# *Overcoming the Limits of Legal Opportunity Structures: LGBT Rights' Divergent Paths in Costa Rica and Colombia*

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ABSTRACT

Costa Rica and Colombia, two of the earliest Latin American countries to protect many LGBT rights, attempted to amplify those rights and litigate same-sex marriage (SSM) in mid-2000s; however, these attempts sparked a major anti-LGBT backlash by religious and conservative organizations. Yet a decade later, Colombia legalized SSM while Costa Rica still lacks the right to SSM. Using a most-similar systems comparative case study, this study engages the judicial politics literature to explain this divergent outcome. It details how courts, while staying receptive to many individual LGBT rights claims, deferred SSM legalization to popularly elected branches. In spite of the lack of legislative success in both countries, in Colombia a new litigation strategy harnessed that deference to craft a litigated route to legalized SSM. In Costa Rica, the courts' lack of conditions or deadlines has left SSM foundering in the congress.

*Keywords:* Colombia, Costa Rica, LGBT rights, same-sex marriage

The most recent wave of democratization in Latin America, while formally including many previously excluded sectors of society into the political process, left others ineffectively represented or unable to protect their rights or advance their interests.[1] These marginalized groups, including indigenous and displaced people, sexual and ethnic minorities, people living with chronic illness or in poverty, and prisoners, frequently found the promises of democratic governance to be largely unfulfilled.[2] Yet one marginalized group, sexual minorities, specifically lesbians, gays, bisexuals, and transgender people (LGBT), has made considerable strides in advancing its rights in many Latin American countries over the last two decades (Corrales 2010, 2015).[3]

Historically, even in well-functioning democracies, LGBT people were routinely discriminated against, consistently denied their constitutional rights, and

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often abused by state and private actors alike, which is a sharp contrast to recent adoptions of "some of the world's most extensive policies for same-sex couples" (Piatti-Crocker 2010, 3), including the legalization of same-sex marriage (SSM) in five countries (IACHR 2015; *New York Times* 2014).[4]

A closer look suggests that these advances in LGBT rights can usefully be grouped into two broad categories. Many rights claims demand protections from state or private agents' harassment, an end to anti-LGBT discrimination, and equal protection for property or welfare rights, including survivor pension benefits and partners' health coverage. These rights and demands for protection and equality were common in many other developed countries. Their impact was limited to a relatively small group of people, they imposed low financial costs, they were achievable with minor legal or regulatory adjustments or training, and they tended to draw only a muted response from conservative and anti-LGBT groups.

A second category of rights includes broader claims for SSM or adoption by same-sex couples, which directly challenged some groups' deeply held religious beliefs or traditions and acted as a clarion call to action for conservative movements.[5] These anti-LGBT movements, in turn, used litigation and legislative procedures to delay or block LGBT-friendly laws or the enforcement of successful judicial decisions protecting LGBT rights (see, e.g., Sáez and Moran 2016). This article argues that judicial reforms in many Latin American countries, starting in the 1980s, opened up new legal opportunity structures (LOS) that facilitated successful litigation to protect many of the rights in the first group.[6] Yet the same LOS and strategies proved insufficient to win cases from the second group of rights, due partly to their lack of public support, the more controversial nature of those rights, their broader societal impact, and organized, effective opposition. Attempts to achieve this second group of rights through legislative arenas were generally unsuccessful, but LGBT movements' use of more coherent, coordinated, sophisticated legal strategies or sympathetic political actors willing and able to animate new legal opportunity structures at the international level have proved more promising.

This argument is illustrated by analyzing the evolution of LGBT rights protection in Costa Rica and Colombia. As existing research has established, LGBT people in both countries won many significant rights through new LOS, starting in the early 1990s (Wilson 2007, 2009, 2011; Gianella and Wilson 2016; Wilson and Gianella 2017). The article then explains how this strategy might still work to win claims for the first group of rights but has proved insufficient to win the more profound and contentious rights, which reveals a lacuna in our understanding of courts' effectiveness in advancing marginalized populations' fundamental rights.

