of the day—far from being set in stone, it has responded to social change' was key to arguing for policy change (Wong, 2012). The country's main SSM advocacy group further argued that marriage is a societal bedrock institution that is clearly civil in nature and regulated by parliament, which meant that the exclusion of same-sex attracted people from it by virtue of their 'inherent, unalterable characteristic of their personhood and lives' made the ban on SSM wrong in principle, as a matter of public policy, and 'morally repugnant discrimination' (Puplick & Galbraith, 2014). A broadly similar argument was advanced in Ireland, where marriage for same-sex couples was presented as 'just another step in the evolution of marriage' (The Convention on the Constitution, 2013, pp. 51-52). In the UK, the equality frame also came to dominate, even though the country's lesbian and gay rights activists were more ambivalent towards SSM initially (Milmo, 2010). Ultimately, however, the discourse shifted to one of equality, with then Prime Minister David Cameron embracing the legalisation of SSM as a matter of equality and commitment (Grube & van Acker, 2017). Uniquely among the cases studied here, same-sex marriage was justified on the basis of marriage's stabilising impact on couples rather than as a mode of modernising marriage, an argument precipitated by the rift between moderates and conservatives within the Prime Minister's own party (Grube & van Acker, 2017).

Conclusion

The idea that marriage could include same-sex partners seemed ground-breaking or absurd as late as the 1970s. Nevertheless, the idea has found policy expression in an increasing set

of Western countries. This paper's ambition was to add to the literature that tracks the individual histories by showing the broader contextual shift of marriage itself. This analysis also adds to the theoretical explanations of same-sex marriage by theorising the necessary evolution in opposite-sex marriage that allow for a rights-based advocacy effort for same-sex marriage. It argues that the institution of marriage has shifted in two important ways: it has been secularised and contractualised. In this framework, secularisation refers to the schism between the state and church in the regulation and administration of marriage. This evolution allows for marriage to evolve away from the dogmatic ideal of marriage, which has evolved little since its articulation in canon law. Subsequent to secularisation, marriage is theorised to contractualise. This latter process relates to three interrelated evolutions. The combined effects of increased cohabitation, extra-marital childbearing, and a reduction in marriage's primacy in union recognition, result in marriage losing its primacy as an institution of family organisation. Marriage therefore is understood to move away from a lifelong and procreative institution and increasingly evolve towards a contract with special rights and obligations. In this contractual understanding of marriage, the union is not necessarily life-long, it need not entail procreation, and it represents but one form in which relationships are recognised. At the same time, marriage is no longer the sole locus of acceptable sexuality, it ceases being a predominantly religious ritual, and is reduced in its importance to young adults' transition to adulthood. These changes find expression in both law and social practice, and offer an important avenue through which same-sex advocates can argue for the inclusion of same-sex couples in civil marriage. The secularisation and contractualisation of marriage are therefore theorised to be two necessary processes for the legalisation of SSM. They are, however, insufficient conditions because they alone do not bring about a change in policy. Rather, the two evolutions create an environment in which advocacy is more likely to succeed in bringing about same-sex marriage.

Through a comparative historical analysis of secularisation and contractualisation in Australia, Canada, Ireland, the UK, and New Zealand, this paper finds support for both processes. Moreover, the debates surrounding SSM in each case country support an important link between changes in marriage and lesbian and gay activists' advocacy strategy. In all countries, the exclusion of same-sex couples from civil marriage was lambasted as unjust, immoral, and anachronistic. The ability to make these arguments, however, importantly relates to the observed social and legal changes, because as the paper's introduction notes, earlier attempts at equality frames were unsuccessful in all countries studied. Nevertheless, the study design and methodology are too weak to determine how precisely the twin process of secularisation and contractualisation play into the processes that ultimately yield SSM. As previous research has shown, a plethora of other factors can be shown to be causally relevant, such as human rights law (Johnson, 2015; Langford, 2017), the evolution of a supranational soft norm (Fernández & Lutter, 2013; Kollman, 2009, 2013), and the lesbian and gay rights movement's embrace of SSM as a goal. Nevertheless, the analysis supports the claims that both evolutions of marriage are necessary but insufficient for the ultimate achievement of SSM and that secularisation has to precede contractualisation.

At the same time, the analysis throws open a wide field of future research. First, it seems worthwhile to further refine the processes associated with contractualisation. It would be interesting to test whether there are any threshold effects with regard to each stream of change, whether there is a temporal sequencing to them, and how their individual effects combine. Second, it seems important to embed the change of marriage as an institution more explicitly in other approaches to SSM. By foregrounding the assumptions made regarding marriage in lesbian and gay advocacy, norm-based scholarship, and more socio-political analyses, we could better grasp what notion of marriage is assumed by those pursuing SSM.

This also could prove instructive in regard to establishing in what contexts SSM is more likely to be achieved. Finally, a broader set of countries ought to be analysed. While this paper is confident of the presence of both mechanisms in the Anglo-Saxon world, countries with other church–state conflict legacies, legal systems, or political heritages may offer more complete narratives of how marriage has to change (if at all) for the inclusion of same-sex couples into civil marriage. A more encompassing set of countries could be included in a quantitative analysis (e.g., event history analysis) but this would necessitate clearer indictors and measures of each process, which are more likely to be obtained from qualitative research. The combination of all these efforts would ensure that marriage is not mistaken for a static institution in analyses that explicitly regard same-sex marriage but rather that they take stock of its malleable nature and long policy legacy.

Figure 1 The Causal Pathway

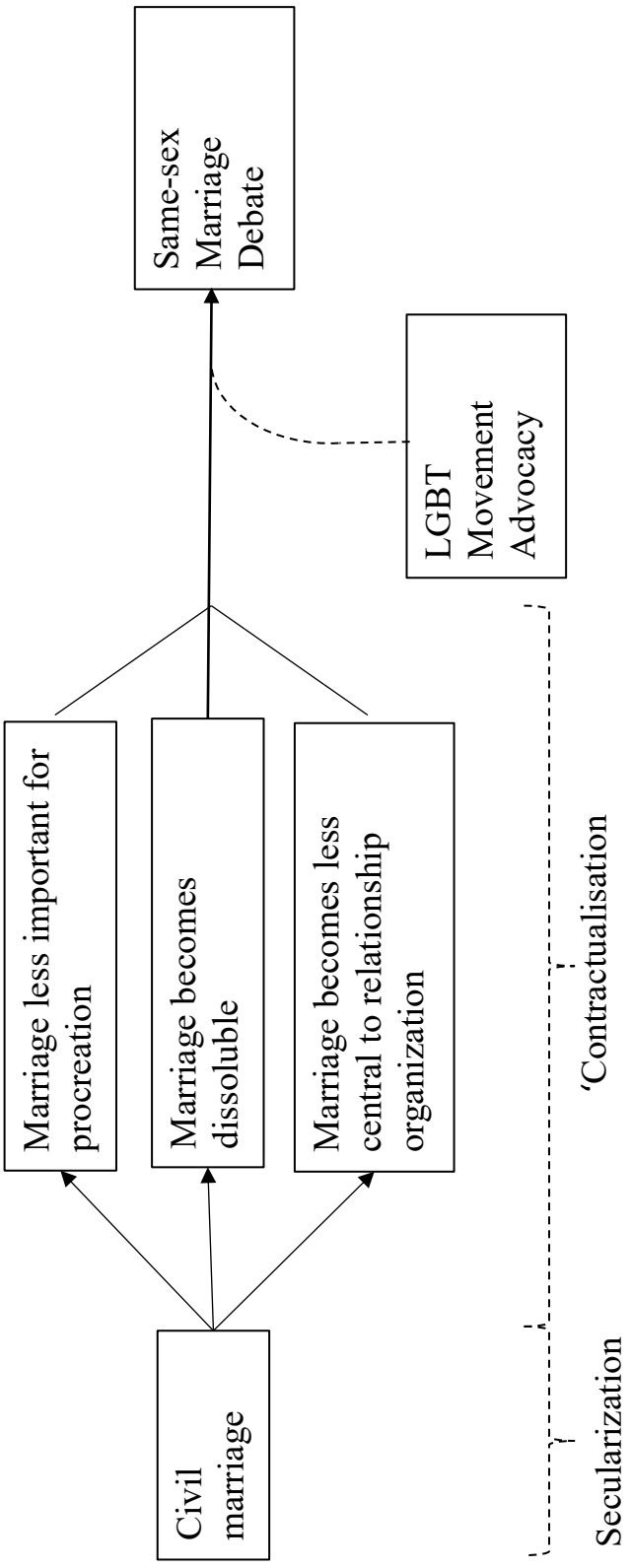
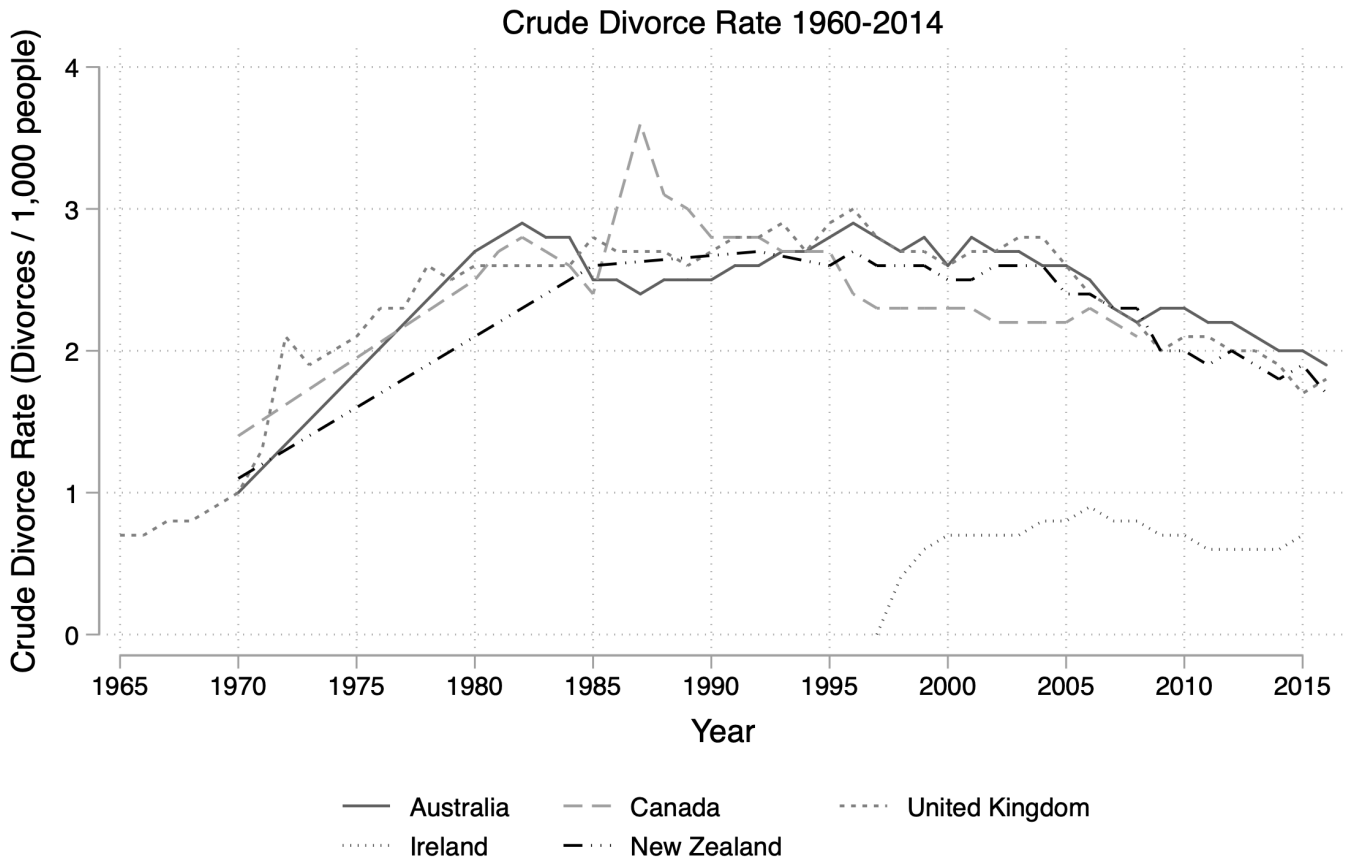
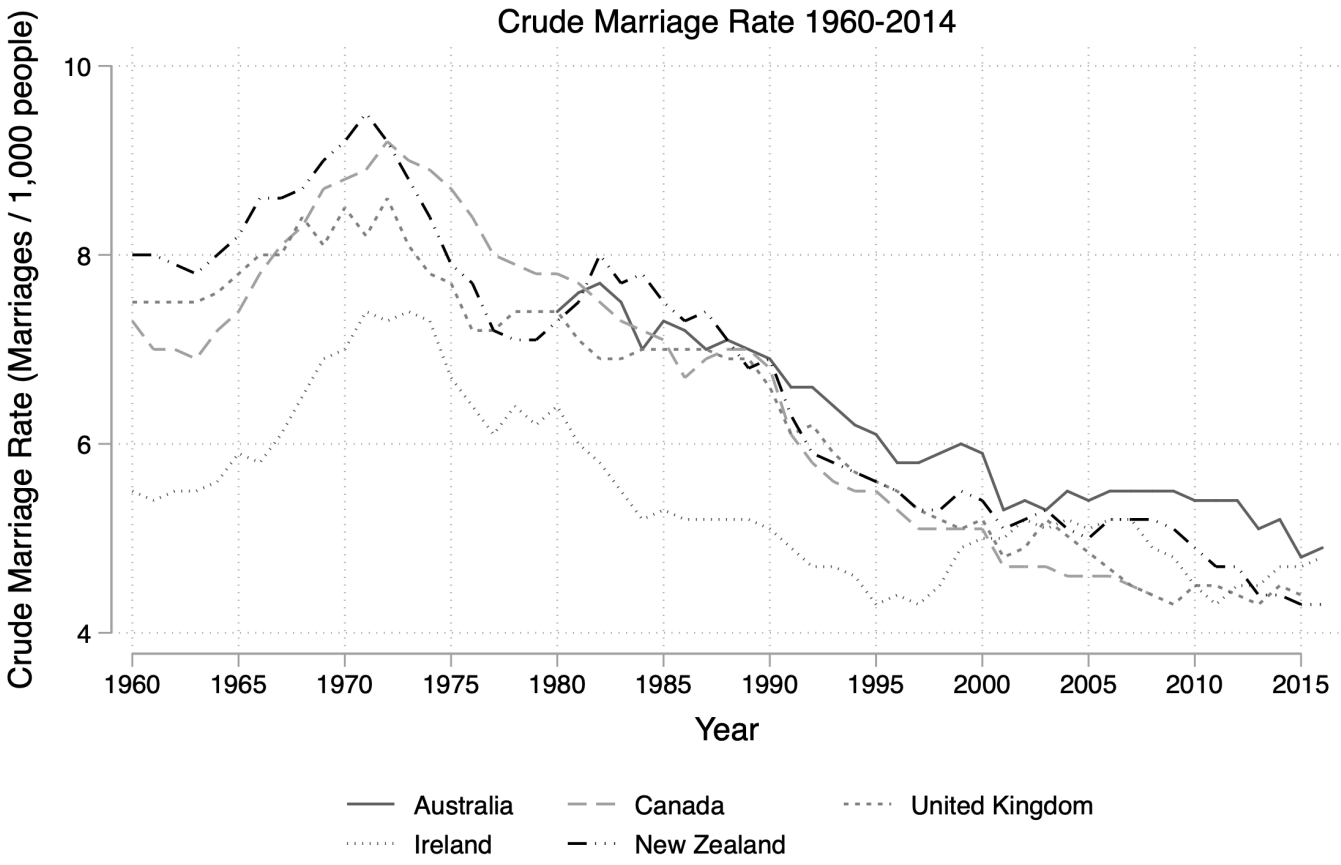


Figure 2 Crude Divorce Rate 1960–2014



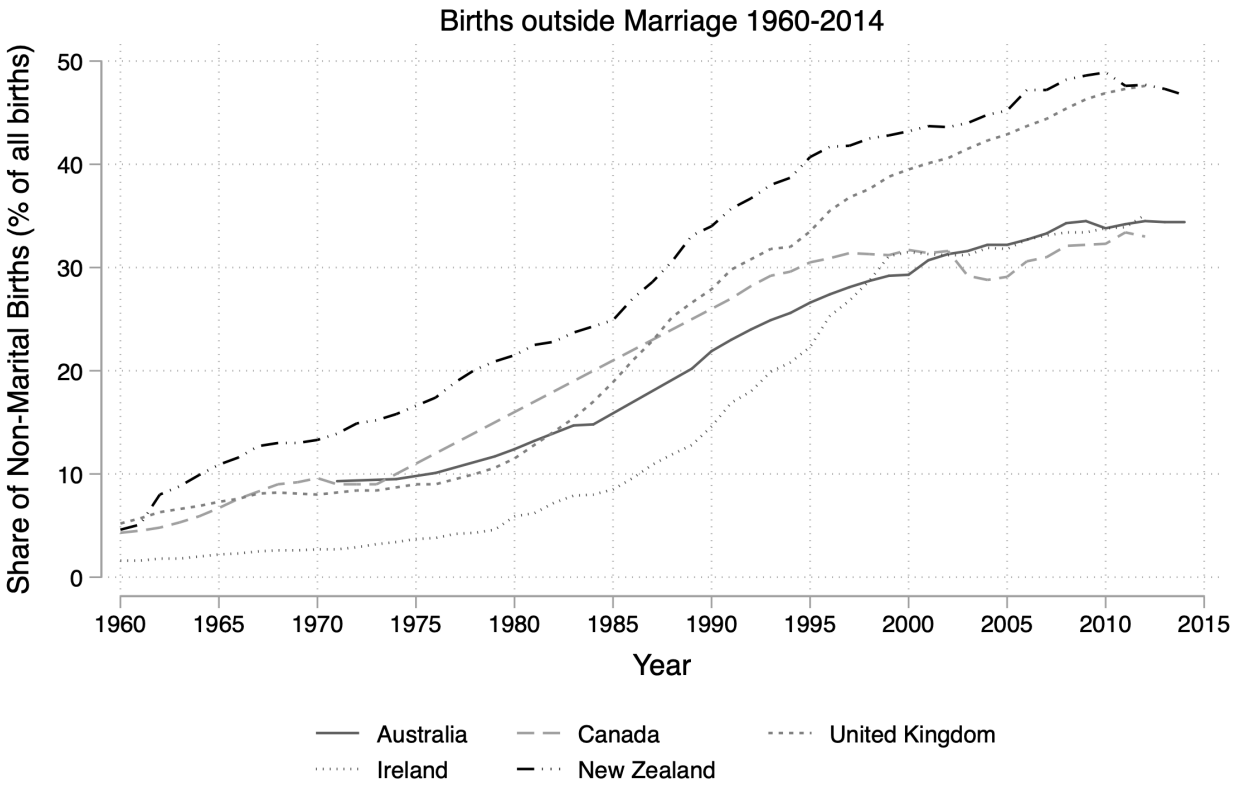
Source: OECD Family Database (2019)

Figure 3 Crude Marriage Rate 1960–2014



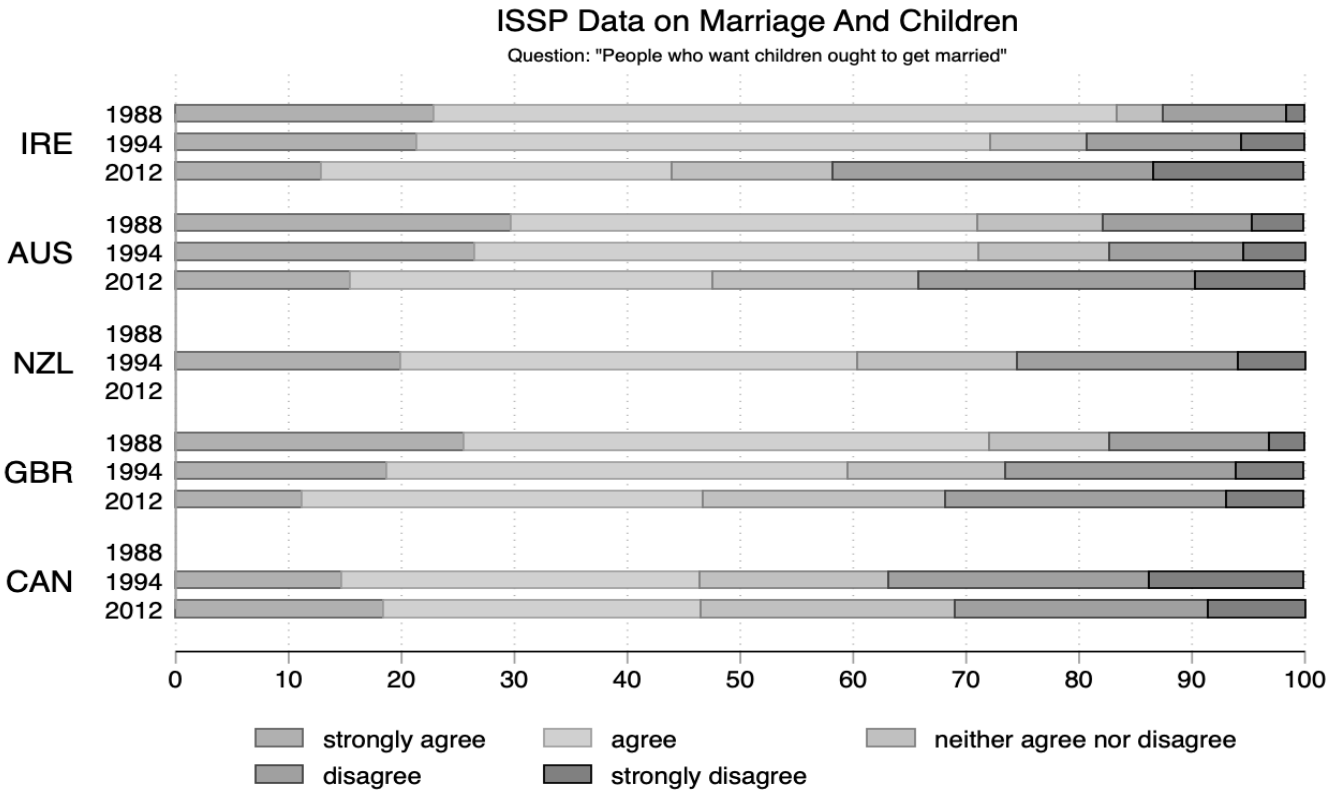
Source: OECD Family Database (2019)

Figure 4 Ex-nuptial child births as a share of all births



Source: OECD Family Database (2019)

Figure 5 ISSP data on non-marital births



Sources: ISSP Research Group (1990), ISSP Research Group (1997), ISSP Research Group (2016)

Table 2 The Marriage Ideal Types

	Dogmatic Marriage	*Contractual Marriage*
Can the marriage be dissolved?	No	Yes
Who can enter into marriage?	One man and one woman, to the exclusion of all others	Two adults, to the exclusion of all others
What is marriage's primary purpose?	Procreation	Recognition of the couple
What is marriage's role in society?	The only legitimate form of family	One of multiple forms of family recognition Remains often at the apex of relationship recognition schemes

Table 3 Causal Process Observations (CPOs)

	Expectation	*General Expectation*	*Specification for Case*
Secularisation	H1	Religious and civil marriage are institutionally separated and assigned to religious and secular authority, respectively.	Was civil marriage created as an explicitly different institution? Was the state responsible for its regulation?
Regulation of Sex	H2	Marriage ceases to be the solely acceptable institution for child-begetting/rearing.	Was the category of illegitimate child abolished? Were children increasingly born into unwed families?
Dissolubility	H3	Marriage becomes dissoluble through the legalisation of divorce; the grounds for divorce increase until ultimately no-fault divorce is possible.	Was divorce available? If so, to whom and on what grounds? Was there a move towards augmenting the grounds for divorce? Did no-fault divorces get legalised?
	H4	Divorce becomes more wide spread and remarriage after divorce increases.	Did divorce rates increase over the years? Could and did divorcees remarry?
Relationship Regulation	H5	Marriage becomes one of several ways in which relationships are recognised.	Did non-marital unions receive recognition by the state? Were some or all of the privileges associated with marriage attributed to new forms of relationship recognition?
	H6	Marriage loses importance as a form of organising an individual family.	Did marital rates drop? Did cohabitation and non-marital unions increase?