Thus, Costa Rica turned from an early leader in LGBT rights protection in Latin America to a laggard as it failed to legalize SSM and adoption rights in the face of a reluctant apex court and profound political and social opposition. Colombia, another early leader in LGBT rights advancement in Latin America, presented similar difficulties in achieving SSM legalization, but after lengthy political and legal battles, in which LGBT movements coalesced in an umbrella organization and worked closely with an LGBT-friendly litigation organization, LGBT groups suc-

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cessfully litigated same-sex marriages and adoptions, even while their demands remained very unpopular and were thwarted in legislative arenas.

This article proceeds to review the role of courts in furthering social rights in general and LGBT rights in particular. It then discusses the case selection before conducting the comparative case study. It presents conclusions about how the Colombians overcame the limitations of LOS and why the second category of LGBT rights remains stalled in Costa Rica.

## Securing LGBT Rights Through the Courts

Many legal scholars and politicians believe that courts are an inappropriate venue to bring about social changes such as SSM. They argue that the "separation of powers" principle requires social rights law to be written in legislative assemblies, implemented by executives, and applied by judiciaries (Langford 2008, 31). Any judicial action that overturns existing law is considered undemocratic behavior by "activist" judges, who are effectively legislating from the bench and undercutting democratic legitimacy.[7] This argument was powerfully articulated by U.S. Supreme Court Justice Antonin Scalia, who called the U.S. Supreme Court's 2015 SSM decision a "threat to American democracy," "a naked judicial claim to legislative—indeed, superlegislative—power; a claim fundamentally at odds with our system of government" (*Obergefell v. Hodges*, Justice Scalia dissenting).

Evidence, though, shows that courts across the Americas routinely decide cases on economic, social, and cultural (ESC) rights, which animates a separate, ongoing debate on the empirical question of "can" courts bring about social change, rather than the philosophical question of "should" they. Much of the early research on the impact of court decisions examines the U.S. experience (see, e.g., McCann 1994), while more recent work includes investigations of the impact of court decisions in democratic, developing countries (Gargarella et al. 2006; Langford 2008; Rodríguez Garavito and Rodríguez 2010).

On one side of this debate are scholars like Ran Hirschl, who are skeptical of courts' ability to bring about social change and argue that courts and constitutions are "part of a broader process, whereby political and economic elites, while they profess support for democracy, attempt to insulate policymaking from the vicissitudes of democratic politics" (2004, 73). Accordingly, courts are not sympathetic or effective venues through which to pursue social rights. Gerald Rosenberg (2009, 643) furthers this argument: "litigation on behalf of the disadvantaged rarely, if ever, makes sense as a strategy for change," while Klarman (2005, 482) states that successful litigation on unpopular social rights will "mobilize opponents, undercut moderates, and retard the cause they purport to advance." Rosenberg (1991, 2008, 2009) concurs with Klarman and notes that early SSM litigation victories in the United States "created a backlash of enormous proportions" that "set back the cause of marriage equality for at least a generation" (G. Rosenberg 2009, 657).

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Major backlashes are important, according to Friedman (2010), because courts are affected by public opinion.[8] While the exact mechanism of that effect remains unclear (Epstein 2017), courts are generally viewed as reluctant to decide cases that stray too far from public opinion because the judges fear harming the court's legitimacy and the public's confidence in the judiciary.[9] It follows, then, that LGBT groups should not litigate for their rights, but if they do, they should not expect to win, because courts are aware of the unpopularity of their claims (and the potential unpopularity of the court's decision). And if they are able to win in court, then they should expect a severe political backlash that might reverse their litigated gains.[10]

Other scholars, though, trace the positive impact of court decisions on a broad range of social policies and across a variety of democratic countries. Most notably, Epp (1998) argues that courts' rulings can and do bring about significant social change that can amount to "rights revolutions" in countries that have the preconditions for a general rights consciousness, a bill of rights, and rights-friendly judges. But Epp also recognizes that rights are not self-activating and therefore require "material support for sustained pursuit of rights" (1998, 17) to advance their litigation strategy. Even taking into account ongoing homophobia and political and legal backlash, there is little debate that court decisions have profoundly enhanced the social and economic lives of LGBT people in the United States, affording them many previously denied rights (Cenziper and Obergefell 2016).[11]