Table 4 The Evolution of Divorce Law

	UK	*AUS*	*CAN*	*IRE*	*NZ*
Parliamentary Divorce	1669	-	-	1669–1937	-
Judicial Divorce	1857	1858–1873	1758–1968[15]	1996	1867
Abolition of Double Standard of Fault	1937	1959	1925	1996	1898
Availability of No-Fault Divorce	2019*	1975	1986	-	1920

[15] The wide range is explained by Canada's federal structure. Divorce was regulated in Nova Scotia (1758), Prince Edward Island (1791), and New Brunswick (1833) when they were still independent colonies. Divorce was also made available in Rupert Land – now the provinces of Alberta, Manitoba, Saskatchewan, and the Northern Territories as well as Nunavut – in 1870. British Columbia recognised the *Matrimonial Causes Act 1857* in 1867. The provinces of Ontario, Quebec, and Newfoundland only got judicial divorce proceedings with the standardisation of Canadian divorce law through the *Divorce Act 1968.*

3. From *Halpern* to *Wilkinson*: The Unusual Diffusion of Same-Sex Marriage across Anglo-Saxon Countries

The diffusion of same-sex marriage as a policy idea across the Anglo-Saxon countries challenges extant theories of policy diffusion. Even though much research has established mechanisms that regard diffusion by professional actors through political channels, this is not what is observed with regard to same-sex marriage in the Anglo-Saxon countries. This paper uses documentary and primary interview evidence to conceptualise a new type of policy mobility. This mobility is unique because it occurs in the courts rather than in the political arena and is therefore open to a new type of transfer agent. This analysis explains important aspects of the evolution of same-sex marriage in the Anglo-Saxon countries and suggests a new theoretical framework for further empirical scrutiny.

There are several milestones that are often cited in the literature on same-sex marriage, with two of them relating specifically to same-sex couples' rights: one is Denmark's pioneering introduction of formalised non-marital union recognition in 1989, and the other is the

Netherlands' legalisation of same-sex marriage (SSM) in 2001. Arguably, another such milestone was Canada's legalisation of SSM in 2003: it not only opened up civil marriage to Canadian same-sex couples, but also proved for the first time that marital recognition for same-sex couples was not limited to European nations but could occur outside of the continent. While this galvanised many movements across the globe, there is a less often acknowledged direct impact on SSM advocacy across some Anglo-Saxon countries (Castles, 1993; Obinger & Wagschal, 2001). This set of countries, which includes Australia, Canada, Ireland, the United Kingdom and New Zealand, is historically and socially linked in a way that made Canada's legalisation of SSM reverberate in a unique way. In Australia, Ireland, and the UK, couples who had married in Canada returned to their home countries and sued for their marital status to be recognised. While each legal case was unique, they all contributed significantly to the SSM struggle in their respective countries: they challenged the exclusion of same-sex couples from marriage, garnered immense media and public attention, and forced the issue about whether or not countries had to recognise internal same-sex marriage in the same way they recognised heterosexual couples' overseas marriages.

A cursory read of the empirical facts would suggest that this is just another instance of international policy transfer – a concept that is well established in the literature. In fact, scholarship on policy diffusion (Majone, 1991), policy transfer (Dolowitz & Marsh, 1996, 2000) and lesbian, gay, bisexual and transsexual (LGBT) rights (Kollman, 2007, 2013; Paternotte & Kollman, 2013) all acknowledge that domestic advocacy and policymaking are or can be internationally embedded. Indeed, recent scholarship has evolved concepts of domestic policy learning (Rose, 1993) to include cross-national learning, and even included notions of forced and negotiated policy transfer (Dolowitz & Marsh, 1996; Evans, 2009). The type of agents that engage in transferring policy ideas or programmes across domestic polities has also expanded beyond politicians to include agents as diverse as firms,

international organisations, and advocacy groups. The problem with all these approaches is that none of them seem to fit the case at hand well.

A principal obstacle is that much of the extant theory regarding the international mobility of policy ideas focuses on the political arena. This is either conceptualised through politicians actively looking abroad for possible policy solutions to common problems, or through non-state actors seeking to influence domestic policymaking and sharing knowledge and strategies transnationally. The case of SSM in the Anglo-Saxon countries, however, occurs outside this narrowly conceived notion of politics, in the courts. The political importance of the judiciary is well-documented both in scholarship on North American LGBT rights (Andersen, 2006; Pierceson, 2014; M. Smith, 2008) and European litigation on same-sex union recognition (Ammaturo, 2014; Johnson, 2015). What separates this scholarship from the case at hand, however, is that the courts will be perceived as a possible venue for domestically driven policy change. Put differently, the courts are one possible venue for policy evolution if we take stock of the multi-institutional nature of politics (Armstrong & Bernstein, 2008). In the case of same-sex marriages in the Anglo-Saxon countries, however, the courts were also a locus for importing a policy idea, namely same-sex marriage, from one polity into another. This is more akin to concepts of policy transfer than domestic policymaking, but cannot be adequately explained by the extant literature on policy transfer because it strongly focuses on the narrow parliamentary political arena.

This paper therefore uses the case of same-sex marriage within the Anglo-Saxon world to further develop the theoretical framework of judiciary-based policy mobility. The paper presents a critical case study, because extant theory inadequately explains the observed empirical pattern of how same-sex marriage moved across the Anglo-Saxon world. It is a form of theory-building which offers initial insights and suggests further lines of inquiry. In doing so, it relies primarily on documentary evidence and original interview data

gathered in late 2017 through four in-person semi-structured interviews in England and Australia. It first outlines how same-sex marriage came about in Canada and how it subsequently diffused across the Anglo-Saxon world. In analysing the pattern of policy mobility, the argument will further highlight the shortcoming of extant theory with regard to this particular case. Based on this assessment of established frameworks, the paper then uses its data to outline a framework for understanding judiciary-based policy mobility. This coheres around both the existence of a secondary institutional venue of policy transfer and exploring to what extent this venue is open to a new category of agent. It concludes by summarising the argument and outlining further lines of inquiry.

From Halpern v. Canada to Wilkinson v. Kitzinger

In order to better understand the uniqueness of the case at hand, the first step is to summarise how Canada came to legalise same-sex marriage and how that legal change then rippled through the other case countries. Unusually for what had been happening at the time, both instances involved legal cases rather than political processes. Canada's lesbian and gay rights advocates had pursued a coordinated legal strategy that focused heavily on the country's constitutional non-discrimination clause. This ultimately led to a set of legal challenges that argued that the exclusion of same-sex couples from marriage was a violation of Canada's constitutional right to non-discrimination. In its landmark decision *Halpern v. A.G.,* the Ontario Court of Appeal found for the plaintiff and ordered that same-sex couples had to be issued with marriage licences. This paved the way for Canada's parliament passing a marriage bill in 2005, which opened civil marriage to same-sex couples across the country. In fact, the bill went beyond that, because, unlike early European bills, it did not impose any citizenship or residence requirements, which in fact opened same-sex marriage to any couple able to travel to Canada. This proved vital for the other Anglo-Saxon countries, because they eventually found themselves presented with the question of whether a same-sex marriage

solemnised in Canada ought to be recognised by the state that had not itself passed a bill to legalise SSM. This section therefore traces the evolution of Canada's law regarding same-sex union recognition before summarising under what circumstances marriage recognition cases were launched in Australia, Ireland, and the UK.

Canada – A Same-Sex Marriage Pioneer

Originally, Canada's marriage law had been tacit with regard to the gender composition of the married couple (Alderson & Lahey, 2004a, p. 19). This only changed in the 1960s and 1970s when initial claims for same-sex marriage were made. In the absence of a positive legislative definition of who could marry whom, the exclusion of same-sex couples from marriage was primarily justified on the basis of case law. More specifically, the cases of *Hyde v. Hyde and Woodmansee and Corbett v. Corbett* (*Corbett v. Corbett*) were invoked to justify marriage as the union between one man and one woman to the exclusion of all others (Davies, 2008). Whilst initial challenges to this heterosexual understanding of marriage failed,[16] important institutional changes throughout the 1980s created a more permissive environment for such claims. First was the patriation of the Canadian Constitution in 1982 and second was the inclusion of a newly created *Charter of Rights and Freedoms (The Charter)*.

The Charter in particular proved instrumental in bringing about SSM in Canada. In particular, its non-discrimination provision became an important basis on which LGBT rights were won, even though it did not originally cover sexual orientation. Instead it focused on race, nationality and ethnic origin as unlawful grounds of discrimination. The scope of the non-discrimination clause, however, evolved. Through a series of legal challenges,[17] the

[16] For example *North v. Matheson* in 1972 (Davies, 2008).
[17] The most cited cases in this process are *Canada v. Mossop (1993), Egan and Nesbit v. Canada (1995), Miran v. Trudel (1995), M. v. H. (1999)* and *Halpern v. Canada (2003)*.

clause increasingly came to be applied to same-sex rights issues. One such case, for example, argued that the difference in rights for same-sex and opposite-sex non-marital couples was unjustifiable.[18] A series of similar cases were won and ultimately resulted in sexual orientation being 'read into' the Charter's non-discrimination clause.

Against this backdrop of equal non-marital union recognition (Davies, 2008; Hiebert, 2002; Wintemute, 2004) and the protection of the Charter's non-discrimination clause (Alderson & Lahey, 2004b; Davies, 2008; Hiebert, 2002), three legal challenges were brought to challenge the exclusion of same-sex couples from marriage on the grounds of unlawful discrimination in 2003. All three cases made a similar argument and submitted that the ban on same-sex marriage was unconstitutional because it excluded gay couples from marriage solely on the basis of their sexual orientation. Moreover, they argued that the state could not make a convincing argument as to why it excluded same-sex couples from marriage (Alderson & Lahey, 2004b; M. Smith, 2002). The first case to be decided was the *Halpern* case before the Appellate Court in Ontario. In its judgement the court found that the exclusion was discriminatory, and it used its institutional power to remedy the situation by ordering that civil marriage be accessible to same-sex couples instantaneously.[19]

The *Halpern* decision influenced not just the concomitant cases in British Columbia and Quebec, but it also guided judicial decisions in the increasing number of provinces that saw similar lawsuits being filed. In reaction to this judicial evolution of policy, the federal government ultimately realised that it had to engage with the issue of same-sex marriage. As socially, politically, and geographically diverse provinces had all moved to allow same-sex marriage (M. Smith, 2002, p. 12), there was a strong country-wide embrace of SSM

[18] *M v H* [1999] 2 S.C.R. 3.
[19] The cases in British Columbia (*Barbeau v. British Columbia*) and Quebec (*Hendricks v. Quebec*) reached similar conclusions around the same time. *Halpern* stands out, however, for its immediate application of a remedy by the court. The judges ruled that the ban was to be removed immediately and for the competent authorities to recognise same-sex marriages promptly.

building. In order to offer a nationally unified regime, Prime Minister Chrétien announced that his government would not appeal the Halpern decision and that the federal government would move to legislate same-sex marriage nationally (Chrétien, 2003). After a constitutional reference to the Supreme Court, the government did eventually introduce a same-sex marriage bill on the 1st of February 2005 and passed the bill into law on the 28th of June 2005, with broad support.

From Halpern to Wilkinson v. Kitzinger

In tracing Canada's route to SSM, two important things stand out. First, it legalised same-sex marriage after a set of courts had already found the country's ban on same-sex marriage to be unconstitutional. Second, the country uniquely decided not to impose citizenship or residence requirements for those seeking to wed. Unlike the Netherlands and Belgium (Waaldijk, 2005), Canada did not require one member of the couple to be a resident or a national. While it is not clear why this innovation occurred, it proved consequential. It created the first institution of same-sex marriage which was accessible to same-sex couples globally. Given the couples' ability to travel to Canada to wed, there was nothing stopping international visitors from contracting marriage while in Canada. While this added to the positive mood of the LGBT rights movement, it created a latent problem for countries that had not yet legalised same-sex marriage. Namely, they had to decide how to deal with couples who had married in Canada, subsequently become subject to that country's jurisdiction, and demanded that their marriage be recognised akin to opposite-sex marriages contracted abroad.

Canada did become a popular destination for same-sex couples wishing to get married. The attraction was clear for those in close proximity, such as the United States and Mexico, but people travelled from further afield in order to get married. Amongst those foreigners who travelled to Canada in order to get married were the plaintiffs in each of the

legal cases considered here. These are all cases which involved a foreign couple marrying in Canada and subsequently returning to their native countries. Once returned, in each instance the couple found that their marriage was not treated akin to how an opposite-sex overseas marriage would have been treated by the state. In response, they decided to sue the relevant government body for recognition. Despite this similarity, the individual circumstances and ultimate outcomes of these legal challenges were varied and are therefore summarised below.

In Australia, two couples petitioned the Family Court of Victoria to recognise their Canadian marriages (Farouque, 2004; Tomlins, 2004). Jacqueline Tomlins and Sarah Nichols were on holiday in Ontario when they heard the news regarding *Halpern* and decided to wed in Canada before returning to their native Australia, whereas their compatriots Jason McCheyne and Adrian Tuazon flew to Ontario with the intent of using their Canadian marriage to test Australia's stance on same-sex marriage (Walker, 2007). Both couples filed their joint petition in the Victoria Family Court to seek clarification as to whether their Canadian marriage would be recognised. They based their petition on the fact that any legally contracted overseas opposite-sex marriage was being recognised in Australia and wanted to establish whether the same applied to their marriage. Before the court could consider the matter, however, the publicity surrounding the case led to swift parliamentary action: Australia's government and opposition banned same-sex marriage and its recognition through the *Marriage Amendment Act 2004*. The act muted the legal case in Victoria and proscribed same-sex marriage domestically, but also barred the recognition of legal overseas same-sex marriages.

In Ireland, Ann Louise Gilligan and Katherine Zappone launched a legal challenge when their marriage was not recognised by the Irish Revenue Commissioners (*Zappone & Anor v. Revenue Commissioner & Ors* [2006] IEHC 404). The couple had married in British

Columbia and returned to Ireland shortly thereafter, to find that they were no longer considered married (Zappone & Gilligan, 2008). They had filed their taxes jointly in Ireland, but were denied the tax relief accorded to married couples because they were a same-sex couple. The couple challenged the Revenue Commissioners and argued that neither the Constitution nor tax legislation specified that only opposite-sex marriages could be recognised. The judgement, however, dismissed their claim and argued that marriage was understood to be heterosexual both in the Irish Constitution, and in terms of the *Civil Registration Act 2004*.[20] The judgement thus set the precedent that overseas same-sex marriages would not be recognised in Ireland.

In 2006, Sue Wilkinson and Celia Kitzinger were the first couple in Great Britain to launch proceedings to have their Canadian marriage recognised. The couple had also married in 2003 and returned to the UK in 2006. Upon their return, they found that their marriage had been reclassified as a civil partnership, which they argued was a discriminatory downgrading of their Canadian marriage (*Wilkinson v. Kitzinger & Ors* [2006] EWHC 2022 (Fam); [2006] H.R.L.R. 36). Citing the European Convention of Human Rights and the *Human Rights Act 1998*, they argued that the state had violated their right to marry and to be treated equally. While they accepted that same-sex marriage was unavailable in the UK, they insisted that their marriage ought to be recognised because it met the same legal tests that an opposite-sex Canadian marriage met in order to be recognised in the UK. The court, however, dismissed their case and argued that the state sufficiently recognised their union through civil partnerships and that marriage's long-standing definition as heterosexual was an 'insurmountable hurdle' to their claim.

[20] The *Civil Registration Act 2004* was passed to legislatively incorporate the common law definition of marriage and stipulated being of the same sex as a barrier to concluding a marriage (Asher, 2009; O'Sullivan, 2009).

The three cases, therefore, were unsuccessful in bringing about the recognition of SSM in Australia, Ireland and the UK. However, it would be wrong to assume that they had no impact at all. In Ireland, the support network that had formed around the litigants turned into the Marriage Equality advocacy group that ultimately lead the successful 'Yes' campaign during the 2013 marriage referendum (Coulter, 2007). The lack of any legal recognition for same-sex couples was also exposed, which prompted the Irish government to legislate civil partnerships in 2010 (Coulter, 2007). In Australia, in turn, some of the original litigants were instrumental in setting up the domestic advocacy apparatus that ultimately brought about policy change in 2017 (Litigant 3, Interview, 2017). At the same time, the national ban on SSM shifted advocacy to the state level, where several non-marital union schemes were introduced in the wake of the *Marriage Amendment Act 2004*.

The policy change in Canada regarding same-sex marriage is therefore directly linked to policy developments across the Anglo-Saxon countries. The ability to marry in Canada led four same-sex couples to marry and to seek recognition of those marriages in their home countries. None of these legal challenges brought about the recognition of SSM. However, the ability to file the cases seems important for understanding the national trajectories in Ireland and Australia. This begs the question to what extent this judiciary-based diffusion of same-sex marriage as a policy idea can be accounted for in the extant literature. As the subsequent sections will argue, neither the scholarship on same-sex union recognition nor the literature on international policy mobility have managed to explain this process fully, which necessitates the conceptualisation of a new mode of policy mobility

Same-Sex Union Recognition and International Policy Transfer

The experience of same-sex marriage litigation in the case countries therefore makes clear that there is a distinct transnational component to how the policy idea spread from Canada to the Anglo-Saxon world. This challenges early scholarship on same-sex union

recognition,[21] which had primarily assumed that these processes occurred in domestic policies with little input from abroad. The main narrative went as follows: Countries were expected to traverse a trajectory of liberalisation, in which a string of domestic law reform would decriminalise homosexuality and end other forms of individual discrimination before shifting to embrace and recognise same-sex couples as couples (Waaldijk, 2007). Indeed, it was often intimated that non-marital union recognition had to precede marital union recognition for same-sex couples. However, with the advent of comparative work (Paternotte, 2011; Rydström, 2011; M. Smith, 2007), it became apparent that there was an international and transnational component to SSM's global diffusion. There are three broad conceptualisations (Ayoub, 2015) that were developed to address the question of policy diffusion. While these approaches are interlinked, they are presented separately below to better illustrate how all of them struggle to reconcile the evidence presented above.

One way of conceptualising the international component to same-sex union recognition is to focus on the increased connectedness of national LGBT movements (Fernández & Lutter, 2013; Kollman, 2007, 2009, 2013; Paternotte & Kollman, 2013). Both formally and informally, national movements have exchanged strategies and ideas with similar movements in neighbouring countries. This helps explain how developments in one country have reverberated in others. For example, the embrace of same-sex marriage in the Netherlands was quickly followed in Belgium, while the idea of non-marital union recognition spread rapidly through the Nordic countries. This effect, however, goes beyond the symbolic power of policy change. More formally, national LGBT movements are akin to epistemic communities (Adler & Haas, 1992) that have developed formalised

[21] Same-sex union recognition is used as a concept distinct from same-sex marriage. The latter is solely used for the policy which allows same-sex couples to enter into the state of civil marriage. Same-sex union recognition polices, in turn, are all sets of policies that recognise gay couples *as* couples. These could include (in)formal partnership recognition schemes, civil unions, and civil marriage.

transnational advocacy networks (TANs) (Keck & Sikkink, 1998). In both instances of policy reverberating internationally, information is shared about successful messaging, political strategies, or the coordination of action. On the one hand, the epistemic community can be international in nature. For example, the European comparison of Belgium, Spain, and France highlights the importance of a like-minded and connected set of international legal scholars (Paternotte, 2011). These lawyers shared legal strategies and helped influence policymaking in all three countries. On the other hand, TANs offer a more formalised version of these epistemic communities. In Europe, the International Lesbian and Gay Alliance (ILGA) – Europe is a key organ through which information and strategies get shared across the continent. Its impact on policy change, however, has not yet been empirically determined.

Another approach to break out of the 'stubbornly nationalist' (Kollman, 2013, p. 10) analysis of same-sex union recognition incorporates supranational norms regarding same-sex union recognition into the analysis. This argument focuses on an increasingly shared reference to human rights across LGBT movement rhetoric. In particular, it underscores the repeated and increasingly forceful claim that human rights include the right to be recognised as couples for same-sex couples (Kollman, 2007). To establish this norm, however, requires entrepreneurs that help reshape the international understanding of what forms of relationship ought to be recognised by a modern state. By using their organisational platforms, these norm changers seek to persuade ever more countries to recognise same-sex couples (both in marital and non-marital form), which helps institutionalise a new norm of recognising these couples. As ever more states follow suit, it becomes vital for laggard states also to change their policies in order not to be deemed out of step (akin to the norm cascade proposed by Finnemore & Sikkink, 1998). Illustrative of this approach is the idea of formalised non-marital union recognition for same-sex couples in Europe. Unlike the more contested idea

of same-sex marriage, the idea that some form of relationship recognition ought to be available to same-sex couples seems to have become the norm in Europe. In fact, those countries that do not offer such a scheme (e.g. Greece and Italy) have been ordered by the European Court of Human Rights to create such schemes (Johnson, 2015). Importantly, however, no case argued on human rights has so far brought about same-sex marriage in Europe or the Antipodes.

While these normative theories focus on how a supranational norm infuses into national politics, a complementary and third approach focuses on the bottom-up processes that shape the potential embrace or rejection of same-sex union recognition. To some extent, this approach bridges the gap between a supranational norm and its expression in domestic policy change. In part, the emphasis is on social movements and their ability to demand action (Ayoub, 2016). The movement embraces the norm that same-sex couples ought to be recognised and uses its resources to bring about this change in a domestic policy setting. In this endeavour, it will often encounter opposition from other social movements, which in this particular case is often religiously motivated. Not only do religious interest groups offer a counter-force, but it is also religious beliefs that strongly shape individual opinions regarding homosexuality and same-sex rights (Adamczyk & Pitt, 2009; Ang & Petrocik, 2012; Baunach, 2012; Clements, 2015b; Hayes & Moran-Ellis, 1995; Langstaff, 2011). It is therefore this struggle between religious and socially conservative forces against socially liberal LGBT rights advocacy that is determining the outcome of whether and how this international norm finds expression in a nation's law. This dynamic is particularly potent in countries where the state and church have historically been in conflict (Manow, 2009). The contestation, however, goes beyond social advocacy groups and includes political struggle. In fact, much analytical focus has been placed on the impact of the political expression of Christianity on policymaking. Especially the impact of religiously affiliated parties on the

agenda-setting dynamic has found rigorous analysis (Engeli et al., 2012; Hurka et al., 2018; Knill et al., 2014; Manow, 2015).

As alluded to, all three theories run into trouble when applied to the case at hand. First, any argument based on a supranational norm is problematic, because the legal cases happened too early for an SSM norm to have been established. In fact, while same-sex union recognition is the norm in Europe today, this was far from established in the early 2000s and a consensus on SSM was even further from having been accepted. Thus, it is improbable to argue that there was any such norm that could have shaped the diffusion. The norms appealed to by all were non-discrimination and equal treatment. In fact, the British case referenced European human rights, but these norms are not explicitly about same-sex couples' rights. Second, all three approaches put strong emphasis on the political agency of advocacy groups or networks. Given that the mentioned cases were individual couples' legal challenges, it is unclear how they can be reconciled with theories that foreground collective advocacy. While some couples had support from LGBT rights groups, the legal action arose primarily from a private desire to have their marriages recognised. Thus, the established methods of explaining the global diffusion of same-sex union recognition are ill-equipped to explain the diffusion at hand.

There is ample scholarship within policy studies, however, that could offer theoretical frameworks: policy learning (Rose, 1993), policy diffusion (Majone, 1991) or policy transfer (Dolowitz & Marsh, 2000). The problem is that all of these frameworks are methodologically nationalist (Diane Stone, 2004, p. 549) in that their primary agent is often conceived to be the state and its agents. In these theories then, it is the state that identifies a policy problem and seeks 'policies, administrative arrangements, institutions and ideas in one political setting (past or present) [to use] in the development of policies, administrative arrangements, institutions and ideas in another political setting' (Dolowitz & Marsh, 2000,

p. 5). While this could be done voluntarily or through imposition (Dolowitz & Marsh, 1996) or negotiation (Evans, 2009), the primary agent in all cases is the state. In the cases here, however, the state was opposed to the transfer implied by the legal action. Rather than looking for how to recognise same-sex couples, states categorically opposed recognising each couple in the way the couple had found recognition in Canada. The transfer therefore was pursued by the individual couples and not the government, rendering these theories irrelevant. There is literature that conceptualises the international mobility of policy ideas beyond the state, of course, but it equally struggles to explain the cases at hand. In particular, the often-cited TANs (Keck & Sikkink, 1998) and epistemic communities (Adler & Haas, 1992) also fail in this case, because none of the plaintiffs were involved in an expert community of legal activists, nor did they claim allegiance to any TAN that works on same-sex couples' rights. At the same time, each couple meets the criterion of a transfer agent, because their actions were deliberate and intentional in that they sought to have their marriages recognised in a legal environment that up to that time had not offered it (Evans & Davies, 1999, p. 244).