In Latin America, litigation for ESC rights through courts became common practice starting in the early 1990s (Sieder et al. 2005; Helmke and Ríos-Figueroa 2011 Langford et al. 2017). Latin American judicial reforms in the 1980s and 1990s transformed courts from inaccessible and inactive to accessible and assertive venues, which changed how individuals and social movements viewed the role of courts in advancing ESC rights, including those of LGBT people. No longer were courts viewed with suspicion as inhospitable arenas where judges routinely deferred to popular branches and sided with economic and political elites, as described by Hirschl (2004; see also Couso 2006, 63; Hilbink 2007, 269). Instead, courts became arenas where marginalized groups and individuals could and did successfully claim their previously denied social rights. This transformation has contributed to the "normalization" of rights litigation (Langford et al. 2017; Wilson and Gianella 2017).

Epp's 1998 framework offers a compelling explanation for the general lack of rights revolutions and the specific lack of LGBT rights in Latin America before the 1990s, but it cannot account for the Latin American rights revolutions that began in that decade (Wilson 2009). The new or reformed superior courts were staffed by rights-conscious judges with broad definitions of legal standing, which permitted individuals direct access to courts without the need for lawyers or legal fees and abandoned previous excessive legal formality. This open access significantly diminished the need for deep-pocketed support organizations and social movements, identified by Epp as a crucial component to advance social rights litigation. Thus, the emergence of new LOS with low-cost access to courts diminished the need for legal sophistication and well-organized and funded organizations for marginalized, weakly organized groups and individuals to harness the power of the reformed courts (Wilson 2009).

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This is not to suggest that litigation is the only possible strategy to advance LGBT rights or that it has to be used to the exclusion of other strategies. In some Latin American countries, alternative, non–court-centered strategies have improved LGBT rights when political avenues allowed LGBT activists to create political alliances and push legislative solutions, such as in Uruguay in 2013 (Boidi 2013; Human Rights Watch 2013). Díez (2013, 2) argues that the recognition of same-sex unions in Argentina and Mexico was similarly the product of well-organized LGBT activists, who effectively "framed policy within rare political opportunities that provided the ideal conditions for the policies to be adopted." In these two cases, initial movement toward LGBT rights was clearly tied to alliances cemented between nascent LGBT organizations and new left parties that controlled state-level governments in federal systems.

While we agree with Diaz's analysis of early LGBT successes in both cases, the expansion of those early state-level marriage equality laws to the national level was the result of a two-pronged litigation strategy: nationwide recognition for Mexico City's SSM and separate, direct challenges to the constitutionality of narrow marriage definitions in other states that prohibited SSM. This incremental litigation in courts across the country and at the federal level eventually resulted in the nationwide legalization of SSM (Alterio and Niembro Ortega 2016; Kahn, 2015), even though it remained very unpopular and unsupported by the political elite.[12]

Similarly, in Argentina, alliances between LGBT organizations and sympathetic political parties initiated a compromise to legalize same-sex civil unions (SSCU), a legal status short of traditional marriages, rather than full marriage equality. As in Mexico, though, it was a series of court actions that moved the debate beyond the original political compromise agreeing to same-sex civil unions, and resulted in the legalization of SSM (*Freyre, A. vs. Gobierno de Buenos Aires*; Andia 2013). Thus, the role of political actors in Argentina and Mexico was clearly significant in the initial period of SSM legalization at the local level, but the lack of a corresponding friendly national-level political venue meant that for SSM to be legalized countrywide required a litigation strategy that harnessed the newly available LOS.

The openness and accessibility of courts significantly diminished the need for litigants to seek political, popular, or social movement support to pursue their rights. The vast majority of LGBT cases were uncoordinated "wildcat" claims, filed by individuals with particularistic interests, rather than part of a coordinated legal strategy designed to incrementally secure full equality for LGBT people (Gianella and Wilson 2016). Our analysis of the development of the LGBT legal mobilization allows us to argue that, perhaps paradoxically, the relative ease with which these early rights were litigated appears to have arrested the development of well-organized support networks or the building of social movements to promote and successfully litigate more profound LGBT rights, such as SSM. We also show that in Costa Rica, while all domestic opportunity structures through which to legalize SSM appear to be blocked, a new international legal opportunity structure, the Inter-American Court for Human Rights (IACtHR), has shown promise as an arena to advance LGBT rights, even without support groups, resources, and sophisticated legal strategies (Chinchilla 2016).

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## Research Design and Country Case Studies

Costa Rica and Colombia are useful comparative cases. They experienced many decades of similar anti-LGBT animus, followed by surprising advances in many long-suppressed rights of LGBT people, before the two countries' LGBT rights paths diverged over the last decade. Although we employ a most similar systems design, we recognize that the two countries have different political histories: Costa Rica, the hemisphere's oldest democracy, is generally regarded as one of Latin America's democratic and human rights success stories, while Colombia has endured a more checkered political history, with long periods of internal armed conflict and politically destabilizing drug cartels, which resulted in an internally displaced population of more than 6 million (IDMC 2016).

However, throughout the period considered here, both countries have been governed through well-functioning democratic institutions and have created similarly strong, assertive apex courts at a time when hostility toward LGBT people was high and discrimination by state and private actors alike was routine, widespread, and practiced with impunity (Colombia Diversa 2010, 2011, 2013; Albarracín and Lemaitre 2016; Schifter 1989; Wilson 2009).

The utility of these case studies is further enhanced in that these new courts became among the earliest guarantors of basic LGBT rights in Latin America (Wilson and Gianella 2017; Gianella and Wilson 2016), which permits us to focus on the divergence in the two countries' paths to marriage equality over the last decade. Until the mid-2000s, LGBT rights advancements were similar in both countries, and both appeared to stall while addressing the issue of legalizing SSM in the mid-2000s. In both countries, apex courts declared SSM to be a political issue that should be resolved by the elected legislative chambers, not the courts. In response to the political debate on SSM, well-organized, deep-pocketed, and politically connected organizations and political parties generated a popular backlash against LGBT rights in both countries. Yet in spite of that hostility, courts in both countries continued to rule in favor of other, less controversial rights, including pension rights, nondiscrimination claims, and health rights (Wilson and Gianella 2017).

At this point, the trajectories of the two countries' LGBT rights advances diverged, eventually resulting in the legalization of SSM and adoptions in Colombia and a decadeslong, ongoing political and legal stalemate that stalled SSM and adoptions in the Costa Rican Congress. That the more democratic of the two countries, Costa Rica, now lags far behind Colombia on LGBT rights issues further demonstrates the relevance of courts and litigation to advancing LGBT rights, even in well-functioning democratic countries with well-earned international reputations for their human rights records.

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## Legal Opportunity Structures and LGBT Rights

Colombia's 1991 Constitution and Costa Rica's 1989 constitutional amendment created new courts, which effectively generated new legal opportunity structures that became central to the successes of early LGBT rights claims in both countries (Uprimny 2007; Wilson and Rodríguez 2006; Wilson 2009). A key feature of the LOS created by these new superior courts is their very open, low-cost access for all people in the country, regardless of economic or social status. The Costa Rican Constitutional Chamber of the Supreme Court (*Sala Constitucional*, commonly written Sala IV) receives claims from anyone in the country 24 hours a day, 7 days a week, regardless of age, race, gender, nationality, income level, or legal training. In Colombia, cases can be filed with lower courts anywhere in the country under similar open access conditions. All cases decided by Colombia's lower courts are automatically appealed to the Constitutional Court, which chooses what cases to examine (Jaramillo and Barreto 2010).