Another point that is unique about how the idea of same-sex marriage spread across the Anglo-Saxon countries is that it was not primarily a political process. Unlike the norm-based scholarship discussed above, the pursuit of SSM in this particular set of countries occurred in the courts. This connection between the judiciary and LGBT rights is of course not novel, but it has traditionally been confined to the domestic context. North American scholarship on SSM in particular indicates that the judiciary can play a vital role in policy development (Andersen, 2006; Pierceson, 2014; M. Smith, 2008). This ability to make policy in the courts, however, should not be overemphasised, because legal opportunity structures (Andersen, 2006), the courts' embeddedness in the broader political structure (M. Smith, 2008), and limitations placed on judicial power by political culture (Pierceson, 2005)

all temper judges' policymaking. What the case of SSM in the Anglo-Saxon countries makes clear, however, is that the courts are not just a domestic venue for policy debate but also a venue for policy transfer. This goes to the point made earlier regarding the multi-institutional nature of policymaking (Armstrong & Bernstein, 2008). All of the mentioned models of policy transfer conceive of policymaking as operating in the political institutions of the state (i.e. Parliament, party politics, etc.), which is probably the most usual venue for policy transfer. However, it is essential here that this notion conceives of politics too narrowly and ignores the judiciary as an alternate political venue in which policy debates may occur. Given the consistent involvement of the courts in the Anglo-Saxon countries, it seems important to establish when and to whom this mode of transfer is accessible.

Policy Transfer in the Courts – A New Approach to Policy Mobility?

As the established frameworks for policy transfer fail to adequately explain the cases analysed here, the paper now tries to draw out to whom and under what circumstances this judiciary-based mode of policy transfer is accessible. This analysis will offer an important evolution on the domestic analyses that have already indicated the judiciary's impact on lesbian and gay rights across the West. If it is accepted that courts are a potential policy transfer venue, the question as to whether there is something unique about the agents involved in this type of transfer needs answering. As there is already a large range of possible agents spanning states to non-state actors and networks, groups, and international organisations, it is vital to establish whether the judiciary-based approach to policy diffusion is pursued by any of the established agents or whether it features a new type of transfer agent.

The first point to note in this regard is that none of the litigants involved in SSM recognition cases were state agents, nor were they acting on behalf of multinational corporations. In fact, some of the litigants' employers were adamant that they 'neither

supported same-sex marriage and/or opposed it' (Litigant 1, 2017). The agency therefore clearly occurred as a private citizen act and not as the agent of a particular group. In fact, all informants underscored the private nature of their cases. All couples stressed that fundamentally they were seeking to have their individual marriages recognised. As one litigant put it:

> Marriage is not about one person owning another person […] but it's two people coming together because they want to […] it's two people choosing to celebrate what they have and then having those 100 people from their life in their space all together and create a happy memory and get some love and energy in a world that is […]not easy most of the time (Litigant 3, Interview, 2017).

Nevertheless, all plaintiffs were aware of the larger structural injustice they were fighting. In particular, the symbolic injustice that they as a couple had suffered by the state's refusal to recognise their marriages galvanised them. To underscore the private nature, informants frequently emphasised that they had married *before* turning to domestic advocacy groups for support. As such, they did not engage in communicative cooperation at the transnational level prior to their wedding, nor did they actively pursue international links with other litigants. While some of their supporting agents were clearly integrated into TNAs, the litigants themselves cannot be seen as active participants thereof.

Furthermore, most of the litigants had not been involved in prior advocacy work and did not mention any links to advocacy groups, be they domestic or transnational. The marriages, therefore, were privately motivated. In the words of one litigant:

> And also, on practical grounds anyway we needed a marriage [… but] I think we would have found ways round the practical […]. It is the marker of inequality that is imposed upon me – [on] us that is the most profoundly hurtful (Litigant 1, 2017).

While most of the couples married opportunistically, one couple was partly strategic about their marriage. They planned from the outset to return to their home country to test their

nation's laws on SSM. Neither of the partners, however, had been involved in organised advocacy work, which blurs the line between the pre-meditated and strategic advocate and the ex-post advocacy intimated previously. This line is also blurred in a second couple that had been quite involved in domestic advocacy for LGBT rights. Nevertheless, their decision to marry was framed as a deeply personal one. They underscored that they decided within five minutes of hearing about the *Halpern* ruling that they would get married, without any intention initially of challenging laws in their home country (Litigant 4, 2017).

In trying to establish whether this constitutes a new type of transfer agent, the definitional ambiguity in the extant literature with regard to transfer agents' characteristics hampers any definitive categorisation. Nevertheless, the analysis yields three unique characteristics that mark out a new type of transfer agent: (1) none of the couples were professionally engaged in policy advocacy, domestically or internationally, prior to their legal challenges; (2) they acted primarily as individuals seeking to redress a genuinely felt case of discrimination; and (3) none of the litigants acted on behalf of the larger national LGBT movement. There were also certain enabling factors that were shared by all couples. Even though only one couple included a lawyer, all were well-educated and professionally connected dyads that occasionally had engaged in rights advocacy. In each case, some organisations supported the legal challenges, but the majority mood of the LGBT movement was either despondent or overtly hostile. Either the push for SSM was seen as '"aping heterosexuality" from the boys […] and from the lesbian feminists it was "a patriarchal institution that we don't want a part of"' (Litigant 4, 2017). One couple, in turn, was accused by a major national LGBT rights group of 'being overdemanding, rude about civil partnership, not appreciating or understanding the historically oppressive nature of marriage, [and] probably being antifeminist' (Litigant 1, 2017). This suggests that these were indeed unique agents, because they do not fit any extant conceptualization of policy entrepreneur.

In positively defining this 'judicial policy entrepreneur', some characteristics follow from the judicial venue. In countries where the courts are open to all, no degree of professionalisation is necessary in order to make an application. This means that, compared to the barriers to entry that demand professional policy entrepreneurs in parliamentary-based models, the judicial venue ought to be more widely accessible. It is nevertheless not open to anyone. What is required is legal standing – or the ability to demonstrate that a law or action directly harms the person seeking to address the court. Standing alone, however, seems insufficient in trying to explain why these couples decided to pursue landmark cases. In the words of one informant:

> We did know some other people who'd married in Canada but either they had small kids or they'd married for religious reasons primarily and – and actually that was more important to them than the civil rights issue, or they were basically closeted and didn't want to do this (Litigant 2, Interview, 2017).

This indicates that there are important personal considerations to be taken into account. As the quote hints at, the ability to manage the disclosure of one's sexual identity held back some potential litigants. Moreover, the potential impact on private family life and a desire to protect one's children seem to have been additional barriers. Finally, the individual's understanding of the problem impacted the decision to seek legal recourse. For some, their marriage was a private and primarily religious matter that did not need to be endorsed by the state. For the litigants who did bring legal action, however, the public refusal to recognise their marriages was more important. They felt a 'want to be validated somewhere' and sought the right to participate in marriage '[because] when you get married here, you're part of the history of the state' (Litigant 3, Interview, 2017). Thus, it seems to be a strong desire to challenge a perceived injustice that combines with a personal readiness to endure public scrutiny that enables this new type of agent.

While the decision to engage in a landmark case is fundamentally a private one, the case of same-sex marriage litigation in the Anglo-Saxon countries also brings to the fore further institutional characteristics. While the accessibility of the courts has already been mentioned, there are two further institutional features of note. First, all four countries are common law countries. As such, the decision of a court in one case will be seen as authoritative in deciding all similar and subsequent cases (Pierceson, 2010). This is different in civil law countries, where cases are decided on individual merit and do not impact subsequent cases. The extent to which this precedent function enables or entices legal action is unclear from these cases and should be explored further. Second, all cases relied on international law. In particular, litigants were able to argue that they had been discriminated against because their marriages would have been automatically recognised, had they been opposite-sex couples. To bolster this claim, international human rights law was also cited with Article 16 of *The Universal Declaration of Human Rights*, granting a right to marriage being most frequently referenced. This intimates that an international legal framework that either grants a particular social right or regulates the recognition of such a right transnationally seems vital for judiciary-based policy transfer. These international legal norms, however, were equivocal in their effects. In Ireland and England, for example, the consistently heteronormative interpretation of the European Convention of Human Rights (Johnson, 2015) hindered the case for same-sex marriage. In Australia, in turn, parliament acted swiftly to assert the national political will over any potential legal obligation. Thus, it is both the mechanisms and effects of applicable international law and their interaction with domestic legislative action that promise a rich avenue for future research.

A final consideration relates to New Zealand, which is the only Anglo-Saxon country in which no legal challenge to the ban on SSM was launched on the basis of a Canadian marriage. While it is possible that no qualifying couple existed, there are other reasons that

help explain the absence of such a challenge. As Keck and Sikkink (1998, p. 25) have highlighted, 'the existence of legal mechanisms does not necessarily make them feasible instruments'; rather, they need to be activated. One circumstance that seems to have foreclosed litigation as an instrument of policy transfer in New Zealand, is recent previous litigation. New Zealand stands out as the only country in which the issue of same-sex marriage had been litigated in the late 1990s. In *Quilter v. Attorney General* ([1998] 1 NZLR 523. 1), three lesbian couples sued New Zealand for refusing them marriage licences. As in Canada, the couples relied on an argument that used the nation's human rights bills (*The New Zealand Bill of Rights Act 1990* and *The New Zealand Human Rights Act 1993)* to challenge a tacitly heterosexual definition of marriage (*The Marriage Act 1955)*. The case, unlike its Canadian counterpart, was unsuccessful, thereby settling the question in New Zealand law and closing the judicial venue to activists.[22] Given the close temporal proximity of *Quilter* and *Joslin* to the changes in Canada, a further legal challenge was likely to fail, given the doctrine of precedent. A more intense study of New Zealand's experience, however, is likely to yield more precise causal links between previous litigation and attempts at judiciary-based policy transfer.

Conclusion

In summary, the empirical evidence on how the policy idea of same-sex marriage reverberated from Canada to the rest of the Anglo-Saxon countries intimates that there is a need for another way of conceptualising international policy mobility. This judiciary-based mode of policy mobility is set apart not just by its institutional venue, but also by a new type of transfer agent. In regard to the first, it has become apparent that the courts may represent

[22] Two of the couples involved in *Quilter* decided to apply to the UN Human Rights Committee in pursuit of a supranational decision (a route that had proven successful in the drive to abolish anti-sodomy statues (cf. *Toonen v. Australia*)). The complaint in *Joslin v. New Zealand*, however, was equally unsuccessful in 2002.

an institutional venue in which a policy may be imported from abroad. In particular, in cases where a potential transfer agent has legal standing and decides to bring their case, there is a chance of policy transfer if not policy change. This route of policy mobility, however, is only preliminarily explored here. More research is required into the precise impact of institutional features on each element of the transfer process. In regard to the new type of agent, it has become clear that this policy entrepreneur is less professionalised than extant conceptualisations suggest. Rather than people pursuing policy transfer as their main career, these cases revolved around couples that opportunistically engaged in transnational policy advocacy. Furthermore, there is a set of personal resources and commitments that seem to enable and motivate these agents. The precise requirements for such agents, however, are yet to be determined.

In addition to explaining the empirical record, there are important conceptual evolutions that a judiciary-based mode of policy transfer would entail. First, it promises to challenge the ready dismissal of coercive policy transfer. While the idea of state-imposed policy transfer was conceptualised early on by Dolowitz and Marsh (1996), it has mostly been dismissed outside of times of occupation (Evans, 2009). The notion that non-state actors would be able to impose policy transfer has remained underexplored because of an assumption that their limited power resources would proscribe such action. As has been noted, North American scholarship underscores that courts have unilaterally imposed new policies against the will of the elected political elites (Andersen, 2006; Pierceson, 2014; M. Smith, 2008), which is the very definition of coercive policy transfer (Tews, 2002, p. 1181). This means that, theoretically, judiciary-based policy transfer could offer a coercive form of policy transfer to non-state actors. While this has not been observed in the case of same-sex marriage, the European Court of Human Rights' decisions to force Italy and Greece to legislate non-marital recognition schemes for same-sex couples does support this theoretical

expectation.[23] However, it is noteworthy that in both Australia and Ireland the lawsuits galvanised what would later become the advocacy groups that brought about SSM. Thus, while it may not always be a form of coercive transfer, litigation appears still to be a potent but undertheorized mechanism of policy mobility.

Second, a more explicit study of judiciary-based policy transfer promises to remedy the rather myopic understanding of politics in contemporary scholarship. Given the dominance of political scientists in the literature advancing policy transfer, it is important to realise that the policymaking itself is multi-institutional. Therefore, it is vital to conceive of policymaking more broadly and include institutions beyond the parliamentary ones in our analysis. Doing so also brings to the fore a new set of transfer agents. The idea that a same-sex couple should be able to marry was diffused from Canada not by collective agents or by professional policy entrepreneurs, but rather by a set of individual couples who felt that they could and wanted to highlight the exclusion of same-sex couples from marriage in their home countries. This new type of transfer agent ought to be studied more explicitly to help understand under what circumstances they are able to engage in policy transfer.

While the evidence advanced in this analysis is far from conclusive, it offers important areas of future research. In regard to lesbian and gay rights, in particular, the mechanism could prove fruitful if applied to Latin America, where judiciary-based advocacy for LGBT rights has been prevalent. At the same time, a broader set of countries would also allow the assessment of how limited this mode of policy transfer is to common law countries. In particular, it would help test whether it is the precedent function described above that is pivotal for this from of policy transfer to be pursued. At the same time, the importance of other legal institutions could be assessed. Based on the analysis presented here, international

[23] *Valliantos and Others v. Greece 2013* and *Olliari and Others v. Italy 2015*.

and regional human rights law, domestic non-discrimination statues, and laws relating to the recognition of overseas marriages seem promising avenues for research. Finally, more qualitative work should be done to understand the new policy transfer agents. This should focus on both actual litigants and those with legal standing who did not pursue legal action. This would help better assess which resources and commitments are required for such agents to come forward.

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4. Same-Sex Union Recognition in Australia: A Test for the Morality Policy Framework

The analysis of morality policy has increasingly spread from the United States to include continental Europe. In particular, scholarly attention has focused on countries with a partisan state-church conflict in Europe. This has led to an unevenly developed theoretical framework. This paper critically engages with the extant theory through a case study of same-sex union recognition in Australia. It confirms the importance of distinguishing between latent and manifest morality policy, establishes the applicability of traditionalist and progressive frames, and foregrounds the importance of political institutions for morality policymaking. Its findings draw attention to important future avenues of research to remedy the uneven theoretical development of the morality policy framework.

In late 2017 gay and lesbian Australians and their allies gathered all over the country, awaiting a momentous announcement: the result of the postal vote on same-sex marriage (SSM) called by Prime Minister Malcolm Turnbull. The vote marked the apex of a 13-year wrestle among the Australian political class over whether or not to legalise SSM. In the end,

the government decided to put the question to the people through a postal survey, but even doing that was marred in controversy. While the government pursued a national referendum on the question, the opposition parties blocked such a poll twice in the Senate. In order to circumvent this roadblock, the government refashioned the vote into a postal survey, which did not require parliamentary approval. In so doing, the government found a way to survey the Australian electorate on the question of same-sex marriage and ballots were mailed, returned, and counted. The Australian electorate had finally provided the sword to cut through the Gordian knot that had formed around same-sex marriage in Australia. Within weeks a bill legalising same-sex marriages was passed, and the first same-sex marriages were celebrated in 2018.

The political maelstrom surrounding same-sex marriage started in 2004, when the Commonwealth banned SSM domestically and proscribed the recognition of overseas same-sex marriages. The *Marriage Amendment Act 2004* enjoyed bipartisan support and marked Australia out as one of a few countries that banned SSM legislatively. Even though this ban endured for over a decade, the Commonwealth still increased the rights afforded to same-sex couples in 2008. Through a packet of reforms, the then Rudd government changed over 85 pieces of Commonwealth law to ensure the equal treatment of same-sex and opposite-sex de facto partners.[24] This set of reforms significantly increased the rights available to same-sex couples and meant an increased recognition of these unions by the state. This begs the question why the reform of de facto partnerships was so readily achieved while over 20 attempts at legalising same-sex marriage failed.

[24] A de facto relationship is a non-marital relationship recognition available in Australia. The federal government grants de facto couples rights and responsibilities if they live together on a genuine domestic basis and are not related. While some states have offered more formalised non-marital unions, de facto status was the sole way the Commonwealth recognised same-sex couples till 2017.

It is striking how differently same-sex union recognition policies fared in Australia between 2004 and 2017. While the 2008 reforms were politically straightforward, most attempts at legalising same-sex marriage were frustrated: bills were either denied a second reading, voted down, or expired with the dissolution of parliament. One particularly promising attempt, however, occurred in 2012, when debates in both the House and the Senate progressed to a full second reading. This attempt was ultimately unsuccessful, but is often seen as one of the critical episodes in Australia's political engagement with SSM.

This article uses the experience of same-sex union regulation in Australia to understand the case of SSM, but especially to refine our understanding of what is often called 'morality policy' (Engeli et al., 2013; Kalyvas & van Kersbergen, 2010; Knill, 2013; Studlar et al., 2013). The morality policy framework has developed a rich theoretical and empirical debate regarding morality policymaking, both in the United States and in continental European countries that feature a church-state conflict in their party system (Kalyvas & van Kersbergen, 2010). The latter are referred to as 'religious' in the two-world model (Engeli, Green-Pedersen, & Larsen, 2012) and are contrasted with 'secular' countries where such a conflict is absent. While the dynamics surrounding morality policies in the US are well analysed, the dynamics in other secular countries remain underexplored. Australia offers a critical case study (Eckstein, 1992) for the morality policy framework, because the country is clearly part of the secular world in terms of the two-world model (Engeli et al., 2012), but its repeated and unsuccessful attempts at legalising same-sex marriage are unusual and hard to explain within the extant framework.

The analysis presents a comparative case study of two policy episodes regarding the recognition of same-sex couples in Australia. In particular, the article seeks to understand why the substantive increase in same-sex couples' rights through de facto recognition was achieved so much more expeditiously than the many attempts at same-sex marriage

legalisation. The article focuses on a 2012 attempt at legalising SSM and compares it with the political circumstances of the changes to de facto union recognition in 2008. The two policy episodes are treated as comparative case studies and are chosen for their high degree of comparability: both concern an instance of policymaking during a Labor government and occurred in the Commonwealth Parliament. The analysis marshals contemporary documentary evidence, recorded parliamentary debate, and original interview data to contribute to the morality policy framework. The interviews were conducted in Australia in late 2017 and consisted of five informants stemming from politics, advocacy, and the civil service. The analysis advances the morality policy framework in two important ways. First, it affirms the importance of distinguishing between latent and manifest morality policies. The distinction is shown to be consequential in circumscribing the degree to which policy proposals can be strategically framed by the executive. The ability to frame morality policy, in turn, is shown to matter for the political dynamics that accompany a proposed morality policy. In this, I argue that latent morality policies enable the depoliticization of the moral conflict within a policy, which helps the privatization of the policy conflict (Schattschneider, 1960). Manifest morality policy, however, cannot be privatised and its morality-based debate is likely to foreground intra-party conflict rather than precipitate partisan conflict in countries with large umbrella parties.

In presenting this argument, the article first canvasses the literature on morality policy and underscores the morality policy framework's weakness regarding secular countries other than the United States. It goes on to present the history of same-sex union recognition in Australia between the country's ban of SSM in 2004 and its legalisation in 2017. Its legislative record regarding same-sex union recognition will underscore the need for further scrutiny, given that it confounds theoretical expectation. In order to make sense of this empirical pattern, the paper engages with the framing of two morality policies: the

reform of de facto recognition and the attempt at legalising same-sex marriage in 2012. This analysis will centre upon both framing decisions and institutional influences of parliamentary agenda setting and policy legitimation dynamics. Before outlining future avenues for research in the area of morality policymaking in 'secular' countries, the concluding section summarises the article's main findings.

Morality Policy and Same-Sex Union Recognition

Given the particular nature of same-sex union recognition, the policy lends itself to an analysis on the basis of the morality policy framework. Even though the literature has not produced a clear definition of what morality policies are (Tatalovich & Wendell, 2018), the issue of same-sex unions has repeatedly been analysed in terms of this framework (Engeli et al., 2012; Heichel et al., 2013; C. Mooney & Schuldt, 2008; M. Smith, 2002; Studlar, 2001). The framework's application in countries such as Australia, however, has been infrequent. Other than in the US, the framework has hardly been applied to countries without a denominational party in their party system, which has left the framework's theorising for such country cases underdeveloped. Thus, this section argues that the morality framework is the most apt framework for analysis to understand the case at hand and in turn that the case helps advance the framework.

Morality Policy as a Concept

The concept of morality policy evolved out of a perceived inadequacy of extant theorising on explaining policy that was not primarily centred upon economic redistribution across classes. In particular, the framework provided by Lowi (1964) around redistributive policymaking could not capture the totality of policies that were debated in Western democracies (T. A. Smith, 1975). Issues such as gun control that were primarily argued from first principles were especially undertheorized, spurring work to better understand the policy dynamics underpinning these problems. An initial distinction was established around

whether or not there was a conflict of values. Murder, for example, is broadly rejected and its punishment hardly controversial. This type of policy that penalised broadly condemned action was captured by the idea of 'politics of sin' (Meier, 1994). Not all policies that entail a value conflict, however, share a broad societal consensus around the morality of the action and the need for its regulation. Same-sex marriage is one such example, lacking a broad societal consensus regarding its morality and consequentially occasioning vociferous debates about its desirability as a policy and legitimacy as a societal institution.

While there is a broad agreement that morality policies relate to political contestation over values, a positive definition of either morality policies' characteristics or subject matter has been elusive. As Knill (2013) has summarised, there are three different ways in which to conceive morality policy: as a policy type, as a policy frame, or as a set of pre-defined policies. In early analyses, which focused on the US, morality policies were primarily seen as a policy type. They were thus characterised by a lack of economic interest and a strong emphasis on values (C. Mooney & Lee, 1995). They entailed their own type of politics because of their grounding in conflicting values. The argument was made that morality policies were far more salient than more technical policy areas, because their non-technical nature made them prone to capturing the attention of both politicians and society at large (C. Z. Mooney, 2001). The ensuing debate, however, was hard to settle because the moral nature of the debate meant it was largely impervious to evidence. In short, morality policy as a policy type contrasts morality policymaking with 'instrumental' thinking on policymaking (Lowi, 2011) and defines morality policy as largely regulatory of individual behaviour on the basis of societal morality judgements (Tatalovich & Daynes, 2011).

The same value conflict is acknowledged by those seeing morality policy as largely a framing issue. They differ from policy type proponents, however, in underscoring the need to present a problem as a morality problem. While the policy-type understanding assumes

that morality policies will automatically be recognised as such, the framing approach makes this process contingent on agency. Mucciaroni (2011) has underlined that this framing process is strategic. Rather than accept a dichotomous understanding of policy problems, this approach sees policies as arranged along a spectrum, from clearly morality to clearly instrumental policy. This leaves a swathe of 'hybrid' policies that combine a value conflict and an instrumental policy problem. These policies in particular are receptive to strategic framing by political agents who may wish to encourage one mode of debate over the other.

The final understanding of morality policy evolved with the concept's migration to the European context, where scholars were much more categorical in their definition of morality policy (Tatalovich & Wendell, 2018). In this most recent iteration, morality policies are still seen as encapsulating a value conflict (see C. Z. Mooney, 2001), but they are restricted to questions of death, marriage, and reproduction (Engeli et al., 2012, p. 26). This definition is much more assertive than previous understandings and restricts the range of policies that were analysed. The emphasis of analysis also shifted when the concept migrated to the European context. In particular, agenda setting and the impact of institutional factors such as the political party landscape were underscored (Hurka et al., 2018). In the two-world model, which categorises countries as belonging to a 'secular' or 'religious' world, Engeli et al. (2012) set up different dynamics of agenda-setting, predicated on the existence or absence of a religiously affiliated party. This European model thus defined morality policies by their content and sought to understand how political conflict around them is structured institutionally (Studlar & Cagossi, 2018).

While morality policy as an approach is clearly multifaceted, its attention to value conflict makes it ideally suited to studying policy issues such as same-sex union recognition. Moreover, the various understandings of morality policy can be integrated by distinguishing among three broad types of policy (Knill, 2013; Mucciaroni, 2011). First, there are non-

morality policies that are detached from, and cannot be presented as, a value conflict. As such, they are akin to 'instrumental policy', which is meant to solve operational problems or to achieve a set of material outcomes (Lowi, 2011). Second, there are manifest and latent morality policies. In the case of manifest morality policy, the value conflict is inescapable. These policies resonate with core values of the polity and galvanise society-wide debate, and are largely immune to evidence-based argumentation. The political institutions that moderate debate and aggregate disparate interests will ultimately determine the degree to which policy change is observed (Knill, 2013). Third, latent morality policies are akin to hybrid policies (Mucciaroni, 2011) and contain both instrumental and value-based conflicts. The strategic framing by political agents therefore determines which political dynamics occur, where the public appeal of a value-based conflict must be balanced against its tendency for intractability. Thus, it is often those trying to prevent policy change that adopt an overt morality-based argument, in the hopes of socialising the conflict and stalling change (Schattschneider, 1960).

Morality Policy in the Secular World

The understanding of value-based conflict and its impact on policymaking dynamics has thus advanced substantially. Nevertheless, the theoretical framework is unevenly developed. While the dynamics in the US and the continental European context are well understood, the understanding of morality policymaking in secular countries is underdeveloped. This lacuna becomes even more pronounced when the extraordinary nature of the US within the secular world is acknowledged (Studlar & Cagossi, 2018). Recent work by Hurka et al. (2018) engages critically with this imbalance and develops the two-world model to incorporate more of the secular world. Specifically, the authors demonstrate that the two-world model may be too dichotomous and collapse two important parameters: the presence of a state-church conflict and the party-political engagement with value conflicts inherent in

morality policies. This distinction is necessary to account for countries where morality policy is debated along party lines without there being a religious party (e.g. France's debate regarding SSM), or instances where the presence of a nominally religious party ceased to be consequential for morality policymaking (e.g. Germany's legalisation of SSM). Hurka et al. (2018) have then diversified the worlds of morality policymaking by creating two more types of countries: the 'traditionalist' and 'unsecular' worlds, that is, four worlds in all.

The distinction between policy dynamics during agenda setting and policy legitimation is an important innovation to the original two-worlds model, which struggled to incorporate the policy process beyond agenda setting. The four-worlds model is better at incorporating both dynamics. In the two original worlds, the presence of a denominational party is consequential at both stages. In the religious world, electoral competition makes it likely that an increasingly secular electorate will defect from parties whose policy stances are guided by dogma. This creates an incentive for competitor parties to keep such controversial items on the political agenda (Engeli et al., 2012; Kalyvas & van Kersbergen, 2010). Policy change, in turn, is only likely when the institutional decision-making process is captured by a party or alliance of parties whose policy preference is different from the status quo (see for example Paternotte, 2011). In secular countries, in turn, the two-world model assumes there is no clear electoral incentive to bringing morality policy to the fore. Hurka et al. (2018), however, have demonstrated in the case of France that there can be stiff party competition on morality policy, even in countries where no political party is overtly religious. In these 'traditionalist' countries there is no formal state-church conflict, but morality policy precipitates a conflict along party lines. The inverse is the case in 'unsecular' countries. Even though a state-church conflict is represented in the party landscape, the persistence of a religious party is politically irrelevant.

Same-Sex Union Recognition in Australia – A Test for the Morality Policy Framework

Australia's engagement with same-sex union recognition defies theoretical expectation (see Figure 6 on page 112). The country is classed as 'secular' in the two-world model, which leads one to expect infrequent and sporadic engagement with morality policy. Figure 6, however, illustrates that between 2004 and 2017[25] Australia repeatedly and continuously had parliamentary debates about same-sex marriage. This is in part why Hurka et al. (2018) have classed Australia as a 'traditionalist' country. While they are right in ascribing Australia to the set of countries without a state-church conflict, their assessment that the policy was debated along party lines is mostly a function of their focus on 2013. This partly underplays the long-standing commitment of the Australian Greens to SSM and overplays the Australian Labor Party's (ALP) commitment to the policy. The ALP had been instrumental in passing the country's legislative proscription of SSM in 2004, and it only changed its party platform in support of a free vote on SSM in 2011 (Taylor, 2013).

The puzzle at the core of this paper relates to Australia's engagement with same-sex union recognition more broadly. Australia's early adoption of non-marital union recognition meant recognition of same-sex couples as early as the 1970s. The recognition afforded through the *Family Law Act 1975*, however, was deemed wanting by many same-sex couples. It nevertheless became the locus of much lesbian and gay rights activism in the country after the *Marriage Amendment Act 2004*, which settled the question on SSM. In particular, the lesbian, gay, bisexual and transgender (LGBT) movement focused their attention on state-level formal relationship recognition, which helps explain why registered

[25] The country legislatively banned SSM in 2004. It ultimately passed a bill overturning the ban and legalising SSM in 2017.

partnership schemes kept spreading in the early 2000s and 2010s.[26] However, the issue of federal recognition of same-sex couples re-emerged in the run-up to the 2007 election.

The country's Human Rights and Equal Opportunities Commission (HREOC) in 2007 recognised the importance of de facto relationships for same-sex couples and their relationship with the Commonwealth government. The Commission therefore launched an investigation to ascertain whether same-sex and opposite-sex de facto couples were treated equally in regard to federal de facto legislation (Human Rights and Equal Opportunities Commission, 2007). Its analysis focused in particular on financial and work-based entitlements and found that discrimination against same-sex couples was likely because relevant legislation referred to 'spouse' and 'partner'. Given the ban on SSM, this language based on marital status often meant that same-sex couples were excluded, which equated to a real and material disadvantage. While the HREOC catalogued a range of offending legislation, it suggested that most inequality could be overcome through linguistic changes alone.

The timing of the report made it possible for lesbian and gay rights advocates to centre their advocacy during the federal election on the HREOC findings. In fact, the report was used to commit the ALP to an audit of federal legislation for further discrimination in the case that the party won the election (Franklin, 2007; Wright & Nicholson, 2007). After a sweeping election victory, the new ALP government kept its promise and commissioned a sweeping audit of Commonwealth law that went beyond the entitlements covered in the HREOC's report. In the end, the audit found legislation in taxation, superannuation, social security, health, aged care, veterans' payments, workers' compensation and employment

[26] The following states passed formal relationship registration schemes for same-sex couples: Tasmania (2004), Victoria (2008), New South Wales (2010), Australian Capital Territory and Queensland (2012), and South Australia (2017).

entitlements law in need of amendment ("Government removes same-sex discrimination," 2008). On the basis of the audit, it introduced two bills to Parliament aiming to change the offending legislation and diminish inequality between same-sex and opposite-sex de facto couples. Both pieces of legislation managed to pass all parliamentary stages quickly and became law without much opposition.[27]

In sharp contrast to de facto recognition, same-sex marriage presented an intractable policy problem for Australian politics. The repeated attempts at legalising same-sex marriage kept the issue alive and on the political agenda. However, the impact of these bills should not be overstated. The majority of them either were defeated or lapsed at the end of the parliamentary session. Thus, the political reality was more akin to the theoretical expectation, in that most bills were tabled but rarely debated. Moreover, Australia's political system gives the government of the day strong executive power, which includes the power to moderate the political agenda (Dörring, 1995; Rasch & Tsebelis, 2011; Tsebelis, 2002). Thus much of Figure 6 is explained by the fact that while private member's bills allow politicians to bring an issue to the floor (Marsh & Read, 1988), these bills usually fail without government support. Both factors combine to explain much of the country's engagement with SSM, as both Kevin Rudd (2007–2010) and Tony Abbott (2013–2015) had personally ruled out supporting any changes to the country's ban on SSM. This leaves the period under Julia Gillard (2010–2015), who had supported the ban on SSM but was less vocal and determined in opposition than other party leaders. Moreover, it was under her premiership that both Houses of Parliament allowed a second reading of two SSM bills.

[27] The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008* passed all stages in under three months and with a comfortable majority. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008* was equally strongly supported and both bills passed by November 2008.

The analysis now goes on to engage in a comparative case study that focuses on the political dynamics around two highly comparable policy episodes. It compares the 2008 reforms of de facto recognition to the attempt at legalising same-sex marriage in 2012. The latter is chosen because it uniquely entailed debates in both the Senate and the House of Representatives. Moreover, the political realities of the time presented a viable path to legalisation through the combined majority of ALP and Green lawmakers. Finally, the analysis focuses on the Commonwealth Parliament because it has sole competence of marriage policy in Australia. While states had pioneered non-marital same-sex union recognition, marital recognition could only be legalised at the Commonwealth level.[28] Through this comparison, the article seeks to critically engage with the extant theoretical framework for morality policymaking in states that lack a denominationally affiliated political party.

Latent and Manifest Morality Policies in the Secular World

In order to develop an understanding of morality policymaking in secular countries, this section answers two important questions. First, it tests whether the different framings of the two policy proposals were consequential in shaping the political dynamics. Second, it tests whether the political dynamics confirm Australia's place as a 'traditionalist' (Hurka et al., 2018) or 'secular' (Engeli et al., 2012) country and how its political institutions shaped the debate around same-sex marriage in 2012.

Framing Politics – The Impact of Policy Framing on Political Dynamics

In trying to explain the success of the 2008 reforms, there are circumstantial factors that helped the government beyond any framing effort. Importantly, the bills to change de facto

[28] In 2013 the Australian Capital Territory legalised SSM within its territory. However, the Commonwealth challenged the law as unconstitutional. In its ruling, the High Court sided with the federal government as the constitution clearly attributes it sole regulatory power over matters of marriage.

recognition were introduced shortly after the election. This gave the government a strong public mandate and capitalised on the diminished opposition. Given the landslide ALP victory, the Liberal-National opposition was more concerned with reorganising itself and positioning itself for the next election than opposing a majority government delivering a clear election promise (Former Coalition Staffer, Interview, 2017). The diminished capacity of the opposition, however, cannot wholly explain the success of the 2008 reforms. An important aspect of its political strategy capitalised on the fact that non-marital union recognition was a latent morality policy (Knill, 2013).

The non-marital recognition of same-sex couples had two key components: an instrumental policy to end material discrimination and a value-based pursuit of remedying the symbolic injustice of incomplete recognition of same-sex couples. The government made clear early on that it saw the legislative project as the former. In order to minimise morality arguments, the government explicitly precluded changes to the accessibility of adoption and artificial reproduction for same-sex couples. This excluded manifest morality policy issues from the debate and helped minimise opposition push-back (Maley, 2007). Rather, the proposed legal changes zeroed in on and reiterated the HREOC's claim that it was linguistic ambiguity that excluded same-sex couples from benefits that opposite-sex de facto couples accessed easily (Human Rights and Equal Opportunities Commission, 2007, p. 61). This focus on language-based discrimination allowed the government to remedy material discrimination towards same-sex couples without having to contemplate changing the country's policy on SSM (McClelland, 2008).

The government's framing was broadly accepted. The leader of the opposition concurred that 'to abolish unfair discrimination against same-sex partners is not in itself to devalue the institution of marriage' (Nelson, 2008). In wider society, however, the argument was less accepted. FamilyVoice Australia (2008), the Australian Family Association (2008),

and the Australian Christian Lobby (2008) feared that any upgrading of non-marital union recognition inevitably devalued the status of marital unions. The limited impact of these fears, however, indicates that the vocal commitment to the *Marriage Amendment Act 2004* successfully defined the reforms to de facto recognition as a question of material discrimination. Thus, a combination of a strong public mandate interacted with a carefully calibrated and mutually accepted instrumental policy framing to assure de facto recognition for same-sex couples proceeded without political controversy.

In sharp contrast to de facto recognition, the same strategic definition of the policy problem was unavailable in the case of same-sex marriage. Unlike non-marital union recognition, marital recognition is a manifest morality policy (Knill, 2013) and as such cannot escape debate via value conflict (Engeli et al., 2012; Heichel et al., 2013; C. Mooney & Schuldt, 2008; M. Smith, 2002; Studlar, 2001). For instance, unlike non-marital union recognition, SSM entails debate on the issue of adoption and artificial reproduction rights for same-sex couples. This, combined with the inherently moral nature of this historically religious institution (Coontz, 2006), made a value-based political conflict inescapable. Unlike in 'religious' countries, however, the debate could not focus on the appropriate place of religion in a modern state; rather, it focused on progressive and conservative notions of marriage (see the dynamics illustrated by Hurka et al., 2018).

In fact, Australia's secularity was rarely debated overtly and instead parliamentarians focused on whether policy should strive to moderate societal behaviour or adapt to it.[29] The underlying value conflict therefore found articulation in debates over

[29] While Australia's secularity was widely accepted, some MPs made religious comments. Specifically, they voiced concern over 'de-authorising [the] Judeo-Christian influence in [Australian] society' (Boswell, 2012) through the state's unwarranted interference with the essentially religious institution of marriage (Fierravanti-Wells, 2012).

Australia's progressive nature as the country of the 'fair go' versus its need to safeguard a historically important and unique societal institution for the sake of that society's future.

In regard to the former, those opposed to SSM constructed marriage as a foundational and unchanging institution: it had been 'in the whole of history [… a] relationship between a man and a woman' (Brandis, 2012, p. 6978) and was primarily procreative in nature (Bilyk, 2012). In particular, the close association between marriage and child-bearing and -rearing was used to underpin the rationale for excluding same-sex couples. In fact, to traditionalists same-sex marriage 'imping[ed] on the rights of children' (Bishop, 2012, p. 6994) and in particular 'the right of the child to be raised in a home with a husband and a wife in a long-term loving relationship' (Back, 2012, p. 6986). This concern with procreation and children was reiterated by some churches, which saw marriage as 'the main place in which children are socialised to take their place in the wider community' (Australian Catholic Bishops Conference, 2012, p. 2), which in turn made marriage a public good the state should safeguard (Australian Christian Lobby, 2012, p. 4).

This conservative faction also discounted the need for further policy action. In fact, they felt that 'equal rights for same-sex people [… had been] secured four years ago when the parliament passed the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws) Bill*' (Brandis, 2012, p. 6978). As same-sex unions could not be equated to opposite-sex ones, to treat them equally would 'do both injustice' (Bilyk, 2012 p. 7314). Traditionalists especially feared that similar equality and 'fair go' arguments would be used to '[force] the inclusion of polygamous marriages' (J. Murphy, 2012, p. 2184) and more broadly that traditional values would come under further pressure, as had been the case in other countries (Robert, 2008).

The traditionalist frame, therefore, united socially conservative politicians and churches, which argued on the basis of an immutable understanding of marriage that was

strictly heterosexual, vital to the proper socialisation of children, and which would be endangered by the inclusion of same-sex couples. This frame was countered by a progressive coalition of lesbian and gay rights advocates, socially liberal parliamentarians, and more liberal religious denominations. This progressive alliance framed both the institution of marriage and the impact of same-sex couples' admission to it in diametrically opposed terms to the former.

To progressives, marriage was primarily a secular institution that was increasingly unpopular and primarily contracted without religious celebrants (Perrett, 2012). Thus, it was a secular institution that was in need of modernisation. They underscored that 'marriage as an institution [had] proven flexible in reflecting the norms of the day' (Wong, 2012) in the past and cited the introduction of no-fault divorce as one such evolution. Thus, the reality of same-sex couples having families that included children (Boyce, 2012) made it paramount that the law be modernised to afford them the same legal protection (Siewert, 2012, p. 7001). In fact, the raising of children was seen as a societal effort that included parents as well as institutions as far-ranging as the courts, boarding schools, and siblings (Brodtmann, 2012).

For those who saw marriage as malleable, the exclusion of same-sex couples from it also became a question of discrimination. Supporters reiterated the notion of 'relationship apartheid' first suggested by the Gay & Lesbian Rights Lobby (2012), which saw 'same-sex couples being excluded from the opportunity to choose the category of relationship that we generally regard as representing the greatest degree of love and commitment [as] a form of pure discrimination on the basis of sexual orientation' (Parke, 2012, p. 6921). This also directly challenged the claim that full equality had been achieved in 2008. In fact, it underscored the superior moral and symbolic recognition that comes with marriage.

In analysing the framing of the policy issue, it becomes clear that the distinction between latent and manifest morality policy is consequential. The debate around non-marital

union recognition could be framed in an instrumental manner, which minimised both societal and political opposition. In fact, the strategic decision to skirt adoption and artificial reproduction rights in the 2008 reform was paramount to the bills' smooth passing; it minimised opposition scrutiny and muted socially conservative objections from within the ALP. The debate around marriage, however, could not be strategically framed and had to be debated on first principles. As Australia does not have a clear state-church conflict, this debate occurred along similar patterns as identified by Hurka et al. (2018). In particular, the two factions differed on the conceptualisation of marriage and the degree of equality already achieved by same-sex couples. Traditionalists combined an argument of material equality with a portrayal of marriage as incompatible with same-sex couples. Progressives, in turn, foregrounded the malleability of marriage and the discrimination suffered by same-sex couples and their children because of their exclusion from marriage. This created a dynamic whereby neither side accepted or engaged with the opposing faction's framing of the policy problem or evidence. In short, the debate was not about finding a workable compromise so much as each side stating its case as vehemently as possible.

'Traditionalist' or 'Secular' – The Impact of Political Institutions on Morality Policymaking in Australia

The political dynamics surrounding same-sex marriage in Australia therefore seem to correspond to the wider assumption of how issues are framed in 'traditionalist' countries. The party-competition dynamics, however, are more difficult to reconcile with this model. Hurka et al. (2018) submit that in 'traditional' countries the morality policy issue will be debated along party lines, but this is not what was observed in Australia. Thus, this section seeks to explain the policy dynamics on a partisan level, both as it relates to the pattern depicted in Figure 6, and to the 2012 episode more specifically.

First, the frequent submission of SSM bills by the Australian Greens seems akin to the party-political competition theory proposed in the religious world (Engeli et al., 2012; Kalyvas & van Kersbergen, 2010). The tabling of a bill required the two major parties to take a stance on the policy issue. In the case of the Liberal-National coalition, their repeated embrace of marriage as heterosexual often reinforced the perception that they were rigid in their policy stance, a point that became increasingly problematic as public opinion grew more supportive of SSM (IPSOS, 2013). For the ALP, there were even more serious electoral concerns. Like many left parties, it had to bridge a divide between socially conservative immigrant and blue-collar communities and more progressive urban constituents (Callaghan, 2000). In particular, its reliance on several marginal seats that leaned towards traditionalism (Senator, Interview, 2017; LGBT advocate, Interview, 2017) made the challenge by the Greens damaging. By forcing the ALP to reiterate its support for the *Marriage Amendment Act 2004,* the Greens could hope to gain support from Labor's progressive urban voters (Bramble & Kuhn, 2009) and bolster their position in Parliament. Thus, there were clear party-political incentives for the Greens in particular to keep the policy issue in the public debate.

As has already been indicated, however, most of these bills were defeated in whipped votes, expired at the end of parliamentary sessions, or were withdrawn. This dynamic is more closely aligned to the political dynamics presented by Engeli et al. (2012) for 'secular' countries. Parties are expected to be reluctant to take up a position on moral policy issues because they cannot easily be articulated in the framework of established right-left fault lines. Thus, it is theorized that the use of agenda-setting power and control over parliamentary time acted to empower successive governments to skirt debate regarding same-sex marriage (Dörring, 1995; Rasch, 2014; Rasch & Tsebelis, 2011; Tsebelis, 2002). In particular, the succession of personally unsupportive Prime Ministers meant little hope

for most bills, given the strong nature of parliamentary Prime Ministers in Westminster systems (Rhodes, Wanna and Weller, 2009). The degree to which Prime Ministers can implement their personal policy priorities, however, is tempered by their electoral success, the campaign promises, and the degree to which they are supported by their parties. Thus, a Prime Minister who manages to combine a broad public mandate with a strong party mandate (Strangio, Hart, & Walter, 2013) can be considered especially strong.

The dynamics in 2012, in part, can be explained by the nature of political mathematics. The Gillard government emerged with a minority government, which was only the second minority government in Australian history since the 1940s (Suri & Lofgren, 2010). It had to rely on independent and Green parliamentarians in order to stay in power (Suri & Lofgren, 2010), which limited the Prime Minister's ability to pursue her personal policy priorities. Moreover, Gillard's position as leader was tenuous from the start. She came to the helm of the ALP through a leadership spill in which she relied heavily on socially conservative colleagues rather than through a party-wide election (Senator, Interview, 2017). In part, she garnered their support through her strong commitment not to change marriage policy, a commitment she reiterated in the 2010 general election ("Australian PM Julia Gillard: Gay marriage against my upbringing," 2011; Cullen, 2012; "Gillard against gay marriage," 2010). While she was committed to her stance on SSM well beyond her years as Prime Minister (Hatch, 2015), her relative weakness within the party became apparent in 2011, when the socially liberal faction supporting same-sex marriage managed to change official ALP policy to embrace a pro-SSM stance (Senator, Interview, 2017). In order to get this motion voted on, however, the liberal faction had to compromise and conceded to a free vote for ALP MPs rather than binding all members of the Parliamentary Labor Party to support any future SSM bill. In particular, the institutional power of the Shop, Distributive and Allied Employees' Association (SDA) and its socially conservative leaders (Senator,

Interview, 2017)[30] tilted the balance in favour of traditionalism within the ALP and helps explain its limited embrace of same-sex marriage.

These internal party divisions also came to the fore when the 2012 bills were debated. The Gillard government honoured its commitment to a free vote on the matter. This stance, however, was akin to defeating the legislative proposal, because, in the face of a united opposition and limited support within the ALP benches, there were not sufficient votes to carry the bill in either chamber. The split within the Labor benches, in turn, mirrored that seen at conference, with socially conservative MPs who helped Gillard's leadership challenge opposing the bill.[31] In an attempt to save the bill, socially liberal ALP members called upon the opposition to relax its opposition, but this was to no avail.

On balance, the partisan engagement with same-sex marriage in Australia blends elements of the 'secular' and 'traditionalist' worlds: while the politics in the Senate seem akin to the latter, the House of Representatives' dynamics conform to the dynamics expected in 'secular' countries. In the Senate, the Australian Greens had an important venue in which to table SSM bills for electoral reasons. By keeping the debate alive, the Greens could draw attention to both the ALP's and the Liberals' opposition to SSM. Given that public opinion was shifting in favour of SSM (IPSOS, 2013), the Greens' stance promised electoral gains, especially among the urban elites that often voted for the ALP. In the House of

[30] Joe de Bruyn, its leader, was particularly vocal in his opposition. As 'the only Dutchman who doesn't like dykes' (Gough Whitlam in Latham, 2005, p. 297), his opposition was vociferous. He warned that a platform change would hurt the ALP in his 2011 conference speech (Coorey, 2011) and continued his opposition to SSM throughout his tenure at the SDA, repeatedly commenting that 'marriage started with Adam and Eve' and that it was 'objective truth' that gay couples could not marry (Millar & Schneiders, 2015). The SDA only changed its official stance on SSM after de Bruyn's departure in 2015.

[31] Senator Farrell was a long-term state secretary of the Shop, Distributive and Allied Employees' Association, and was a key power broker in the ALP's socially conservative wing. He and Senator Feeney led the challenge to Kevin Rudd and convinced Julia Gillard to run (Coorey, 2010).

Representatives, in turn, more 'secular' dynamics were observed: subsequent governments used their control over the parliamentary agenda and timetable to stifle debate on SSM bills. The minority government after the 2010 election was less able to do so. In addition, its leader had a tenuous backing in the wider and parliamentary party, given her accession to the helm of government through a party spill. The absence of a strong leader did lead to a change in official ALP policy, but the degree of change was minimised by a strong socially conservative faction.

Conclusion

This article was motivated by the uneven theorisation of the morality policy framework within the extant literature. While much analysis has focused on the US and continental European countries, the analysis has rarely included 'secular' countries or non-European polities. A notable exception to this is Hurka et al. (2018), who have demonstrated that morality policy may be a highly salient partisan issue, even in countries without a politically relevant state-church conflict. To further this evolution of the morality policy framework, this article engaged with same-sex union recognition in Australia as a critical case for the morality policy framework. In short, the Antipodean nation is devoid of a religiously affiliated party, and rarely allowed debate on same-sex marriage, but it passed sweeping reform to non-marital union recognition for same-sex couples without controversy. Further, while parliamentary debate on SSM was rare, bills seeking to legalise same-sex marriage were numerous and frequent but unsuccessful.

To explain the different political dynamics surrounding marital and non-marital union recognition, the article develops the distinction between latent and manifest morality policy (Knill, 2013). While the reform to de facto recognition occurred at a politically opportune moment, the article also revealed clear evidence of strategic framing by the government. In particular, a commitment to exclude changes to same-sex couples' access to

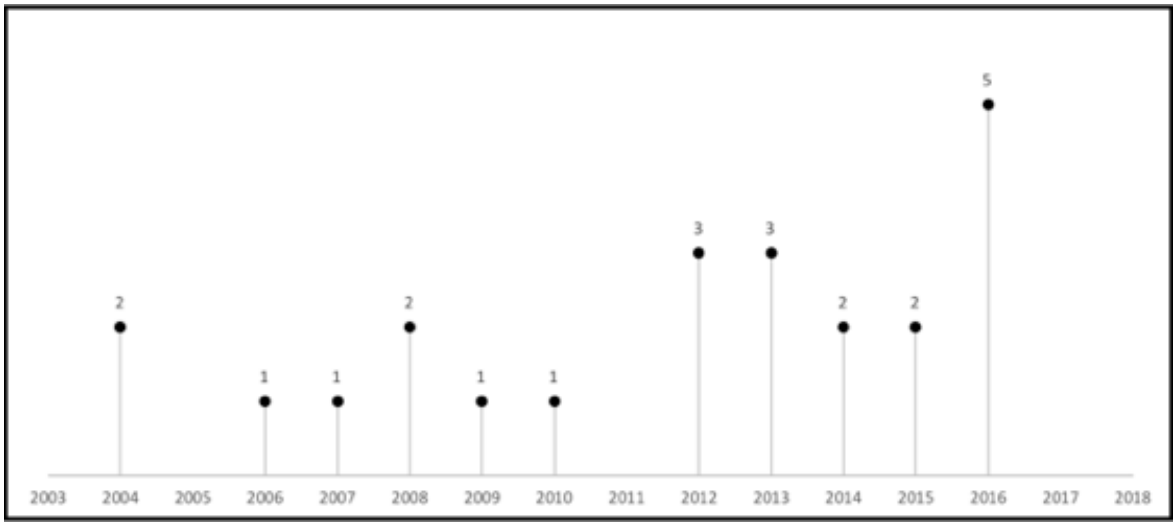
adoption and artificial reproduction helped skirt a value conflict. This propitious framing went unchallenged by the opposition and assured the success of the proposed reforms. The attempt at legalising SSM in 2012, by contrast, offered no such strategic framing opportunities, because marriage is a manifest morality policy. Like in the French case (Hurka et al., 2018), the absence of a clear religious cleavage led to a debate focused on progressive and traditionalist frames. These frames, moreover, presented arguments that were impervious to evidential challenge and prevented compromise. Importantly, the division into progressive and traditionalist camps cut across party lines; with a particularly evident rift in the ALP.