Unlike their prereform precursor courts, both contemporary courts employ few legal formalities, apply very broad definitions of standing, and require no filing fees or lawyers to file a rights claim.[13] These institutional rules allow anyone to litigate for their constitutional rights, including the most poorly organized, socially and politically marginalized people (Cepeda 2004, 74; Wilson 2009). As a result, even powerless LGBT persons or groups have been able to present legal demands in court without the support of strong, well-organized, deep-pocketed civil society organizations, or the need to muster resources. While this openness has encouraged many individual claims, it also renders organizational development or political alliances less central to the rights claims. In both countries, ordinary people can and do file writs of protection (*acción de amparo* in Costa Rica; *acción de tutela* in Colombia), which has resulted in a growing tsunami of individual cases (Gianella and Wilson 2016, 16; Cepeda 2004).

The growth in litigation reflects the increasing faith that rights claimants put in litigation strategies and courts' ability to resolve issues that were previously unresolved by political or legal actors. That is, unlike the courts analyzed by Epp (1998), to which access was restricted, slow, formal, expensive, and required lawyers employing coordinated, sophisticated legal reasoning to push cases through hierarchical court systems, in Colombia and Costa Rica, similar support structures were an unnecessary part of any litigation strategy. Indeed, the success and ease of litigating rights claims probably harmed efforts to build effective LGBT organizations or encourage coordination of litigation strategies and create alliances with popularly elected representatives. Albarracín (2011) notes that although some lawyers were active in filing cases to protect the fundamental rights of Colombia's LGBT population, the need to create an umbrella organization to handle emerging legal challenges against LGBT rights and to design strategies to achieve recognition of same-sex couples became clear only after the congress rejected a same-sex civil union bill and forced LGBT actors to engage with politicians.

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The Colombian Constitutional Court (CCC) issued numerous decisions establishing rights for various marginalized groups that had been ignored for decades (Cepeda 2004, 2011). For example, Internal Displaced People (IDPs) won court rulings that provided a new legal framework that facilitated their access to health, education, and other fundamental rights (Rodríguez Garavito and Rodríguez, 2010). Other court decisions reframed health as a justiciable constitutional right; later they declared the country's health care system to be in a "state of unconstitutional affairs" and mandated that the government correct the fundamental problems of the health care system (Yamin and Gloppen 2011). As a result of the accepted authority of the CCC, all actors understood the importance of participating in court events to articulate and advance their interests.[14]

The CCC uses a consultation process, with public hearings that allow it to hear all sides of an issue and to deliver ambitious, complex rulings that address human rights violations faced by marginalized groups, such as prisoners (T-153/1998), IDPs (T-025/2004), or all Colombians, in regard to their health rights (T-760/2008). The process of monitoring compliance with these complex rulings allowed the CCC to develop strategies to monitor compliance by different state branches and led to the court's practice of setting deadlines, to force state agencies and branches to address and resolve ongoing rights violations (Langford et al. 2017).

In Costa Rica, the number of cases filed with Sala IV similarly grew rapidly as the utility of the new LOS became increasingly apparent. In 1990, the first full year of operation, 2,000 cases were filed; by 2010, 18,000; and by 2015, almost 20,000 cases per year. More than 80 percent of all cases are *amparos*, generally filed by individuals. In Sala IV's more than 200,000 decisions since its inception, it has ruled on nearly every part of the constitution and has been an assertive rights protector and accountability agent, limiting the actions of the other government branches and their agencies to the parameters of their constitutional remits. These decisions include sweeping gender equality in marriage and divorce, immigration, and elections. They have separately constructed a constitutional right to health, benefiting many chronically ill patients, and have defined limits on congressional powers to amend the constitution (Gloppen et al. 2010; Wilson 2009, 2011).

## Cases, Strategies, and Actors

The institutional design of apex courts in Costa Rica and Colombia has allowed legal actions to be initiated by individuals without the support of well-organized, coordinated activist networks. LGBT rights litigation began with uncoordinated cases to defend individuals' rights from state or private agencies' actions, such as police brutality or discrimination. In those early cases, the courts frequently ruled in favor of LGBT people, against blatantly unfair or unconstitutional discrimination based on sexual orientation or gender identity, and against the maltreatment of sexual minorities by the police and other state and private actors. These claims, while significant to the claimants and similarly situated individuals, were of little conse-

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quence to socially conservative organizations and, in general, provoked little interest, objection, or backlash.