The framing thus conforms to the expectation of the 'traditionalist' world. The legislative dynamics, however, were demonstrated to be more ambiguous. The broader pattern of subsequent bills being tabled seems to follow the partisan competition proposed by Hurka et al. (2018). The instrumental role played by the Australian Greens, and their likely electoral motivation, reveal an electoral calculus in a case without politically relevant state-church conflict akin to the one proposed for the 'religious' world (Kalyvas & van Kersbergen, 2010). The dynamics in the House of Representatives, however, were demonstrated to be much more akin to the 'secular' world expectations: governments used their agenda and timetable control to stifle debate. In the case of the 2012 debates, however, the article illustrates that the focus of analysis has to be broader than just the presence of a religiously affiliated party. In particular, the vested interests within the ALP are revealed to be consequential for the party's stance on SSM. The episode also helps to illustrate that both parliamentary mathematics and a Prime Minister's powerbase within their party can be consequential for the debate of morality policy.

While the Australian dynamics defy clear classification in the four-world model, its analysis opens up important avenues for future research. One such line of inquiry centres

around the consequential nature of framing and its interaction with latent and manifest morality policies. In particular, it seems worthwhile to establish whether the progressive/traditionalist framing developed here applies across morality policies and in other countries without state-church conflict. Another line of inquiry relates to the importance of electoral institutions for morality policymaking. It is striking that the Australian Greens' presence in the Senate was instrumental in their party-political use of the SSM debate. In the House of Representatives, by contrast, the electoral institutions created fewer but larger parties (Duverger, 1954, p. 217; Neto & Cox, 1997; Sartori, 1968), which also seem vulnerable to intraparty fracturing when debating morality policy. Thus, the extent to which the electoral institutions shape the political dynamics surrounding morality policymaking in countries without a partisan state-church conflict seems another fruitful line of analysis. Finally, the dynamics at the ALP party conference and the pattern of suppressed SSM bills intimate an important role for party leadership in majoritarian systems. In particular, the leadership selection and their corresponding degree of dominance warrant further testing. The limited support Julia Gillard had within the ALP is crucial to explaining the debate analysed in this article. It also contrasts sharply with Tony Abbott's strong command and his ability to impose his policy preference on the caucus throughout his tenure. Thus, it seems worthwhile to study the impact of party leadership on morality policy issues being forced to debate or effectively kept off the parliamentary timetable.

Figure 6 Number of same-sex marriage bills introduced in the Commonwealth parliament (2004-2016)



5. Children before Commitment: The Curious Case of the Adoption and Children Act 2002 in England and Wales

England and Wales is an unusual case in regard to same-sex couples gaining the right to adopt jointly. Unlike most other jurisdictions, joint adoption for same-sex couples was granted before any form of formal relationship recognition was available. This paper establishes the 'need to reform' and the problem definition advanced by the Labour government before analysing the causal stories and parliamentary debate surrounding the Adoption and Children Act 2002. The findings highlight the importance of the government's drafting power, its ability to privatise policy conflict, and the institutional rules of policymaking in Westminster.

The speed with which gay rights have evolved in the Western nations over the past three decades is unprecedented. Increasingly, countries have granted legal rights to lesbian and gay individuals and same-sex couples, while also overcoming previously punitive regimes with regard to homosexuality: countries have removed discrimination against individuals by revoking bans on consensual homosexuality, equating the age of consent, and lifting bans on lesbian and gay people serving in the armed forces (Waaldijk, 2007). While this

represents an increased acceptance of gay individuals, the same-sex couple was initially omitted from legislation. Starting in the late 1980s, however, this increasingly changed, with pioneering attempts to grant same-sex couples rights as couples through registered non-marital unions. As this form of non-marital union spread across Western nations, civil marriage increasingly became the final frontier for those campaigning for same-sex couples' rights. Ultimately the advocacy succeeded and, starting in 2001, some countries have moved to grant access to civil marriage to same-sex couples.

While this evolution has been well documented both at the national (see for example Eekelaar, 2014; Y. Murphy, 2016; Nguyen, 2015; Paternotte, 2011; Pierceson, 2014; Rydström, 2011) and supra-national level (Fernández & Lutter, 2013; Johnson, 2015; Kollman, 2007, 2013), what has been recognised less often is the wider conceptualisation of same-sex couples as families. The idea that same-sex couples form unions that go beyond the adult dyad has however also found increasing legislative recognition. Concomitant with its legalisation of same-sex marriage (SSM), the Netherlands was the first to allow same-sex couples to adopt unrelated children. Germany, France, and Ireland followed this example and also granted adoption rights when they legalised SSM. In other instances, adoption rights were granted before SSM was legalised. Often this occurred when non-marital union recognition was legalised, or in the interim between non-marital and marital union recognition for same-sex couples. Austria, for example, legislated civil partnerships in 2010 and liberalised its adoption law to include same-sex couples between 2013 and 2016. Same-sex marriage, in contrast, only became legal in 2019. Denmark and Sweden are two additional cases where adoption was made increasingly accessible to same-sex couples after civil partnerships were available, but prior to SSM.

The broad pattern, therefore, is one where the adult same-sex dyad is recognised prior to granting same-sex couples joint adoption rights. The form in which the couple is

recognised, however, can be either marital or not. One significant outlier in this regard is England and Wales.[32] In this jurisdiction, same-sex couples were granted the right to adopt jointly before their adult dyad had received any form of formal recognition. Thus, the *Adoption and Children Act 2002* liberalised the adoption law in the country two years before civil partnerships were available to same-sex couples, followed by same-sex marriage in 2013. This unusual sequencing of same-sex couples' rights presents the empirical puzzle at the core of this article. In particular, the paper seeks to investigate why same-sex couples were granted the right to adopt children jointly in England and Wales before they were given access to civil partnerships.

In pursuing this investigation, the first section offers a historical account of same-sex couples' rights in England and Wales before outlining the theoretical and analytical framework underpinning the analysis. The analysis focuses on the construction of the 'need to reform' and the causal stories (Deborah Stone, 1989) advanced in the communicative policy sphere (Schmidt, 2002) of parliamentary debate. After establishing the policy narratives and counternarratives, the paper considers the institutional setting in which the debate occurred to establish why and how the government narrative prevailed and same-sex couples were accorded joint adoption rights. In concluding, the paper situates the English/ Welsh experience in the United Kingdom and the broader literature on explaining the expansion of same-sex couples' rights.

The Evolution of Same-sex Couples' Rights in England and Wales

The regulation of homosexuality in England and Wales followed the broader British approach in the post-war era to homosexuality. Broadly speaking, there were three different

[32] In the wake of devolution, most of the subject matter at hand has been a devolved competence. The focus of this paper is on England and Wales, as it is the administrative entity of the UK as a whole that pioneered LGBT policy.

eras that each represented a unique approach to the question of homosexuality (Hayes & Moran-Ellis, 1995; Stychin, 2006). The initial period between the end of World War II and spanning until the 1980s was characterised by a permissive policy environment. This is illustrated well by the fact that in 1967 consensual homosexuality was decriminalised, thereby implementing one of the recommendations of the Wolfenden Report published in 1957. This liberal approach to homosexuality, however, was reversed with the onset of the HIV/AIDS epidemic. The government's approach to lesbians and gays was characterised by moralism (Clements, 2015c), which strongly associated homosexuality with notions of disease. Therefore, homosexuality became an issue that needed to be contained rather than embraced, which is illustrated well by article 28 of the 1988 *Local Government Act*. This section forbade councils to use public monies in the 'promotion of homosexuality', which included any debate of lesbian and gay rights issues. Thus, in contrast to the preceding era, the second wave was characterised by a hostility towards homosexuality and a wish to contain and suppress it. Starting in the new millennium, however, this hostility dissipated. With the advent of New Labour, the emergent human rights jurisprudence and the gay movement's shift towards demanding recognition as individuals and couples marked the advent of a third era. This change also created a window of opportunity for the Blair government to legislatively capture the new tolerant mood (Eekelaar, 2014; R. J. Simon & Brooks, 2009b). It capitalised on this new mood by passing sweeping reforms that granted same-sex couples adoption rights, access to artificial reproduction technology and civil partnerships. This new liberalism carried into the Conservative-Liberal Democrat government, which moved to legalise SSM in 2013.

The question of same-sex couples' rights as couples surfaced for the first time in debates regarding the *Adoption and Children Act 2002*. The act did not initially contemplate same-sex couples but rather was presented as an attempt at a much overdue modernisation

of the English and Welsh adoption law. In fact, it was the first major piece of legislation on adoption since 1975 (Lewis, 2004). Adoption itself had gone through a series of re-imaginations (Trisellotis, 1995) and had started to be seen as a tool for child care rather than a tool to prevent illegitimacy as heretofore (Kirton, 2013). In the 1900s, successive governments had moved to outlaw private adoptions (Kirton, 2013) and towards working with families to return children to their birth families rather than 'saving' children by putting them up for adoption (Eekelaar, 1991; Lewis, 2004). The New Labour government under Tony Blair shared the notion that adoption should be seen as part of the childcare system and placed significant emphasis on changes to this part of family policy. In 2000, the Prime Minister announced a review of adoption on the basis of which legislation was introduced in 2002 (Kirton, 2013). The government's ambition in reforming adoption law was to standardise and streamline adoption across England and Wales (Lewis, 2004). It looked to create a national register of adoptees and sought to increase support to new adopters, to disseminate best practices, and to put in place national standards. The *Adoption and Children Act 2002* had at its core, however, an ambition to make it easier for looked-after children to get adopted (Lewis, 2004). This policy goal was politically uncontroversial, but the proposed liberalisation of qualifying criteria for joint adopters sparked ardent political conflict. In particular, the idea of allowing same-sex couples and unmarried couples more broadly to adopt proved controversial. This proposed change represented a substantial evolution from the *Adoption Act 1976*, which only allowed joint adoption by married couples, and a re-imagination of the family in the eyes of the government. Despite the vocal opposition, the bill was passed and unmarried couples, including same-sex ones, were allowed to apply to adopt jointly in England and Wales.

Shortly after the reforms to adoption policy, a bill proposing civil partnerships was presented to Parliament for debate. The inclusion of this bill on the parliamentary agenda

was surprising, because then Home Secretary Jack Straw had only two years earlier maintained that he saw 'no circumstances' under which the government would be introducing 'so-called gay marriages' (Shipman & Smart, 2007). In starting the consultations on civil partnerships, the government made a concerted effort to de-problematize non-traditional family forms and to underscore the importance of a monogamous love dyad (Shipman & Smart, 2007). Akin to the strategy pursued in the case of adoption policy reform, the government justified its policy proposal as part of its larger modernising agenda that sought to bring policy in line with social reality, rather than try and implement policies that promoted some theoretical ideal. In this modernising spirit, civil partnerships were presented as offering much-needed recognition and legal protection of same-sex couples. In part, the policy also responded to the increasingly vocal demands of the lesbian and gay rights movement (Weeks, 2000), although more radical elements of the movement saw in civil partnerships an 'act of proactive statecraft' that furthered the privatisation of care, as a reward for those homosexual couples that conform to heteronormative standards and a devalorisation of all other forms of lesbian and gay existence (Stychin, 2006).

The two additional ways in which same-sex couples were subsequently recognised relates to artificial reproduction technologies (ARTs) and civil marriage. The former occurred in 2008 when England and Wales reformed its ART regime through the *Human Fertility and Embryology Act 2008* (HFEA 2008 hereafter). While commercial surrogacy had been outlawed in England and Wales (Alghrani & Griffiths, 2017), the legislation in place prior to the HFEA 2008 restricted access to married couples, which in effect proscribed access to ART as a route to parenthood for same-sex couples (Crawshaw, Blyth, & Van Den Akker, 2012; Law Commission & Scottish Law Commission, 2019). The 2008 reforms, however, dropped this requirement and extended access to those in civil partnerships and

those in enduring family relationships (Law Commission & Scottish Law Commission, 2019). The next step was the legalisation of SSM. This occurred in 2013 when the Conservative-Liberal Democrat government announced its intention to pass an SSM bill. While this announcement surprised many (Hayton & McEnhill, 2015), the bill was broadly supported and passed the parliamentary process despite opposition in both parliamentary chambers (Hayton, 2015; Hayton & McEnhill, 2015; Heppell, 2014; Watt, 2013).

In summary, same-sex couples in England and Wales were recognised as couples first in adoption policy, then through non-marital unions, before being granted access to ART, and ultimately civil marriage. This sequencing of rights is unusual for both Europe and the Anglo-Saxon countries to which the experience can be most readily compared. In the context of these cases, recognition of same-sex couples usually started with non-marital unions before access to adoption and marriage. This pattern was observed in Scandinavia, continental Europe, and even New Zealand. Other Anglo-Saxon countries followed a different sequencing. Ireland overturned its ban on same-sex joint adoption through a Court of Appeal Judgement in 2013, before granting same-sex marriage in 2015. Canada similarly had the ban judicially overturned in Ontario, with other provinces following the Ontario example. Finally, Australia's states have taken varying pathways in this regard. Nevertheless, the case of England and Wales presents the only instance in which adoption rights preceded any form of union recognition. This begs the question why England and Wales deviated from the more common pattern.

In order to shed light on this question, this article examines how the *Adoption and Children Act 2002* came to include joint adoption rights for same-sex couples even though the country had not yet passed legislation to offer formal non-marital union recognition to its lesbian and gay people. It focuses on adoption rather than ART because the former was legalised first. Moreover, adoption policy has a higher degree of comparability, given its

universal use in Western countries. Artificial reproduction technologies is also a more recent policy issue, and includes moral dimensions that go far beyond the question of same-sex couples' access. Indeed, ART is proscribed in many countries to heterosexual couples, let alone same-sex ones. Thus, the issue of same-sex couples' access to adoption is better placed to analyse the political construction of same-sex couples' inclusion in policy relating to giving children loving and safe families.

Methods and Data

In order to explain why England and Wales took such an unusual route to same-sex couples' rights, the paper focuses on the policy narratives (Deborah Stone, 1989) that were presented during the parliamentary debate of the *Adoption and Children Act* 2002. The focus on the narratives that were presented when constructing the need for reform (Cox, 2001) is justified by the centrality of problem definition in shaping policy solutions.

Problem definition is understood as a specific political discourse that is aimed at explaining a problem, describing a reality, and recommending a particular solution (Rochefort & Cobb, 1994). The construction of the problem is a key part of problem definition that entails the process of 'naming and framing' (Druckman, 2001, 2004; Entman, 1993; Schön, 1993). This process seeks out parts of a larger policy problem to focus on and assembles them into a frame that ultimately offers a causal story that highlights a policy problem, its purported causes, and possible solutions (Deborah Stone, 1989). The specific presentation of the policy issue is consequential, because it influences the political contestation of the political issue, the problem's ability to reach the attention of the public and officials, and the possibility of policy change (see Baumgartner & Jones, 2009; Petracca, 1992). An additional consideration is the availability of a solution to the presented problem (Rochefort & Cobb, 1994). While the influence of policy solutions on problem definition and vice versa is somewhat endogenous, it is usually assumed that policy change

only occurs when a particular problem definition includes an affordable, acceptable, and available solution to it (see Kingdon, 2003; Rochefort & Cobb, 1994). The problem definition is therefore shaped by the causal story advanced, which in turn influences the issue's ability to garner attention. That said, policy legacies and institutional rules, however, are key to successful policy change. That is to say that while the narrative is useful in getting a policy problem onto a political agenda, it is the institution's or policy venue's rules that enable or hamper policy change (Béland, 2019). In particular, the institutions filter the policy solutions and help decide whether key political actors have the capacity and will to adopt the proposed solutions. The below analysis therefore focuses on both the construction of the need to reform, the policy issue advanced, and the moral acceptability of the proposed inclusion of same-sex couples as possible joint adopters.

The analysis to follow therefore subjects government documents, parliamentary debates, and media coverage to a qualitative analysis to establish both the issue framing advanced by the government and possible challenges to it. The focus is on the 'communicative policy sphere' (Schmidt, 2002), where politicians bring pre-coordinated ideas to the public for deliberation and legitimation. This is most appropriate given the concern with possible objections to same-sex couples being included in the policy change. Thus, the first step of the analysis establishes how the need for reform was discursively constructed and the next step explains how the policy solution was presented before, thirdly, subjecting the parliamentary debate to a discursive analysis. This analysis, which focuses on the objections raised and the justifications given in defence of the proposed policy change, is based on an analysis of documentary evidence. This evidence includes the parliamentary record available through the parliamentary Hansard. The Hansard includes the parliamentary debates, committee speeches, and subcommittee debates in both Houses of Parliament. The Health Select Committee of the House of Commons and its evidence

gathering including submissions to it and in-person evidence were accessed through the Committee's records online. These are combined with contemporary media records and extant scholarship on the *Adoption and Children Act 2002*. Finally, the paper offers an institutional explanation of the opposition's failure to prevent same-sex couples gaining access to joint adoption.

Same-Sex Couples and the Adoption and Children Act 2002

The inclusion of same-sex couples in the reforms to adoption policy in 2002 was not obvious at the outset. Rather, the idea to allow unmarried couples to adopt jointly was included in the bill at a later stage. Originally, the government was trying to respond to a crisis in residential care. After committee consultation on the proposed changes to adoption law, however, the Hinchcliffe amendment brought the idea of allowing unmarried and same-sex couples to adopt jointly to the fore. While the Labour government came to support it, elements of the Conservative opposition were attempting to maintain the exclusion of unmarried couples from joint adoption. In the House of Lords in particular, social conservatives objected to the proposed change on this ground. This section therefore establishes how the 'need to reform' became widely accepted and how the proposed bill came to include same-sex couples as possible adopters. In analysing the parliamentary debate, it becomes clear that the opposition charged the government with social engineering and exposing vulnerable children to undue risk. The government, in turn, argued that institutional care was worse for children's life chances, and that ensuring the highest possible number of adoptive families (including same-sex ones) was the best way to secure looked-after children's best interests. While this section focuses on the narratives, the following section will highlight the institutional rules that helped the government's narrative prevail.

The Need to Reform

The impetus to overhaul adoption policy came not from issues in adoption itself but rather from concerns about the state of England and Wales' institutional care. In 1996, the Conservative government of John Major launched a review of safeguards for children in institutional care. This review was launched in the wake of an abuse scandal in North Wales, which saw children in care sexually and physically abused over a long period of time ("Damning report of child care in Britain published," 1997). After a year-long investigation, Sir William Utting published his report into the state of residential care (Utting, 1997). In presenting the report to the House of Commons, the Secretary of State for Health, Frank Dobson, summarised the report as a 'a woeful tale of failure at all levels to provide a secure and decent childhood' (Hansard, 19 November 1997, col. 586). He assured the chamber that after 'consultation the Government will put forward a full programme of policy and management changes to deliver the safer environment to which children living away from home are entitled' (Hansard, 19 November 1997, col. 588).

In 1998, the House of Commons Health Committee published a more detailed report on how being in care affected child welfare. The report paid particular attention to outcomes in education, crime and homelessness, and painted a negative picture of the care system in England and Wales (House of Commons, 1998). It quantified the negative effects of being looked after by the state in terms of educational achievement, crime rates, and incidences of homelessness (House of Commons, 1998, para. 46). While the report acknowledged that the disparities in outcomes could not be entirely blamed on the care system, it continued to state that 'it is difficult to resist the conclusion that the system itself is under-performing' (House of Commons, 1998, para. 50). In regard to adoption, it underscored that the child's return to a loving birth family should always be the goal. However, in instances where this was impossible, adoption was presented as 'a positive choice' (House of Commons, 1998, para.

152). It went on to note 'that local authorities too often do fail to take adoption sufficiently seriously as an option, that unnecessary delays occur, and that insufficient support is offered to adoptive parents' (House of Commons, 1998, para. 153).

The report by the House of Commons directly called on the Department of Health to endorse the increased use of adoption as a solution to the issues in institutional care and suggested the government issue guidance to local authorities on how to implement this (House of Commons, 1998, para. 153). This laid the groundwork for reforms to adoption policy. While recommendations were made for foster care and residential care, the government endorsed the idea that adoption could move children out of institutional care and into new families that would assure better child outcomes (Kirton, 2013). Indeed, a 1998 circular to local authorities outlined the government's intention to 'bring adoption back into the mainstream of children's services' (Department of Health, 1998, p. 1). The turn to adoption was justified on the basis of every child's 'fundamental right' to belong to a family and the 'considerably better [progress through childhood and into adulthood of adopted children] than children who have remained in the care system' (Department of Health, 1998, p. 2). The emphasis on children, child outcomes, and the ambition to reduce inequalities more broadly was a key pillar of Tony Blair's New Labour project (Randall & Sloam, 2009).

The Case for Adoption Reform

The combination of the Utting Report and the report by the House of Commons Health Select Committee created a strong need to reform. Both documents underscored the detrimental effects of being in institutional care on young people's lives. Indeed, the Utting Report indicated that sexual and physical abuse were part of the problem with institutional care. Both reports also underscored the potentially beneficial effects of adoption in ameliorating other issues, in particular with regard to the life chances of children in care. This prompted the government to focus on adoption policy in its response to the crisis, and

in 2000 Prime Minister Tony Blair launched a review of England and Wales' adoption policy.

The review was focused on quantifying the problem and on establishing why adoption from care was not a more prominently used tool when dealing with children in care. The Performance and Innovation Unit (PIU) was tasked with this inquiry, which indicates the importance of the review to Tony Blair. The PIU was situated within the Cabinet Office and was created by the Prime Minister in 1998 to improve cross-departmental policymaking and promote evidence-driven policy innovation (Seldon, 2007). Within a year, the unit produced a report that quantified the number of children in care waiting for adoption and outlined the barriers to finding families for these children (Performance and Innovation Unit, 2000). One of the key obstacles identified was the shortfall in suitable adopters available to local authorities. In part, this lack of families was attributed to the 'huge drop-out rate from initial enquiries to the number of approved adopters' (Performance and Innovation Unit, 2000, p. 35). While the report did not find a single cause for this high rate of attrition, it indicated that the long delay between initial inquiry and local authority response could be part of the problem (Performance and Innovation Unit, 2000, p. 36). To remedy this shortfall in adoptive families, the report recommended government efforts to increase the number of applications. Examples of such efforts included the continued support of National Adoption Week (Performance and Innovation Unit, 2000, p. 57) and the increased recruitment of single people (Performance and Innovation Unit, 2000, p. 58). Importantly, the PIU report did not mention unmarried or same-sex couples as additional pools of potential adopters, even though the report noted that no particular group of potential adopters ought to be excluded pre-emptively (Performance and Innovation Unit, 2000, pp. 34-35, 58, 40).

The government based its White Paper on adoption almost entirely on the PIU. The paper, which was published later in 2000, re-iterated the high hurdles to adoption and identified them as key barriers to improving the outcomes for children in care by depriving them of the chance to find a new loving family. Further, it underscored that it ought to be 'the ability to look after children in a safe and responsible way' that should qualify people to adopt, more so than any other consideration (Department of Health, 2000, para. 4.6). Despite this broad definition of suitable adopters, the White Paper did not explore the question of unmarried couples adopting jointly. In fact, the paper does not discuss qualification criteria at all. This seems to imply no ambition by the government at this stage to change the criteria set out in the *Adoption Act 1976*, which allows either single applicants or married couples as joint applicants to apply for adoption.

Thus, the need to reform in the institutional childcare sector transformed into a call for action on adoption. In order to ensure better outcomes for children in care, the government proposed to increase the rate at which looked-after children ought to be adopted. The ambition to get more children adopted, however, did not initially include a re-imagination of qualifying criteria for those seeking to adopt jointly. In fact, none of the preparatory reviews even contemplated such changes. In fact, both Prime Minister Tony Blair and the Minister for Health Jacqui Smith were on record prior to the parliamentary debate as not wanting to allow same-sex couples to adopt. While they supported the idea of increasing adoption rates for children in care, neither felt this ought to include same-sex couples (Hansard, 21 November 2001).

<u>The Question of Same-Sex and Unmarried Couples as Adopters</u>

The first-time parliamentarians contemplated the inclusion of unmarried couples was in the Health Select Committee of the House of Commons in 2002. The committee had taken up the proposed bill in order to gather evidence in regard to the government's proposed changes

and to make sure the legislation was meeting its stated goals. Upon the bill's return to the full chamber, the chairman of the Health Select Committee, David Hinchliffe, tabled an amendment that sought to overhaul the eligibility requirements for joint adoption. Namely, it sought to drop the marriage requirement in favour of anyone in a committed and stable relationship. This proposal had government support but encountered heavy opposition in the House of Lords. This section therefore traces the origins of the Hinchcliffe amendment and the opposition to it. The next section, in turn, focuses on the institutional dynamics that assured the government prevailed in the end.

The first document that includes the idea that unmarried and same-sex couples ought to be included as potential adopters is the memorandum submitted by the British Agencies for Adoption and Fostering (BAAF),[33] in which the organisation argued that 'If we restrict joint adoption to married adults, we can only reduce the opportunity for children to find adoptive parents' (British Agencies for Adoption and Fostering, 2001, para. 9.3). The organisation argued that it was time for England and Wales to reconsider its ban on unmarried couples as joint adopters 'in the light of the major alteration in patterns of family life in the UK' (British Agencies for Adoption and Fostering, 2001, para. 9.2). While the memorandum does not overtly mention same-sex couples, the BAAF's Chief Executive, Felicity Collier, made it clear when questioned by the committee that the BAAF supported the inclusion of same-sex couples as possible adopters. She argued that 'an obvious sequitur of having unmarried couples in stable, committed relationships [as joint adopters] is that […] people in gay and lesbian relationships, too, would have the option to apply jointly to adopt and make a lifelong commitment to a child' (Select Committee on Adoption and

[33] The now defunct BAAF was a charity that brought together and represented organisations and individuals concerned with fostering and child adoption. The membership was diverse and included social workers, health professionals, local authorities, fostering agencies, and adoption agencies.

Children Bill, 2001, question 103). The case for including same-sex couples was furthered by the Fostering Network and the National Foster Care Association, who argued that 'unmarried couples and gay and lesbian carers have given children excellent care [as foster carers]' (Fostering Network & National Foster Care Association 2001). In short, all three advocacy groups argued that unmarried and same-sex couples offered a further pool of capable and willing potential adopters that was currently being excluded.

This line of argument was taken up by the Chairman of the Common's Health Select Committee when he tabled an amendment that sought to strike the marriage requirement from the *Adoption and Children 2002 Bill* (Doughty, 2002). He even went so far as to call the exclusion a failure to ensure the policy worked in the best interests of the child (Hansard, 16 May 2002, col. 977). To make his case, Mr Hinchcliffe underlined that children were already placed with unmarried couples and that no marriage requirement existed for foster carers. In each case, the exclusion of unmarried couples could have negative impacts (Hansard, 16 May 2002, col. 978). In the case of the child being placed with an unmarried couple, only one adult would have for example full legal parenthood. This deprived a child of the security that comes from being legally tied to both parental figures in her life. In the case of a fostered child, in turn, Mr Hinchcliffe illustrated that it might be best for the child to stay with a couple that had fostered her. However, in the case of unmarried foster carers, the option was either for only one adult to adopt or for the child to be placed with a new couple, neither of which he believed were in the child's best interests. This view was seconded by the leader of the Liberal Democrats in the Commons, who concurred that the proposed amendment was 'about putting the welfare of children before old-fashioned views of the world' (Hansard, 16 May 2002, col. 975). The evolution away from the married and heterosexual family, therefore, was seen as serving the child's 'right to a family, the right to be loved by a family, and the right to be looked after by a family, even if that family unit

does not match our ideal' (Hansard, 16 May 2002, col. 995). Finally, Johnathan Shaw supported his Labour colleagues' amendment by pointing out that 29 out of the 30 organisations that gave testimony to the Health Select Committee supported the expansion of possible adopters in order to assure the best chances for children to be adopted and have a chance at a stable family life (Hansard, 16 May 2002, col. 984).

Most Labour and Liberal Democrat parliamentarians agreed with the argument proposed by Mr Hinchcliffe: the ambition of the bill was to increase the pool of adoptive families to ensure that as many children in care as possible had a chance to live in a family environment. In order to achieve this goal, the requirement for joint adopters to be married had to be questioned. Given that single people and even those single people in long-term relationships could adopt, it seemed a small change to make to the adoption law. In particular, supporters of the amendment argued that legal security for the child and continuity of care for those children fostered by an unmarried couple made this policy change necessary. The inclusion of same-sex couples, in turn, was framed as in the best interests of children and not about gay rights, with frequent reference to the fact that single gay applicants could already adopt in England and Wales (Hansard, 4 November 2002, cols. 95-96).

While this argument convinced most Labour and Liberal Democrat legislators, those in the Conservative opposition benches were split on the issue of whether to allow same-sex and unmarried couples to adopt jointly or not (Hayton, 2010). While modernisers supported the change, those with more socially conservative views (including the leader Iain Duncan-Smith) were vociferously opposed. The bulk of push-back, therefore, originated in the Conservative ranks; with the opposition being much stronger in the House of Lords than in the Commons. In justifying their opposition to allowing same-sex couples to adopt jointly,

parliamentarians either argued that such placements were not in the best interests of the child or would have negative effects on British society at large.

In regard to the broader societal effects, the opposition focussed on the recognition accorded to same-sex couples if they were to be allowed to adopt jointly. As the act recognised same-sex couples *as couples*, the government was accused of 'social engineering' (Hansard, 16 October 2002, col. 870). In particular, the implied equivalence of marriage with cohabitants and same-sex relationships was deemed especially problematic in relation to same-sex couples (Hansard, 16 October 2002, col. 900). While recognition for couples through civil partnerships had been added to the government agenda, recognition in adoption matters would pre-empt this recognition. Some feared that recognition in the adoption legislation would give couples a legal basis on which to fight for wider relationship rights, even if the civil partnership bill failed (see for example Hansard, 16 October 2002, cols. 868, 899). The government's response to this argument was that the status of the 'couple' created by the proposed legislation would be non-precedential and limited to matters of adoption (Hansard, 16 October 2002, col. 876).

The contestation over the inclusion of same-sex couples as adopters, however, went beyond legal concerns. The opposition also questioned the need to contemplate their inclusion in order to reach the government's policy target (Hansard, 16 May 2002, col. 1000; Hansard, 11 July 2002, col. CWH 240). In response to the exclusion of unmarried heterosexual couples, opponents of the amendment stated that those who would like to adopt jointly could get married to demonstrate their commitment to each other and their wish to adopt (Hansard, 16 May 2002, col. 1001). Furthermore, the notion of recognising same-sex couples as families was deemed unnatural. Andrew Lansley argued that 'under normal circumstances', 'for a same-sex couple to care for a child does not require both of them to be parents, because that is not what occurs naturally' (Hansard, 4 November 2002, col. 85).

Earl Howe went so far as to urge everyone to 'resist the idea that gay life should be regarded as in any way equal to heterosexual life' (Hansard, 11 July 2002, col. CWH 235). Lord Jenkin seconded this view that 'adoption […] by same-sex couples would be a very grave mistake' (Hansard, 16 October 2002, col. 869) and moved an amendment that sought to limit joint adoption by unmarried couples to only opposite-sex dyads. While the amendment was withdrawn to focus on re-instating the ban on any unmarried couple adopting jointly, it illustrates the concern with same-sex couples in particular being granted access to children and being recognised as families.

The concerns regarding same-sex couples raising children, however, were also articulated from the point of view of the child's best interests. The objections raised in this line of argument related to the risk posed by unmarried and same-sex couples in particular. Specifically, the instability and stigma associated with same-sex relationships and parenting were deemed too risky for already vulnerable children. In regard to the former, repeated reference was made to the fact that opposite-sex unmarried couples were six and a half times more likely to break up after the arrival of a child when compared to married couples (Hansard, 11 July 2002, col. CWH 228). This rate of breakup was deemed even higher among same-sex couples (Hansard, 11 July 2002, col. CWH 228). This led Earl Howe to conclude that 'if we are looking to give permanence and stability to an adopted child, why should we take that significant extra risk?' (Hansard, 11 July 2002, cols. CWH 227-8).

Another risk for children was traced back to the 'unnatural' nature of same-sex parented families. It was feared that children adopted by same-sex couples would not reap the benefits promised by opposite-sex parenting. In the words of Baroness O'Cathain, 'damaged children need both male and female role models. They need a mother and a father' (Hansard, 16 October 2002, col. 884). The notion of risk was also related to the fact that there was no robust evidence about the impact of same-sex parenting on child outcomes.

While Earl Howe contended that the outcomes were demonstrably worse in education (Hansard, 11 July 2002, col. CWH 228), most agreed that there was insufficient evidence, which meant that those opposed painted it as a 'leap in the dark of which we should have no part' (Hansard, 16 October 2002, col. 871). In particular, the 'risks to a child's psychological development in growing up with two parents of the same gender' (Hansard, 5 November 2002, col. 589) and the stigma associated with having same-sex parents were cited as an additional burden on already hard-done-by children (Hansard, 16 October 2002, col. 875).

In defending the inclusion of same-sex and unmarried couples, supporters rebuked the claim of social engineering and challenged the notion that same-sex parents represented a risk to children. In regard to the former, Minister for Health Jacqui Smith pointed out that single people had been allowed to apply for adoption since 1926 and that this included those who were unmarried and those in same-sex relationships (Hansard, 4 November 2002, cols. 95-96). As this already placed children with unmarried couples, supporters argued that allowing them to adopt jointly would respect the 'child's right to have a legal relationship with both adoptive parents' (Hansard, 4 November 2002, col. 48). This was argued to also ensure a higher degree of stability in the case of one adoptive parent's undue demise. In fact, the inclusion of same-sex couples in joint adoption was not a question of gay rights but of ensuring that all families offer equal legal protection to adopted children. The developmental risks associated with the purported instability of same-sex couples in turn were challenged on the basis that the assessment process and the courts would bar insufficiently committed couples from adopting. In the words of Lord Hunt, a same-sex couple would not only be less likely to abuse a child, but would also have been vigorously assessed by social workers and the judge presiding over the adoption procedures (Hansard, 16 October 2002, col. 879), all of which would ensure that only those couples deemed fit would be granted adoptions. The

same backstop would apply to unmarried opposite-sex couples, which should further safeguard the best interests of the child in care.

More broadly, however, the debate shifted away from same-sex couples and their rights and towards the needs of children. In this line of argument, the amendment was not concerned with the status of marriage, or even gay rights, but with 'getting these wretched children out of care and into families' (Hansard, 11 July 2002, col. CWH 238). To do this, eligibility criteria had to be changed to ensure sufficient adoptive families for children in institutional care. In fact, the demographic trend away from marriage was foregrounded as a reason for abandoning the marriage requirement for joint adoption. In the words of the Conservative John Bercow:

> … the choice in future as cohabitation grows, will be between the offer of a decent, loving, stable and committed home headed by two people who are not married, and the alternative which, despite the best efforts of those who provide the care, is not infrequently the living hell of institutional care or serial fostering arrangements (Hansard, 04 November 2002, cols. 67-68).

Adoption by an unmarried – and by implication same-sex – couple was therefore deemed better for the child's long-term life chances than remaining in care. Equally, the ability of social workers to assess the stability of applicants meant that children would only be placed in suitable families, further increasing the likelihood of better social outcomes after adoption. In the end, even those with reservations conceded that:

> … adoption by an unmarried couple or a homosexual couple is in [no] way the optimum. However, the alternative to adoption in the case of a child who has been in care is so infinitely worse than adoption into a home which is less than ideal that I believe that the risk is justified even if it results in only a handful of children being adopted who otherwise would remain in care (Hansard, 11 July 2002, col. CWH 232).

The Parliamentary Dynamics of the Adoption and Children Act 2002

As the above makes clear, there was a rigorous debate regarding the suitability and desirability of allowing same-sex couples to adopt jointly. While there was broad consensus about the policy problem (i.e. a lack of sufficient adoptive families), the proposed solution of relaxing qualification requirements for joint adoption sparked vigorous debate. The supporters, which included the government, managed ultimately to define the policy problem and solution in a way that minimized the ethical concerns raised by the opposition. To understand why the opposition to same-sex couples adopting jointly failed, we must turn to the institutional rules that underpin policymaking in the Westminster system.

Fundamentally, any bill must pass through the Houses of Parliament and be granted royal assent in order for it to become law. The Crown does not usually withhold assent once a bill has been passed in both chambers of Parliament (Chesterman & Galligan, 2009), which means that the two Houses of Parliament are the appropriate focus of analysis. While the previous section has outlined the nature of the debate, this section pays attention to the political venue in which these debates took place and the balance of power in each.

A first observation is that the bulk of opposition occurred in the House of Lords. The House of Commons was much more supportive of the bill. To explain this, the political realities in each need to be explored. In the House of Commons, the bill had little trouble passing, partly because the Labour government had an absolute majority. This means that it faced little opposition in trying to implement its policies. While the initial bill did not include the provision regarding unmarried same-sex couples, the proposed amendment was strongly supported (it had a majority of 155). This broad support was achieved despite the government granting its MPs a free vote. These votes, which are also called ‘unwhipped’, leave it to individual MPs to vote according to their own conscience. While parliamentarians often still follow party guidance, the support is less assured in the case of unwhipped votes

(Overby, Raymond, & Taydas, 2011). Tony Blair, however, had signalled his support and voted in favour of the amendment, which might have swayed the bulk of the Labour parliamentarians to do the same. The Liberal Democrats, in turn, were whipped in support of the amendment, which further bolstered the support for the idea that unmarried and same-sex couples ought to have the right to adopt jointly. Only the Conservatives imposed a whip against the amendment. While this meant some opposition, the party represented a minority of parliamentarians and was therefore unable to block the bill. Moreover, the Conservatives were split internally, with its socially liberal MPs either abstaining or defying the party whip (Hayton, 2010). This meant an ever-smaller level of opposition in the Commons.

In the House of Lords, Conservative Earl Howe tabled an amendment that sought to re-instate the marriage requirement for joint adoption. As was seen above, this sparked a debate about the stability and parenting quality of same-sex and unmarried couples, which questioned the wisdom of the government's intent to liberalise qualification requirements. The older and more conservative second chamber therefore sought to return the primacy of marriage, despite the vocal opposition of Labour Lords. The effort succeeded with a majority of 30 Lords re-amending the bill to limit joint adoption to legally married couples. This disagreement sent the bill into what is called 'parliamentary ping pong', where bills get passed from one chamber to the other until passed with the same wording in both chambers (The Parliament, 2019). Once it returned to the Commons, support for allowing unmarried couples to adopt jointly grew even stronger. This brought into play another set of institutional constraints, namely those placed on the House of Lords by the *Parliament Act 1911* and *the Parliament Act 1949*. Both pieces of legislation limit the amount of time that the Lords can hold up bills that have originated in the Commons. In effect, this meant that the bill was likely to pass eventually in the iteration that the government wished, unless it was delayed until the end of the parliamentary session, at which point it would have lapsed.

In fact, the Lords acknowledged this upon the adoption bill returning to their chamber. In particular, the fact that the Commons was the elected chamber and had so clearly rejected the Howe amendment made it unlikely that another round of parliamentary ping pong would yield a different result (Hansard, 5 November 2002, col. 596). Thus, the opposition diminished and while the staunch opponents still voted against the bill, it passed with a majority of 30 votes.

Even though the bill received royal assent in November 2002, the provision regarding same-sex couples did not come into effect until 2005. The government delayed the relevant provisions to draft and consult on the assessment criteria for vetting unmarried adoption candidates. A draft of this document was published in 2003 and consultations continued until 2004, with the necessary regulations only passing in 2005 (Ball, 2005). While this means that the policy took effect concomitantly with the *Civil Partnership Act 2004*, it still is unusual for a country to legislate joint adoption rights for same-sex couples prior to considering formalised union recognition, especially given that England does not have a common-law or de facto relationship recognition scheme like other Anglo-Saxon countries. Whether the delay in implementing the pertinent provisions of the *Adoption and Children Act 2002* was strategic, however, cannot be established within the remit of this analysis.

Conclusion

The pathway that England and Wales took in granting same-sex couples rights was unusual when viewed comparatively. The jurisdiction first granted joint adoption rights, then recognised civil partnerships, before allowing access to ART, and ultimately legalising same-sex marriage. This makes the country highly unusual within the wider European context, where formal union recognition precedes any form of adoption or ART rights. In order to understand why England and Wales followed such an unusual pathway, this paper

focused on the *Adoption and Children Act 2002*. The act was chosen because it offered the first parliamentary debate of same-sex couples and their rights in England and Wales. At the same time, the way in which the government constructed the problem definition and responded to challenges to its proposed policy solution promises insights that are applicable to the politics of same-sex couples' rights beyond the boundaries of England and Wales.

In particular, the analysis focused on the problem definition and its inclusion of same-sex couples as joint adopters and the subsequent debate about the acceptability of such liberalisation. None of the early government documents mentioned such changes, but evidence given by the BAAF and the Foster Network suggested that including same-sex couples would help the government achieve its stated goal of increasing adoptions from care. The government followed this line of argument and played down the implication for lesbian and gay rights. The Conservative opposition and its members of the House of Lords in particular, however, challenged this policy image by accusing the government of turning the *Adoption and Children Bill* into a piece of lesbian and gay rights legislation. These charges of social engineering and treating children as trophies for same-sex couples were dismissed by the government and the debate refocused on the issue of increasing the number of adoptive families that could be recruited. The institutional analysis of the parliamentary dynamics of the *Children and Adoption Act 2002* further underscored the strong powers of problem definition available to a majority government in Westminster. The executive was in charge throughout the problem definition phase: it decided to take up the recommendation of the Utting Report and it tasked the PIU with producing a report, which became the foundation of the White Paper; all three focused on the idea that increasing adoption out of care would help solve the issue of inequality in outcomes of looked-after children. Beyond the use of drafting power (Rasch, 2014), the Prime Minister's vocal support of the Hinchcliffe amendment helped secure the support of the Labour parliamentarians who had

been granted a free vote. This combined with the unequivocal support of the Liberal Democrats, and the modernising rebels in the Conservative caucus, assured the amendment's endorsement. Even though the Conservative opposition in the Lords managed to force the bill into 'parliamentary ping pong', the institutional arrangement within Westminster, which limits the ability of the Lords to block any bill originating in the Commons, proscribed an effective blocking of the bill in the House of Lords.

The case of England and Wales thus offers important insights that go beyond the particular policymaking episode of the *Adoption and Children Act 2002*. First, the paper underscores the strong power of majority governments in Westminster systems with regard to policymaking. Both the problem definition and the proposed policy solution remained unchanged in the policymaking process, in large part because of a strong government majority and the primacy of the Commons over the Lords. Second, the English/ Welsh experience highlight the importance of problem definition. The government had a clear ambition of increasing adoptions from care. In part, it pursued this goal by relaxing the requirements for joint adoption at the suggestion of several professional bodies. The opposition in turn attempted to recast the issue as one of gay rights and morality more broadly. These dynamics are well established in the policy literature (Baumgartner & Jones, 2009; Schattschneider, 1960; True et al., 2007). In the words of Schattschneider (1960), the opposition tried to socialise the conflict by appealing to widely held symbolic values of traditional families, virtuous marriage, and the vulnerable child to galvanize the public in opposition to the government's plan. The inability to redefine the issue, however, further underscores the institutional power conferred on the executive in Westminster systems. This institutional power helped the government in refocusing the debate by underscoring its commitment to children's best interests. It backgrounded the lesbian and gay rights component of the Hinchcliffe amendment and foregrounded the less controversial increase

in potential adopters and thus better chances for children in care to find a loving family. This point regarding executive power and issue definition may also prove insightful in other analyses of similar morality-based policy debates in similar institutional settings.

As the introduction made clear, the sequence in which England and Wales granted same-sex couples rights is unusual, both in the British and European contexts. In regard to the former, the *Civil Partnership Act 2004* applied across all nations of the UK, but joint adoption by same-sex couples was only legalised in 2009 in Scotland and in 2013 in Northern Ireland. In Europe, in contrast, no other country legalised joint adoption for same-sex couples prior to offering formal union recognition schemes. There are nevertheless two other instances in which joint adoption preceded formal union recognition: the Canadian province of British Columbia and the Australian state of Western Australia. In British Columbia, the *Adoption Act (BC) 1995* enabled same-sex couples' joint adoption, while in Western Australia the same was achieved through the *Acts Amendment (Lesbian and Gay Law Reform Act) 2002*. In both cases, majority governments managed to pass the respective bills against vocal opposition parties. Furthermore, neither jurisdiction had formal recognition schemes for same-sex couples until their respective central governments legalised same-sex marriage. Thus, it would be fruitful to study the causal stories advanced by each government in justifying the policy change. In the case of Western Australia, the Premier Geoff Gallop had convened a Ministerial Committee on Lesbian and Gay Reform, whose report underpinned the legal changes (Dharmananda & Kendall, 2001; "Western Australia state lawmakers pass gay rights bill," 2001). In the case of British Columbia, the case for legal reform is less readily apparent. In both cases, however, it would be fruitful to study in detail the causal story that justified the need to reform and led to the proposal of same-sex couples' joint adoption without any formal relationship recognition scheme. These analyses, in turn, would make for a fruitful comparison to the English and Welsh case

6. Conclusion

In introducing the research of this thesis, I made the argument that there are two lacunae to which the subsequent analyses could contribute. On one hand, the set of highly comparable Anglo-Saxon countries had not been comparatively studied. This left room for an empirical contribution by documenting the evolution of same-sex couples' rights in these countries. In particular, the thesis has added this empirical record to the evolving literature on same-sex marriage and same-sex couples' recognition more broadly. Even though Canada and the United States have received ample academic attention, both the European and Antipodean countries in the Anglo-Saxon world are far less analysed. To remedy this, the *Appendix* summarised the pathways to same-sex marriage and joint adoption rights in each of the five case countries. This adds important evidence to the canon of histories of same-sex rights. On the other hand, the *Introduction* situated the analyses clearly within the framework of public policy, politics, and social policy scholarship. In this regard, the morality policy framework was singled out as an area in need of refinement and development. As is illustrated below, the thesis has contributed in important ways to this particular theoretical framework through its analysis of same-sex couples' rights in the Anglo-Saxon countries. The purpose of this conclusion is to review and integrate the findings of the four empirical chapters, acknowledge the methodological limitations of these findings, and re-engage with the broader literature in which the analyses are situated. In concluding, this section will also outline areas for future research that spring from the insights summarised here.

Thesis Overview

The fundamental question of how same-sex couples' rights evolved in the Anglo-Saxon countries underpins all chapters of the thesis. However, the question is tackled in slightly different ways in each chapter. While the first two empirical chapters of the thesis engage with all case countries, the second two offer within-case comparisons of Australia and

Britain respectively. All four chapters, however, help advance the understanding of how same-sex marriage and joint adoption by same-sex couples were legalised.

In *Contextualising Same-Sex Marriage* (Chapter 2), I make the point that marriage itself as a socio-political institution has evolved fundamentally in all case countries. Through the twin process of contractualisation and secularisation, marriage has moved away from a sacrament towards a secular institution. This evolution, in turn would prove instrumental in later political arguments over the concept of same-sex marriage. As the chapter highlights, the ability to distinguish between a secular civil marriage and a religious sacrament of marriage was key for advocates of same-sex marriage in the political arena. It is the dichotomy between traditional notions of marriage and more progressive understandings thereof, that is revisited in Chapter 4. At the same time, Chapter 2 helps situate the five case countries in relation to each other. While all countries followed the same trajectory in the end, the speed at which the different stages were completed varied greatly. Ireland, for example, changed little until it changed a lot. In New Zealand, in turn, policy evolved early on but then stalled.

The third chapter, *From Halpern to Wilkinson*, picks up a theme that was an undercurrent in chapter 2: the interconnectedness of this set of countries. In particular, the chapter theorises a new mode of policy mobility that has so far been underexplored. The legalisation of same-sex marriage in Canada in 2005 is shown to be directly linked to the evolution of same-sex couples' rights in Ireland, the UK, and Australia. In all these countries, couples who had been married in Canada had filed lawsuits to establish whether their Canadian marriages would be recognised; akin to the regular recognition of foreign opposite-sex marriages. While none of these lawsuits were successful in changing domestic policy, the mode of policy mobility is theoretically interesting on three counts. First, judiciary-based policy diffusion is underexplored in extant theories. Second, this mode of

transfer is unique in its lower barriers to entry, which principally requires legal standing and a personal commitment to endure public scrutiny. Third, the chapter shows that even unsuccessful attempts at litigation may be materially consequential. In Ireland and Australia, for example, the litigants and their supporters formed the nucleus around which new national same-sex marriage advocacy networks formed.