In Costa Rica, early cases included an end to routine police harassment and discrimination by medical professionals (Resolution No. 4732-94, No. 3001-97) and free access to antiretroviral medications for people living with HIV/AIDS in 1997 (Resolution No. 5934-97). Similarly, early cases in Colombia focused on issues of discrimination and the right of "free development of personality" that included questions of an individual's sexual orientation. These cases were litigated by individuals in a context in which homosexuality, despite its legality, was still used by the state and private entities to sanction people, discharge them from jobs, or expel them from educational institutions and the military (Colombia Diversa 2011; CCC T-152/07, T-909/11, T-476/14).

An analysis of the CCC's LGBT decisions shows that the court's jurisprudence became more inclusive of LGBT rights and more progressive in its understanding of homosexuality at a pace far ahead of popular perceptions of homosexuality. For example, in one of its earliest decisions, the CCC stated, "homosexuals cannot be discriminated against because of their status as such. The fact that their sexual behavior is not the same as that adopted by the majority of the population does not justify unequal treatment" (T-539/94). However, in the same ruling, the court included a significant caveat, stating that the "condition of homosexuality" can be explicit and shown in public as long as it does not have a negative social impact, especially on children. Subsequent rulings, though, developed a more comprehensive understanding of homosexuality and argued that calling homosexuality a form of "misconduct" violated the rights to free development of personality and sexual orientation. The CCC ruled that homosexuality cannot be considered a disease or a pathological abnormality that has to be cured, which effectively established homosexuality as a legitimate sexual orientation, an essential and intimate part of an individual's identity that enjoys a special constitutional protection under the constitutional right of equality and the right to free development of personality (Colombian Constitution Sections 13 and 16; C-481/98).

## Changing Arenas in Colombia: Legalization

A growing list of favorable court decisions for LGBT people in Colombia culminated in a 1998 decision that unequivocally stated, "all differential treatment based on a person's homosexuality is presumed to be unconstitutional" (C-481/98). Yet the court continued to distinguish between individual homosexual rights and those of same-sex couples. In 2001 (C-814/01), building on the 1996 decision (C-098/96), the court again ruled that same-sex couples do not meet the constitutional definition of "family" because they cannot produce children naturally, which is one of the "main duties of a family" (C-098/96). This court decision forced LGBT groups to reconsider their litigation strategy and seek political allies to pursue a legislative solution (Albarracín 2011).

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In 2003, a same-sex civil unions bill, a compromise non–marriage-equality measure that included many legal protections generally resulting from marriage, was introduced in the Senate. The bill ultimately failed to become law, partly because of a visceral backlash from conservative senators and their allies outside of the congress. In response to the legislative and litigation setbacks, the small, disparate LGBT organizations came together to create a unified coalition of LGBT human rights groups, Colombia Diversa, which brought together "resources and people who had many years of experience, as well as new people and resources, all of which was channeled through a single organization aimed at coherent, continuous action" (Albarracín 2011, 15).

Colombia Diversa reframed the issue of same-sex partners' rights and relied on sympathetic senators to submit another same-sex civil unions bill to the Senate in 2005. The new bill relied on the CCC's jurisprudence to protect LGBT individuals' property rights as its foundation, and generated technical studies concerning the possible impact of the proposed law on the country's social security system. Although LGBT rights remained very unpopular in Colombia (at less than 40 percent), Colombia Diversa successfully lobbied the conservative-controlled congress and strategically framed the issue as a human right, rather than a moral issue. The organization also lobbied the national media, which had become overwhelmingly supportive of the same-sex unions legislation (Albarracín 2011, 18). The bill eventually won majority support from both houses of Congress, as well as from the very popular conservative president, Álvaro Uribe. Uribe stated during his re-election campaign, "No to gay marriage, no to adoption. Yes to health and pension benefits" (Ceaser 2007), which is perhaps a good reflection of how successfully the same-sex civil unions law had been reframed.