In *Same-Sex Union Recognition in Australia* (Chapter 3) the focus of analysis shifts more explicitly to the domestic political arena. The particular focus of analysis is on the political conflict surrounding reforms in the non-marital and marital recognition of same-sex couples by the Australian Commonwealth government. Specifically, I compare the politics surrounding the increase in non-marital recognition through de facto recognition and a failed attempt at legalising same-sex marriage in 2012. The chapter finds three important institutional explanations of the different political conflicts surrounding the two policy initiatives. First, the strong institutional power of the executive needs to be acknowledged. In particular, its ability to keep policy items off the parliamentary agenda proved key to explaining policy dynamics in Australia. Further, the strong electoral system and the large umbrella parties it produces may give a false sense of party unity. Particularly in the case of the Australian Labor Party, vested interests and party factions are key to explaining the failure to legalise same-sex marriage at the start of the 2010s. Finally, the ability to define the policy problem is shown to be consequential for the policy legitimation process. While non-martial unions could be distanced from questions of morality, same-sex marriage did not offer such rhetorical breathing room. Thus, the debate over same-sex marriage was more moralistic and the opposition more vociferous.

Finally, Chapter 5 *Children Before Commitment* focuses on the United Kingdom and its unusual sequencing of same-sex couples' rights. In particular, England and Wales is one of a few jurisdictions in which same-sex couples were granted the right to adopt jointly

before their unions had been recognised by the state (be it through marriage or non-marital unions). To explain this unusual sequence of events, the paper finds that the executive was helped by its strong institutional power in defining and legislating the changes to adoption law. In particular, the ability to present the policy change as one of improving children's life chances helped quell opposition to the bill; as did the parliamentary convention that the House of Lords does not block legislation originating from the House of Commons. Moreover, the Labour government under Tony Blair had an absolute majority in the House of Commons and its legislative proposal had the support of the Liberal Democrats. This all but assured the bill's passing in the lower chamber, which meant that there was almost no way for the bill to be blocked in the upper chamber. These findings further underline the power of a majority government in implementing its policy priorities within the Westminster system.

Theoretical Contributions

Theoretically, the thesis set out to understand whether or not the morality policy framework can be further specified for the Anglo-Saxon countries. As Chapter 1 *Introduction* made clear, the theoretical framework had been unevenly developed when it was adapted to the European context. Although Engeli et al. (2012) offer in-depth dynamics for the 'religious' world, their model is largely tacit regarding agenda setting and policy legitimation in 'secular' countries. This point is partly developed by Hurka et al. (2018) who argue that a more fine-grained model is required. The latter thus propose four worlds of morality policymaking, which is a model that distinguishes based on the presence/absence of a religious cleavage and the institutional venue in which the policy debate occurs. However, the analyses in this thesis have brought to the fore sever remaining tensions.

An initial point to outline is that marriage was a central government competency in all of the case countries. This meant that it was for the central government to make the

decision regarding same-sex marriage. Unlike in the United States, therefore, same-sex marriage could only be legalised for the entire nation at once. However, the same was not true for non-marital union recognition, where the mode of government highlighted in Table 1 (on page 15) proved consequential. In federal systems like Canada and Australia, subnational governments offered an alternative venue in which to pursue same-sex couples' rights. This was the case not just in terms of union recognition but also for adoption rights. In Australia, in particular, states and territories proved an important avenue for upgrading same-sex couples' rights in the wake of the 2004 ban on same-sex marriage. In unitary systems, in turn, non-marital union recognition had to face largely similar political obstacles as same-sex marriage. Thus, non-marital unions often represented a bargain, which recognised same-sex couples but did not grant marriage as a status. The precise impact of federal versus unitary governance models for LGBT rights' evolution, however, is beyond the analysis presented here.

A second point relates to the institutional role of courts. As Chapter 3 has outlined, same-sex couples' rights were pursued largely through the courts in Canada. This strategy, however, was less successful in other countries. In fact, the legal challenges launched in Ireland and the UK that are also discussed in Chapter 3 highlight that courts can be a conservative force. In both instances the judges upheld a heterosexual understanding of marriage. Indeed, a High Court judgement in Australia summed up the attitude of all non-Canadian courts I discus in the thesis when it ruled that 'the rights and obligations which attach to the status and the social institution [of marriage] ... are not, and never have been, immutable' but that it behoved the federal Parliament and not the High Court to change the law (Gerber, Tay, & Sifris, 2014). This reticence to proactively change the law outside Canada is likely a function of the different institutional embeddedness of these other Anglo-Saxon courts (M. Smith, 2008).

Given the reticence of non-Canadian courts to change the law, the question of legalising same-sex marriage and joint adoption by same-sex couples became a political one. Thus, the thesis engaged with the morality policy framework which zeros in on the political dynamics surrounding such primarily moral questions. However, the analyses advanced in *Children Before Commitment* (Chapter 5) and *Same-Sex Union Recognition in Australia* (Chapter 4), invite a broader discussion about the frameworks' applicability within the Anglo-Saxon countries and the 'secular' world more broadly.

In regard to agenda-setting dynamics, the framework seems less explanatory in the Anglo-Saxon countries because of their executives' strong control over the parliamentary agenda. While the executive's grip on this agenda is strong, it is not absolute. Both private members' bills and external events can force the government's hand. The case of New Zealand is illustrative of the former, while the swift legislation of the *Marriage Amendment Act 2004* in Australia demonstrates the latter. While the morality policy framework can incorporate private members' bills, it is less adept at incorporating focusing events that occur outside the political arena. To illustrate this, consider the litigation regarding the recognition of overseas same-sex marriage documented in Chapter 3. The filling of these law suits brought the question of same-sex couples' rights to the political agenda. Given the affected governments' need to litigate the cases, the state had to take a position on the policy question. This in turn created a window of opportunity for advocates on all sides to have a broader political debate. Another such external focusing event can be prevalent in federal systems: subnational policy evolution. To illustrate this, consider the legalisation of same-sex marriage in the Australian Capital Territory in 2013. It precipitated a legal challenge, which re-ignited the federal debate surrounding same-sex marriage (see Chapter 4 *Same-sex Union Recognition in Australia)*. This shows that the narrow focus on parliamentary politics may hamper the morality policy framework's explanatory power more broadly.

The same shortcoming in explanatory power is observed in regard to policy legitimation. The framework seems much better at making sense of political dynamics in the 'religious' world rather than the secular one. The recent evolution proposed by Hurka et al. (2018) proved instrumental in strengthening the framework's applicability beyond the 'religious' world. In particular, the foregrounding of policy framing effects and the consequential (in)ability of depicting a policy issue as detached from larger societal value judgements held much explanatory power. In the case of same-sex marriage, the ability to depict marriage as a secular, contractual, and malleable institution (see Chapter 2 *Contextualising Same-Sex Marriage*) proved particularly important in regard to Australia's debate on same-sex marriage (see Chapter 4 *Same-Sex Union Recognition in Australia)* and the debate regarding joint adoption rights for same-sex couples in England and Wales (see Chapter 5 *Children Before Commitment)*. A cursory analysis of the political debates in Ireland and New Zealand further supports this model of morality policy-making in 'secular' countries. It appears a progressive frame is consistently juxtaposed with a traditionalist one; where the progressive frame foregrounds the socio-legal evolutions illustrated in *Contextualising Same-Sex Marriage* (Chapter 2). However, as the following section will make clear, the morality policy framework still struggles with making sense of the policy dynamics more broadly.

In adapting the morality policy framework to the cases studied here, the distinction between latent and manifest morality policy (Heichel et al., 2013) was helpful. In particular, it helps make sense of the framing effects discussed above. The classification of policy issues as either latent or manifest morality policies helps capture the type of rhetorical conflict to expect. In short, manifest morality policies cannot be presented without reference to societal value judgements and therefore will always galvanise a traditionalist versus progressive frame. Latent morality policies, in turn, offer more rhetorical breathing room.

Under the right circumstances, the moral questions inherent in them can be muted, which prevents a traditionalist versus progressive framing. To illustrate this point, consider the debate regarding federal de facto recognition for same-sex couples in Australia (see Chapter 4). The government could construct the policy problem as one of equity and justice. This backgrounded the moral question regarding the recognition of same-sex couples as couples. In fact, this backgrounding of morality helped mute opposition objections almost entirely and aided in the policy legitimation process.

Thus, the framework offers promising tools for the analysis of same-sex couples' rights in the 'secular' world. In particular, it demands attention to the related concerns of policy problem and framing effects. The initial task for a research seems to be to establish whether a policy issue a latent or manifest policy problem. If it is the latter, the policy legitimation will depend on the relative power of progressive and traditional forces. If the policy problem is a latent morality policy, in turn, the analysis becomes more complex. The initial consideration needs to be whether the supports can present the issue as devoid of moral conflict. If so, the ability to defend this definition relies not least on the institutional power conferred on those pursuing policy change. However, in both cases the analysis must not be myopically concerned with just parliamentary politics. Indeed, unexpected influences may come from other branches of government, subnational governments, or international influences. Thus, there are important inherent limitations with the morality policy framework, which cast doubt over its wider applicability. Those limitations and the methodological particular to this thesis will be explored next.

Theoretical and Methodological Limitations

Before indicating avenues for future research, it is important to be transparent about this thesis' limitations. These can be broadly grouped into two types of limitations: theoretical and methodological. While the former limitations are inherent to the morality policy

framework, the latter are a consequence of the choices made by the researcher. This section therefore will first highlight the limitations of the morality policy framework, before taking stock of the tribute exacted by the methodological choices I made.

The initial cost in utilising the morality policy framework relates to its narrow understanding of politics. In short, the framework is concerned only with the processes and actors involved in parliamentary politics. This ignores a large set of other actors. As the analysis has made clear, the judiciary is one such agent. Another one are advocacy groups. In the case of same-sex couples' rights, advocacy groups are a proven explanatory factor (Adam, 1987; Broqua, 2015; Hekma, 2015; Jackson, 2015; Poindexter, 1997; Weeks, 2015) but it is hard to incorproate them into the morality policy framework. This limitation is stark given that the idea of advocacy groups collaborating with politicians dates back to Heclo's (1978) concept of issue networks. Indeed, the notion of issue networks has been applied to more complex models of domestic policy making thorugh the advocacy coalition framework (Sabatier, 1998; Sabatier & Jenkins-Smith, 1993) and analyses of gay rights (Paternotte & Kollman, 2013).

The inability to include advocacy groups, however, also obfuscates one source of international influence not discussed in this thesis. While Chapter 3 has shown the transnational connection through international law, the thesis ignores the transnational element of the gay rights' movement and its opponents' international coordination. As has been well established, advocacy networks are internationally connected and may prove important in explaining domestic political events (Evans & Davies, 1999; Keck & Sikkink, 1998; Diane Stone, 2004). The morality policy framework, however, does not incorporate such efforts easily. On the one hand, its analytical scope is limited to parliamentary politics. This excludes advocacy groups on all fronts, as already discussed. However, the framework also treats parliamentary politics in isolation of both other domestic institutions and

international influences. While the first makes the framework myopic, the second renders it 'conceptually nationalist'. Given the broad awareness of international influence on the politics of same-sex couples' recognition, the latter is a large blind spot.

Finally, the framework is truncated even within the realm of parliamentary politics. For one, the parliamentary venue is cut off from ancillary institutions. As has been shown, courts figured prominently in all case countries. While they rarely changed policy, court cases often proved focus points, which sparked parliamentary debate. Litigation, therefore, may prove an important strategy for agenda setting, but it cannot immediately be reconciled with the extant morality policy framework. Similarly, the dynamics in bicameral systems are hard to model in the morality policy framework. All Anglo-Saxon countries bar New Zealand figure such a chamber but they vary in their potency. However, both the dynamics in the case of adoption reform in England and Wales (Chapter 5) and the same-sex marriage debate in Australia (Chapter 4) require the inclusion of this second chamber to adequately explain the case. The morality policy framework, however, struggles to integrate the entire legitimation process and rather invites a sequential analysis of each venue. Moreover, federal systems such as Canada and Australia offer a multitude of parliamentary venues in which morality policy can be debated. It is however not clear how the morality policy framework can incorporate these multiple venues. While the framework can be applied to each venue in isolation, it cannot readily trace the interconnectedness. The framework, therefore, is limited in its ability to incorporate any vertical influences on a parliament (i.e. from the international realm or a subnational government) as well as horizontal ones (i.e. any other branch of government at the same level of governance).

Methodologically, the thesis is limited by the case study approach and the analytical strategies pursued in the different cases studies. While I argue in the *Introduction* (Chapter 1) why I think case study research is most appropriate for this research project, it must be

acknowledged that the limited generalisability remains a constraint on the findings. In Chapter 4 and Chapter 5, I use the comparative method to further the generalisability, but there remain important scope conditions in place. First and foremost is the fact that the analysis focused on parliamentary systems in the Anglo-Saxon type. This system of governance has a unique set of institutional rules and conventions that may not be more broadly applicable.

Furthermore, the evidence used for the different analyses may have left blind spots. First, the thesis is strongly reliant on documentary evidence. Documentary evidence has the advantage of begin readily available, cost-effective, unobtrusive, and non-reactive. However, it is clear that documentary evidence may be biased in that it is created for a particular purpose. To minimise this limitation, I not only relied on several sources of documentary evidence (i.e. parliamentary record, news media, biographies etc.) but also complemented this evidence with interview data where possible. While this interview data was sometimes easy to obtain, there were other instances where this was less readily achievable. In particular, Chapter 4 *Same-sex Union Recognition in Australia* was hampered by an unwillingness of informants to come forward. The fieldwork for this chapter was conducted at the time of the postal vote, which seems to have discouraged political actors from being interviewed. While some high-value interviews could be secured, the chapter would have been strengthened by more interview evidence. In contrast, the analysis in Chapter 3 *From Halpern to Wilkinson* could rely on almost the entire universe of possible informants. Only one couple was unavailable due to a recent bereavement.

In sum, therefore, there are important caveats to be kept in mind before the avenues for future research are outlined. While the methodological limitations were a result of my choices, those associated with the morality policy framework represent a key source for future avenues of research.

Avenues for Future Research

In concluding, it is important to look forward. While the theoretical contributions made in this thesis help advance the morality policy framework and the scholarship on same-sex couples' rights more broadly, much remains to be done. While there are several lines of inquiry springing from the analysis presented here, I focus first on those relating to the morality policy framework, before considering the implications on LGBT scholarship more broadly.

In regards to the morality policy framework there are two lines of inquiry: one that springs from the limitations discussed above and another that results from the empirics presented in the thesis. The first line of future research relates to the distinction between latent and manifest morality policies (Heichel et al., 2013). In both of the single-country case studies, the government pursued a problem definition that minimised the moral conflict in the political debate. In Australia, non-marital union recognition was actively constructed as a question of equality and not morality. In England and Wales, in turn, the emphasis in debating joint adoption rights for same-sex couples was on looked after children's best interests. Both problem definitions' backgrounding of the moral questions underlying the further recognition of same-sex dyads, helped the bills' passage by muting opposition objections. While the Australian government actively excluded same-sex couples' adoption right to placate the opposition, these adoptions rights could be granted in England and Wales without jeopardising the government's problem definition. This begs the question of how latent and manifest morality policies can be categorised. The evidence advanced in this thesis suggests that the boundary between latent and manifest morality policies may be culturally specific or related to the strength of the executive in drafting legislation. Further

analysis should seek to better understand the applicability of this distinction within the morality policy framework.

A second avenue of future research relates to the interdependence of same-sex couples' rights, and different morality policies more broadly. As the analysis in Chapter 5 *Children before Commitment* highlighted, there is no self-evident sequencing of such rights. And while England and Wales offer an unusual sequence of recognising same-sex couples it is not unprecedented. In Western Australia and British Columbia, same-sex couples were allowed to adopt jointly before their unions were formally recognised. This challenges the truism that suggests union recognition always precedes joint adoption rights. Given the centrality of children in the canonical construction of the family, it may prove fruitful to further unpack the relationship between union recognition and adoption rights for same-sex couples. Canada promises to be particularly instructive case study given the provincial variance regarding the timing of joint adoption rights relative to marital and non-marital union recognition for same-sex couples. This point, furthermore, could be broadened to include other morality policies to establish whether and which other policy legacies may affect the politics surrounding same-sex couples' rights.

Finally, there is a theoretical challenge to advance the morality policy frameworks' understanding of policy making. As the limitations section above has highlighted, the framework is curtailed in its ability to integrate other political venues. It is beyond the remit of this thesis to establish whether such extensions are possible without distorting the framework beyond recognition. What is clear, however, is that there are additional policy venues and relevant policy agents outside the formal political arena that form a necessary part of any explanation of policy change. The extent to which such additions can be made, and in what way, is a substantial area of theorising that may be explored.

Beyond the particular framework of morality policy, the analyses and findings of this thesis suggest three additional lines of inquiry. First, the case countries intimate several avenues for depoliticising the granting of rights to same-sex couples. In Canada, for example, the Courts have forced the government's hand. While this dynamic was not replicated in the other Anglo-Saxon countries, the use of the judiciary for policy change in the United States, South Africa, and Latin America invites further analysis of when non-political strategies are successful. Relatedly, there are other instances of such decisions being taken outside of parliament: In Australia a plebiscite on same-sex marriage volleyed the question to the electorate. In Ireland, in turn, the Constitutional protection of marriage necessitated a constitutional convention prior to any policy change. While this slowed down change, the convention and its recommendations minimised the role of politicians in making policy decisions; as did the mandatory referendum on same-sex marriage. Therefore, it seems fruitful to investigate more broadly how the question of same-sex couples' rights was redirected away from the parliamentary arena to either the judiciary or the electorate.

At the same time, the judiciary-based policy transfer model proposed in *From Halpern to Wilkinson* (Chapter 3) offers ample avenues for future research. In particular, the scope conditions regarding legal systems, policy areas, and available international frameworks requires further analysis. The case of same-sex marriage relies not only on the habitual recognition of legally contracted overseas marriage, but also the international human rights frameworks that guarantee a right to family life and non-discrimination. What other areas of social policy are equally justiciable remains to be determined. Further, all the Anglo-Saxon countries operate a common law system. Therefore, another scope condition to be tested is whether the same mechanism is available in civil law system. In this regard, it seems likely that the agenda-setting function may be equally strong. Once legal cases get filed, they can garner public interest, which in turn may force a debate. However, the

mechanism of precedent is unavailable in a civil law system, which makes it impossible for a single case to overturn a legal norm entirely. Nevertheless, there is the possibility that a particular law can be found to be unconstitutional or that a legal norm is referred for constitutional review. In either case, a legal mechanism would exist to overturn a law passed by parliament. Whether and how this has occurred, however, remains to be established.

Finally, the thesis has focused on rights as markers of same-sex couples' inclusion into the state's understanding of family. In the case of joint adoption and marriage, the fundamental assumption of the analyses was that to achieve the right to either would equate to a broader degree of recognition. However, it is clear that rights are no panacea against discrimination, exclusion, and homophobia. Rather, they bring about legal equality without engendering social equality or inclusion. Thus, the frame of analysis must be broadened beyond just legal change. Two points stand out from the analyses offered in this thesis. First, there was reference to the frequent opposition of the same-sex advocacy groups to same-sex marriage in Chapter 3 *From Halpern to Wilkinson.* Nevertheless, all gay rights movements ultimately came to embrace same-sex marriage as a movement goal. This begs the question of how, why, and when different national lesbian and gay movements have come to embrace marriage equality as a movement goal and whether the political strategies were similar cross-nationally. Secondly, the relationship between public opinion and policy change warrants further investigation. As highlighted in Chapter 4 *Same-Sex Union Recognition in Australia* Australia's public grew increasingly supportive of same-sex marriage between its ban in 2004 and its legalisation in 2017. Even though the support swelled to almost two-thirds of the Australian electorate, it was insufficient in bringing about policy change. Thus, it is important to better understand how public opinion interacts with social movement advocacy and political bargaining.

In concluding, however, it is important to step back and see the importance of the thesis' contribution for the wider field of social policy. As the *Introduction* highlighted, union status is rarely foregrounded in the discipline. As this thesis has shown, there are important inequalities with material and symbolic consequences that spring from the hierarchy of union recognition along sexual identity lines and the exclusion of some adult dyads from marriage in particular. At the same time, the case of same-sex couples' rights in the Anglo-Saxon countries paints an optimistic picture in so far as these exclusions can be overcome. In fact, the thesis has shown how malleable the state's notion of the family has proven to be over the years. The case of same-sex couples' rights in particular furthers earlier feminist work in important ways. While the feminist critique brought to the fore the sexist assumptions underpinning much state policy, the case of same-sex couples' rights foregrounds the challenges faced in trying to overcome the heteronormative policy legacy. The achievement of equality for same-sex couples goes beyond material and legal equality however and speaks to the symbolic acceptance of their relationships and families as of equal value to heterosexual ones by the state as a whole. While it is for the lesbian and gay rights movement and the community more broadly to critically question how far assimilation should go, the study of cases in which legal equality has been achieved, is likely to hold cues for those cases where this has not yet been achieved. It is hoped that this thesis adds to this endeavour by elucidating the processes at work in a new set of case countries.

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Appendix 1 – Background on Case Countries

Given the high degree of familiarity required to conduct case-study research (Della Porta, 2008a; Lijphart, 1975), the below paragraphs summarise each case country's engagement with same-sex couples' rights. While these summaries are not exhaustive, they offer an important context in which to situate the subsequent analyses. The summaries start with Canada, as it was the pioneer amongst the Anglo-Saxon countries. It legalised same-sex marriage in 2005 and was in fact the first non-European polity to do so. Next, summaries of events in the United Kingdom, Ireland, Australia, and New Zealand follow.

Canada

Even though Canada was a pioneer amongst the Anglo-Saxon countries in regard to same-sex marriage, the road to marriage equality was neither straightforward nor quick. It was a continuous and concerted legal strategy that helped continually upgrade the recognition of same-sex couples within the Canadian context. This strategy was vitally enabled by the *Canadian Charter of Rights and Freedoms (Charter)*, which formed the basis of much litigation.

Canada, like all common-law jurisdictions in this thesis, did not have an explicit legal statute that defined marriage as heterosexual. Indeed, until the first demands for same-sex marriage in the 1960s and 1990s, no explicit statutory requirement stipulated that one spouse be male and the other be female (Alderson & Lahey, 2004a, p. 19). Rather, courts relied on precedent to justify the heterosexual understanding of marriage. In particular, the cases of *Hyde v. Hyde and Woodmansee* and *Corbett v. Corbett,* dating from Victorian times, were frequently invoked to justify marriage's heterosexual nature. In fact, it was on the basis of this precedent that early cases were summarily dismissed (e.g. *North v. Matheson* in 1972).

The legal landscape in Canada, however, substantially changed as the country increasingly undid its links to the United Kingdom. In particular, Canada repatriated its Constitution in 1982 and concomitantly instituted its *Charter of Rights and Freedoms*. This charter, which was originally conceived as a tool for national unity,[34] would prove pivotal for the lesbian and gay rights movement's pursuit of increased relationship recognition. In particular, section 15(1) of the *Charter* included a non-discrimination clause that originally did not apply to discrimination based on sexual orientation, but that would come to prove instrumental in Canada's path to same-sex marriage.

In fact, a string of legal challenges to that exclusion meant that by the late 2000s, sexual orientation was to be read into the *Charter*'s non-discrimination clause. The most cited cases in this process are *Canada v. Mossop (1993), Egan and Nesbit v. Canada (1995), Miron v. Trudel (1995), M. v. H. (1999),* and *Halpern v. Canada (2003)*. While the 1995 cases meant that discrimination on the basis of sexual orientation and marital status became unconstitutional, the 1999 case brought about an end to the exclusion of same-sex couples from common-law marriage. This non-marital union recognition is akin to a civil partnership in that it imparts rights and responsibilities to each partner but does not require any registration. Finally, the exclusion of same-sex couples from marriage was found unconstitutional in the *Halpern* decision.

The *Halpern* decision, however, did not occur in a socio-political vacuum. Since the repatriation of the Constitution, Canada's stance on homosexuality more broadly had shifted substantively. Sodomy had been decriminalised, sexual orientation was to be read into the *Charter's* non-discrimination clause (Alderson & Lahey, 2004b; Davies, 2008; Hiebert,

[34] The Charter was originally brought in to placate Quebec's separatist movement and to create a "mosaic" culture in which common values embodied in the Charter would unify the nation whilst allowing individuals to live according to their cultural instincts (Trudeau 1972 in Ang & Petrocik, 2012, p. 9).

2002), and same-sex couples had found recognition qua couples and were to be accorded the same rights as common-law opposite-sex couples (Davies, 2008; Hiebert, 2002; Wintemute, 2004). These factors combined to encourage Canada's major gay rights advocacy group to make a coordinated push to try and overcome the last hurdle in lesbian and gay rights: same-sex marriage (Alderson & Lahey, 2004b; M. Smith, 2002). Even though they succeeded in Ontario in 2003,[35] same-sex marriage was far from universally available in Canada.

As same-sex marriage was endorsed across Canada's basic political administrative divisions, including more conservative and rural provinces (M. Smith, 2002, p. 12), the federal government felt pressure to act. Eventually, Prime Minister Chrétien announced that there would be no appeals of the various provincial same-sex marriage rulings to the Supreme Court and that the federal government would move to legislate same-sex marriage across all of Canada (Chrétien, 2003). At the same time, the government committed itself to getting its draft same-sex marriage bill approved by the Supreme Court before a free vote in the House of Commons. A month after that announcement, the *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* was submitted to the Supreme Court.

After a longer than usual deliberation period, the Supreme Court eventually published its review of the act on 9 December 2004.[36] It found that the bill was compliant with Canada's Constitution, which paved the way for its introduction into Parliament. After the Legislative Committee on Bill C-38 (2005) had amended the bill to clarify that 'it is not

[35] Later that year the Appellate Courts of Quebec and British Columbia also ruled in favour of opening civil marriage to same-sex couples.

[36] Part of the reason why it took the Supreme Court so long to rule on the questions was the fact that the Martin government (which replaced the Chrétien one in December 2003), added a fourth question to the referral. In the end, the Court exercised its discretion in not answering this question ("Reference re: Same-Sex Marriage," 2004; Wintemute, 2004).

against the public interest to hold and publicly express diverse views on marriage' and to underline that religious freedom allowed for individuals (as well as institutions) to disagree with the notion of same-sex marriage without the threat of punishment under the laws of Canada, the bill passed after a free vote (Overby et al., 2011). After its passage through the Senate, Bill C-38 received Royal Ascent and became the *Civil Marriage Act 2005.*

In regard to adoption, Canada's federal structure and the provinces' responsibility for adoption mean that the evolution of this part of same-sex couples' rights has been heterogenous. The first province to allow same-sex couples to adopt jointly was British Columbia in 1996. It was followed by Ontario in 1999; Saskatchewan and Nova Scotia in 2001; Newfoundland and Labrador, Quebec, Manitoba, and the Northwest Territories in 2002; Yukon in 2003; Alberta in 2007; New Brunswick in 2008; and Prince Edward Island in 2009. The last part of the Canadian confederation to legalise joint adoption for same-sex couples was Nunavut, which did so in 2011.

The United Kingdom

In the United Kingdom, the country's Parliament has a long history of regulating homosexuality and same-sex relationships. In fact, unlike Canada, the United Kingdom's courts were peripheral in the evolution of same-sex couples' rights. Furthermore, with the advent of devolution, the United Kingdom's nations gained increasing jurisdiction over some of the rights studied in this thesis. Due to the transfer of significant powers to Edinburgh and Belfast in 2002 and 2007, respectively, the constituent nations have developed differently, especially in regard to adoption and marriage policy. However, this section first focusses on the historical regulation of homosexuality before exploring the present variation in law.

After the end of World War II, there were three distinct eras during which the government took varying stances towards homosexuality (Hayes & Moran-Ellis, 1995;

Stychin, 2006). Immediately after the war and until the 1980s, a permissive mood prevailed. The 1957 Wolfenden Report's recommendation to decriminalise consensual homosexuality between adults, which was legislated in 1967, illustrates the contemporary mood well. However, with the onset of the AIDS epidemic, the government abandoned this permissive stance and turned towards a sharp moralism (Richard & Libby, 2015). Homosexuality became tainted by notions of disease and therefore was seen as in need of containment. The now-infamous section 28 of the *Local Government Act 1988*, which forbade local councils from using public monies for the 'promotion of homosexuality', captures this era's stance towards homosexuality well. With the transition to a Labour administration in 1997, however, a more liberal approach returned. The fiscally inexpensive nature of the policy area (Stychin, 2006) and its close association with the evolving human rights framework meant that the government was increasingly receptive of the gay movement's demands for union recognition (Eekelaar, 2014; R. J. Simon & Brooks, 2009b). However, even though courts increasingly recognised same-sex couples, both the European Court of Human Rights and the British courts were unwilling to interpret human rights law in a manner that would mean a 'right' to marriage for same-sex couples (e.g. *Kitzinger and M v. Secretary of State for Work and Pensions* in 2006) (see, for example, Johnson, 2015). The Blair ministry nevertheless was prolific in granting same-sex couples rights (Clements, 2015a; Eekelaar, 2014; R. J. Simon & Brooks, 2009b). In particular, the *Civil Partnership Act 2004* and the *Adoption and Children Act 2002* did much to recognise same-sex couples as couples.

The initial step in formal relationship recognition in the United Kingdom was the legislation of civil partnerships. The government presented civil partnerships as an effort to de-problematise non-traditional family forms while underlining the importance of a monogamous love dyad (Shipman & Smart, 2007). It therefore foregrounded the relationship of two loving individuals and the need to valorise it, which aligned well with a

shift in the gay movement away from identity towards relationship recognition (Weeks, 2000). The decision to limit civil partnerships to same-sex couples, however, was key to the government's claim that it was still protecting heterosexual marriage. This creation of a specifically gay institution of relationship recognition has been interpreted by some as an 'act of proactive statecraft' to further privatise care and to reward homosexuals couples for conforming to heteronormative standards with rights previously reserved for married opposite-sex couples (Stychin, 2006).

The next step in England and Wales' recognition of same-sex couples followed in 2012, when the Conservative–Liberal Democrat government surprised the country by announcing a consultation on the introduction of same-sex marriage. The announcement surprised on two counts. First, it was not a manifesto promise of either coalition party, nor was it a policy mentioned in the coalition agreement (Eekelaar, 2014). Second, the dominant Tories had suffered damaging rifts in previous policy debates regarding lesbian and gay rights issues. William Hague was defeated in his attempt to repeal section 28 of the *Local Government Act 1988*. Iain Duncan-Smith's decision to impose a three-line whip for the *Adoption and Children Act 2002* resulted in a vociferous split of the Tory caucus that cost Ian Duncan-Smith the party leadership. Michael Howard tried to prevent a similar fate by offering a free vote on the *Civil Partnership Bill* and the *Gender Recognition Bill.* David Cameron's decision to re-engage with a lesbian and gay rights issue thus came as a surprise for many (Hayton, 2015; Hayton & McEnhill, 2015). Nevertheless, Cameron's commitment to detoxifying the Conservative brand, his personal social liberalism, and electoral calculations (Hayton & McEnhill, 2015; Heppell, 2014) help explain the choice. Moreover, the coalition with the Liberal Democrats combined with the precedent of free votes offered political breathing room, which was needed given the party-internal opposition to same-sex

marriage.[37] In the end, the bill passed and legalised same-sex marriage in England and Wales on 17 July 2013.

Unlike the *Civil Partnership Act 2004*, neither the legalisation of same-sex marriage nor the legalisation of joint adoption by same-sex couples applied beyond England and Wales. Under the transfer of powers to Belfast and Edinburgh, the two nations followed their own timelines. In both respects, Scotland followed the English example quickly: it legalised joint adoption by same-sex couples in 2007 and same-sex marriage in 2014. Northern Ireland did not liberalise its same-sex union regime beyond civil partnerships. Its adoption policy, in turn, was forcefully liberalised when the Appellate Court ruled its ban on same-sex couples adopting constituted a breach of human rights. This brought Northern Ireland more in line with the rest of the Union but did not change its ban on same-sex marriage until it was imposed on the nation in 2019.[38]

Ireland

Ireland has perhaps had the most difficulty among the Anglo-Saxon countries in modernising its legal approach to relationships and families (Asher, 2009) due to a very narrow legal definition of both concepts and a longstanding tradition of seeing 'couples outside of marriage as strangers at law' (Y. Murphy, 2016; Ryan, 2008). Despite its legal barriers and its strong Catholic heritage, Ireland nevertheless has moved to recognise same-

[37] Cameron faced push back not only from religious leaders but also constituency members of Tory MPs and the party's grassroots. Contemporary polling showed that less than a third of Tory voters (27.8%) supported the move to bring in same-sex marriage, compared just half of the entire British electorate (42.8%). The discontent amongst these traditional Tory allies, moreover, was widely publicised in the right wing media, adding further pressure on the PM. (Clements 2014)

[38] In 2019, the failure of the Northern Ireland assembly to reconstitute itself after its collapse led to the *Northern Ireland (Executive Formation etc.) Act 2019*. While the act was intended to grant Northern Irish parties more time to negotiate a new executive, it also included a provision regarding same-sex marriage. Specifically, the bill mandated that if no devolved administration was formed by 21 October 2019, same-sex marriage would be legalised in the nation. As the deadline for reformation of a Stormont government was not met, same-sex marriage have become legal in Northern Ireland as of 13 January 2020.

sex couples and their families. As is well known, Ireland uniquely voted to embrace same-sex marriage through a constitutional referendum in 2015. This public vote enabled the legislative changes to allow same-sex marriage, which equated same-sex couples' relationships with opposite-sex couples' relationships overnight. This section therefore lays out the legal groundwork, the gay rights movement's progress towards same-sex marriage, and the political developments that resulted in that referendum being held.

Ireland, like all other former British colonies, inherited British common law. This was reaffirmed in the case of *Ussher v. Ussher,* with the effect being that *Hyde v. Hyde and Woodmansee* equally defined marriage as heterosexual in Ireland (O'Sullivan 2014). Ireland's reification of the heterosexual family, however, far exceeded that of any other Anglo-Saxon country. In addition to its legal precedents, Ireland also passed the *Civil Registration Act 2009*, which made being of the same sex a statutory impediment to contracting marriage (Asher, 2009; Y. Murphy, 2016; O'Sullivan, 2009). Moreover, its Constitution granted special status to the family and to the institution of marriage, which the state pledged to guard with special care. It is therefore unsurprising that change came slowly to Ireland.

Despite this strong institutional protection of the heterosexual family, the lesbian and gay rights movement in Ireland has managed to steadily further the rights of homosexual individuals and couples. Through a combined legal and political strategy, the country's advocacy groups have achieved important victories. One of the most consequential cases pursued by the lesbian and gay movement was *Norris v. Ireland*, which was first presented in Ireland's High Court in 1978 and challenged the country's ban on homosexuality. After a series of appeals, the European Court of Human Rights in Strasbourg ruled that the Irish ban on homosexuality was a breach of European human rights law and forced the country to change its law. In the wake of the verdict, Ireland reformed much of its legislative

framework with regard to its homosexual citizenry, but limited this shift to the recognition of gay individuals (Y. Murphy, 2016).

Ireland would, however, not recognise same-sex couples until the passage of the *Civil Partnership and Certain Obligations of Cohabitants Act 2010* (the Partnership Act). In part, this delay is explained by the Irish judiciary's refusal to re-interpret the constitutional protection of the family based on marriage (O'Sullivan, 2009). Through verdicts like those given in *Murray v. Ireland, B v. R,* and *T.(D.) v. T.(C.)*, the judiciary actually continually underscored the heterosexuality of marriage. With the increased embrace of same-sex unions across other Western nations, Ireland seemed increasingly out of step with other states. This laggard status was further put into stark relief with the case of *Zappone and Gilligan v. Revenue Commissioners* (Asher, 2009; Y. Murphy, 2016; O'Sullivan, 2009; Tobin, 2013). The case regarded a binational couple that had married in Canada, returned to Ireland, and tried to claim a tax benefit only available to married couples. They challenged the Revenue Commissioners' refusal to grant them the benefit and to thereby recognise their marriage. While the case was lost, it focussed domestic attention on both how Ireland recognised couples who formalised their relationships abroad and on how it dealt with the issue of same-sex unions domestically.

With the issue's ascendancy on the nation's mind, politicians also began to engage. In 2005, the Fianna Fáil–Progressive Democrats government convened the Colley working group to ascertain what political options were available for recognising same-sex couples. The working group's report noted that civil partnership could be achieved through a simple act of the Oireachtas, while same-sex marriage would require a constitutional amendment

and thus a public referendum (Y. Murphy, 2016).[39] In light of this, the Finna Fáil–Green government that took office in 2007 decided to include civil partnerships in its government programme and legislated for them in 2010 (Asher, 2009; Y. Murphy, 2016). Ireland's lesbian and gay rights movement, however, was immediately dissatisfied with civil partnerships and sought explicit commitments from each party regarding same-sex marriage in the run up to the 2011 election. While only Labour was willing to commit to same-sex marriage in its party manifesto (Elkink, Farrell, Reidy, & Suiter, 2016), it went on to form a coalition government with Fine Gael, which felt 'lukewarm' about same-sex marriage (Elkink et al., 2016). In drawing up its government programme, the coalition agreed to implement Fine Gael's promise of a constitutional convention[40] while at the same time have this convention debate Labour's proposed legalisation on same-sex marriage (Elkink et al., 2016; Y. Murphy, 2016). In April, the convention therefore duly considered the question of whether Ireland should amend its Constitution to allow same-sex couples to marry (Suiter, Farrell, Harris, & O'Malley, 2016). At the end of the deliberation, 79% of the convention participants favoured the introduction of same-sex marriage. The government, in turn, accepted the convention's recommendation in November 2013 and created the necessary Referendum Commission in January 2015 (Elkink et al., 2016; Murphy, 2016). After an intense referendum campaign, the Irish public accepted the 34th amendment to the Constitution by 62%. This, in turn, made Ireland both the first country to legislate same-sex

[39] It was also mentioned that important legal changes were required to realise same-sex marriage. Most importantly it would be necessary to repeal (at least in part) the Civil Registration Act 2004 (Asher 2009).

[40] The constitutional convention was an exercise in deliberative and participatory government. It brought together 100 individuals (politicians from both Irelands, a random sample of Republic of Ireland citizens, and an independent chair) and asked them to consider a total of 8 constitutional issues. The Convention was presented with written and in-person evidence and then asked to recommend a course of action to the government. The government, in turn, had to respond in writing to the Convention's suggestion and justify its response to each agenda item.

marriage through a public vote and to constitutionally guarantee same-sex couples' right to marriage.

Australia

The last country to legalise same-sex marriage in the Anglo-Saxon world, Australia had wrestled with same-sex couples' rights for most of the early 2000s. It eventually managed to pass legislation to legalise same-sex marriage and opened up the institution to couples starting in 2018. While marriage was a federal policy issue, policy on same-sex couples adopting jointly was administered by states. As in the Canadian case, this led to a variable set of rights for gay couples. Unlike Canadian provinces, some Australian states also passed formalised non-marital unions, which meant even more diverse social rights for same-sex couples across the Commonwealth. The evolution of lesbian and gay rights, however, started at the same time as in Britain. Australia started deregulating consensual male homosexuality in the wake of the Wolfenden Report. While South Australia pioneered the decriminalisation in 1972, Tasmania concluded the nationwide decriminalisation when its sodomy statutes were found to be a breach of human rights in 1997 (Richardson-Self, 2012; R. J. Simon & Brooks, 2009a).

As mentioned, the extension of rights to same-sex couples was complicated by Australia's federal structure: while the Commonwealth retains prerogative over matters relating to marriage, registered partnerships and adoption policy fall to the individual states and territories (Cooper, 2005; Walker, 2007; Witzleb, 2011). Furthermore, both levels of government regulate the rights and duties of 'de facto unions' in their own areas of legislative competence.[41] While same-sex couples were included in 'de facto' partnerships,

[41] De facto unions are non-marital unions that are recognised by the Australian governments. They do not require formalisation like a registered partnership but confer rights and obligations on those cohabiting on a genuine domestic basis.

states and territories took the lead in using this recognition to grant same-sex couples rights (Walker, 2007). At the same time, some states moved to offer formalised non-marital union recognition. The Australian Capital Territory (ACT) pioneered this development in 1994, with Tasmania following suit in 2003, Victoria in 2008, New South Wales in 2010, Queensland in 2012, and South Australia in 2016. [42] The federal government reviewed its treatment of same-sex couples in regard to de facto union rights and responsibilities in 2008 and passed two acts to equalise the rights and obligations of same-sex and opposite-sex de facto unions.[43] These bills specifically and conclusively equalised rights in the areas of citizenship, immigration, taxation, superannuation, and social security assistance (Witzleb, 2011). Adoption and artificial reproduction rights, however, were exempted from this federal equalisation of rights.

The recognition of same-sex couples in Australia produced significant substantive equality that benefited from the fact that marriage had a reduced importance in the legal protection of relationships in Australia (Witzleb, 2011). At the same time, gay advocacy groups initially focussed on non-martial union recognition, which allowed them to achieve substantial legal equality through a piecemeal and state-based advocacy effort without having to confront federal politicians (Witzleb, 2011, pp. 152-153). This, in part, also explains why same-sex marriage was not a priority for the Australian gay rights movement (Walker, 2007).

Same-sex marriage, however, became central to lesbian and gay rights activists in the wake of a 2004 law change that explicitly defined marriage as heterosexual and prescribed the recognition of foreign same-sex marriages in Australia. Prior to the *Marriage*

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[42] Western Australia and the Northern Territory do not offer any formal registration schemes.
[43] *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* and *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*

Amendment Act 2004, Australia's *Marriage Act 1961* was mute on the spouses' sexes, and common law accepted the British precedents on heterosexuality. Indeed, the Menzies government actively fought a gendered act in the 1960s (Nicholson, 2005). The courts had affirmed that the federal Parliament had the right to define what unions were recognised as marriages (in *Attorney General for New South Wales v. Brewery Employees Union of New South Wales* [1908] HCA 94) but also highlighted marriage's malleability (in *Re Wakim; Ex Parte McNally* [1999] HCA 27) as a social institution (Cooper, 2005). Nevertheless, the Commonwealth government under Howard legislatively reified the heterosexual definition of marriage, in large part to pre-empt a more liberal interpretation of marriage (Walker, 2007; Witzleb, 2011). Specifically, Howard sought to mute the 'risk' of same-sex marriage being mandated by Australia's courts after two same-sex couples petitioned the Family Court in Victoria to recognise their Canadian-solemnised same-sex marriages. In a swift response and in light of an election year (Nicholson, 2005) in which the vast majority of the Australian electorate felt unsupportive of same-sex marriage (Cooper, 2005), the government defined marriage as heterosexual and proscribed the recognition of foreign same-sex marriages with the support of the opposition ("John Howard defends Malcolm Turnbull on same-sex plebiscite," 2017).

This comprehensive ban on same-sex marriage galvanised the country's LGBT movement (Nguyen, 2015; Walker, 2007). Given the courts' reluctance to compel the recognition of same-sex marriage, the lesbian and gay rights movement chose to replicate its state-based activism, as it had been successful in bringing about non-marital union recognition. The first state to table a same-sex marriage bill was Tasmania in 2004 (Walker, 2007). The bill, however, died on the floor. In 2006, the ACT's civil union bill was vetoed by the Howard government because civil union was seen as too similar to marriage (Donovan, 2014). In 2013, the ACT directly challenged the ban on same-sex marriage as it

passed Australia's first same-sex marriage law. The bill, however, was voided by the High Court because marriage was a competence of the Commonwealth and no state and territory could legislate in this regard (*Commonwealth v. Australian Capital Territory* [2013] HCA 55). This meant that the effort to legalise same-sex marriage focussed on the federal Parliament after 2013.

Even though two-thirds of Australians supported same-sex marriage by the early 2010s (Nguyen, 2015), the Commonwealth Parliament struggled with the policy. Between the ban in 2004 and the ultimate legalisation in 2017, 22 attempts at passing same-sex marriage bills took place. The closest a same-sex marriage bill came to passing was in 2012 when the federal Parliament debated the policy, but it failed due to a half-hearted embrace by the government and a strong opposition. Under increased pressure, the Abbott government committed itself to a popular vote on the matter, a policy Abbott's successor Malcolm Turnbull remained committed to. However, the bill to call a plebiscite was blocked by the opposition Labor party in the Senate. After a second plebiscite was blocked in the Senate in 2017, the government called a voluntary postal survey, which did not require parliamentary approval. It was held in late 2017 and returned a two-thirds majority in support of legalising same-sex marriage, which broke the Gordian knot surrounding same-sex marriage and led to its legalisation later in 2017.

Same-sex marriage also set the groundwork for nationwide joint adoption rights. In fact, the Northern Territory did not liberalise its adoption law until 2018. This marked the end of a process that had started as early as 2002, when Western Australia passed a radical overhaul of how it recognised same-sex couples that were residents of the state. It was followed by the ACT in 2004, New South Wales in 2010, Tasmania in 2013, Victoria and Queensland in 2016, and South Australia in 2017.

New Zealand

New Zealand is similar to all Anglo-Saxon cases in its early connection to British law. It followed on the heels of England when in 1840 it outlawed sodomy and again in 1867 when it changed sodomy's punishment from death to life imprisonment. Thereafter there was a long gap in New Zealand's engagement with its lesbian and gay citizens. It was not until the 1960s that further legal reform occurred only after a nascent lesbian and gay rights movement was increasingly galvanised (Ministry for Culture and Heritage, 2014c). In particular, the 1969 Stonewall Riots in New York proved pivotal in re-invigorating lesbian and gay rights activism in the country (Ministry for Culture and Heritage, 2014a). In its wake, the Dorian Society and the Wolfenden Association (later the Homosexual Law Reform Society) were founded to pursue better legal protections. New Zealand also featured a short-lived national umbrella organisation of lesbian and gay rights activists (Ministry for Culture and Heritage, 2014a), but generally speaking the activism was centred in its urban hubs. While its early attempts at legal reform failed, the movement achieved the decriminalisation of homosexuality in 1986 (Ministry for Culture and Heritage, 2014b) when half of a gay rights bill was approved. As originally proposed, the bill would have outlawed discrimination based on sexual orientation and abolished the sodomy statute. The second part of the bill, however, was voted down, and protection from discrimination was only honoured in the *Human Rights Act 1993*.

While the original movement collaborated closely with allied parliamentarians, wider relationship recognition was achieved in the courts. In 1996, three same-sex couples brought a case before New Zealand's courts after having been denied marriage licenses (*Quilter v. Attorney-General [1998] 1 NZLR 523*, 1998). The couples claimed that they were being discriminated against on the basis of sexual orientation in breach of the *New Zealand Bill of Rights Act 1990* and the *New Zealand Human Rights Act 1993*. While the court

rejected their case and upheld marriage's heterosexual nature, it also asserted that it fell to Parliament and not the courts to redefine the spirit of the *Marriage Act* (Hide, 2012). Two couples then presented their case to the UN Human Rights Committee in 1998, claiming a violation of their rights under the International Covenant on Civil and Political Rights (ICCPR) (*Ms Juliet Joslin et al. v. New Zealand No. 902/1999, U.N. Doc. A/57/40 at 214 [2002]*, 2002). The claim was rejected by the Committee in July 2002.

After this legal defeat, the New Zealand struggle for relationship recognition moved back to a political strategy. In a first step, New Zealand introduced civil unions – for both same-sex and opposite-sex couples – in 2005. *The Civil Unions Act 2005* passed after 14 months of vociferous debate (Orsman, 2013; Pearson, 2014). Parliament concomitantly passed the *Relationship (Statutory References) Act 2005*, which was much less controversial. The act, however, was key in assuring the legal equivalence between civil unions and marriage, although differences remained, with civil unions not enabling couples to adopt jointly, for example. While some gay couples felt that the new legal institution 'decreased their sense of vulnerability' (Elizabeth & Baker, 2015, p. 64), the uptake of civil unions remained low (Henrickson, 2010), not least because lesbians and gays felt that it was a second-class alternative to marriage ("Society more relaxed over gay marriage," 2012).

The issue of same-sex marriage reappeared on the national political agenda in 2012. Again, the impetus appears to have come from the United States. In particular, President Obama's public support of marriage equality inspired New Zealand MP Louise Wall to submit a private member's bill that aimed to legalise same-sex marriage. The bill was drawn in the private member's bill lottery (Trevett, 2012) and forced the issue onto the parliamentary agenda. When the bill was drawn, both the leader of the opposition Phil Goff and Prime Minister John Key signalled initial support (Trevett, 2012). While the public was largely supportive of the measure (Wynn, 2013), the strong support amongst

parliamentarians in early votes surprised most (Davison, 2012b). Even though there were calls from the nationalists to put the question to a public referendum, the bill passed its first reading with surprisingly strong support of 80 in favour and 40 against (Davison, 2012a).

It was then referred to a committee, which received around 21,500 submissions from the public (Davison, 2013). Of the 2,900 individual submissions, most were supportive of the bill. Those opposed to the legalisation of same-sex marriage primarily objected because of the proposed legalisation of same-sex couples adopting jointly and doubts with regard to religious freedoms. Eventually, the bill received committee support and was presented for a second and third vote. By the final vote, the support had diminished by only three parliamentarians (Collins, 2013), and the bill passed on 18 April 2013 (Chapman, 2013; McBride, 2013). While the strong public support helped all political leaders endorse the bill ("Marriage vote marks sea change in opinion," 2013), it also marked a significant increase in same-sex couples' rights. Same-sex married couples could adopt jointly for the first time after the bill took effect in 2013. Unmarried same-sex and opposite-sex couples, however, remained barred from adopting jointly. This only changed after a same-sex de facto couple sued in the High Court. In its judgement, the court found that the exclusion of unmarried couples breached the *New Zealand Bill of Rights Act 1990* by discriminating on the basis of marital status.