In spite of Colombia Diversa's efforts to build a political support coalition, however, the bill was ultimately defeated when a handful of conservative senators took the unusual and unexpected action of changing their vote to *no* during the final vote. While this appeared to be a textbook example of marginalized groups organizing and employing an effective strategy and forming alliances with sympathetic politicians to change a law, it was nonetheless thwarted by a few senators using congressional rules and outside lobbying against the bill to undermine the expected legislative victory. For Colombia Diversa, the legislative loss effectively blocked the political route, leaving it with "no way of moving forward" (Albarracín 2011, 19); the earlier litigation strategies appear to confirm Gerald Rosenberg's (2009) and Klarman's (1994; 2005) warning of powerful backlashes against unpopular LGBT rights litigation that could reverse earlier advances.

At the same time the bill was working its way through Congress, Colombia Diversa began to work with a public interest law group, Dejusticia, to file a new case with the CCC to legalize SSM, this time based on the legal concept of human dignity rather than equality (Albarracín 2011, 18). It is notable that this litigation, since it no longer required majority support in the congress, was a claim not for same-sex civil unions but for full marriage equality. In 2005, a serendipitous ruling from the United Nations Human Rights Committee found Colombia's denial of

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pension rights to the surviving partner in a same-sex relationship to be in violation of the United Nations Covenant on Civil and Political Rights (*Case X v. Colombia* 2005). The UNHRC ruling in favor of same-sex couples' property rights strengthened Dejusticia's legal arguments, as did the increasing number of countries that had legalized same-sex marriage.[15]

All these events took place at a time when the CCC's definition of "family" gradually became more inclusive of nontraditional family types. In a separate 2007 decision, the court completely abandoned its previous position on same-sex relationships when it ruled that the exclusion of same-sex couples from the economic benefits of marriage was an unconstitutional violation of fundamental human rights because it imposed heterosexuality as a condition of access to those benefits (C-811/07).

As the court's views on homosexuality and families continued to evolve, the initial series of significant but quiet rulings on LGBT rights was amplified: between 2007 and 2011, the court's decisions on rights for same-sex couples indirectly impacted questions of family. For example, when a 2007 court decision declared unconstitutional the use of "man and woman" in a 1990 property rights law, it attracted the attention of lay Catholic groups, which claimed that the decision went "against the family and matrimony" (BBC 2007). In 2008, same-sex couples' pension rights, including survivor benefits, were granted (T-1241/2008), as were pension transfers (C-336/08), and in 2009, same-sex couples were granted equality in nationality, social security, and criminal matters (C-029/09). While these cases were largely concerned with homosexuals' property rights, by implication they also incrementally addressed legal definitions of family and marriage, which set them apart from the earlier, narrower cases and helped spark a major backlash from conservative and religious groups. The backlash grew with each subsequent decision expanding the rights of homosexual couples (Albarracín and Lemaitre 2016).

In 2011, the CCC declined to rule in favor of a very unpopular claim for same-sex couples' adoption rights, and in a separate, unanimous vote, rejected a challenge to the constitutionality of the 1887 law that defines marriage as being between one man and one woman. The CCC argued that the SSM question should be resolved in the popularly elected congress, not the constitutional court (*El Tiempo* 2011). Furthermore, while recognizing the power of the popular branches to define "family," the CCC instructed Congress to pass "comprehensive, systematic, and orderly legislation" by June 20, 2013 to rectify the "deficit of protection" experienced by same-sex couples. The CCC informed Congress that if it failed to pass the required legislation within the two-year window, same-sex couples could have their partnerships recognized by a notary or a judge. What is notable here is that this decision was issued in a sociopolitical context in which the vast majority of Colombians and their parliamentary representatives remained firmly opposed to SSM. The court's deference to the popularly elected congress was, though, clearly conditional on the congress's passing an acceptable law before the specified deadline.[16]

The court's muted SSM decision exposed it nonetheless to criticism that echoed Justice Scalia's criticism of the U.S. Supreme Court as superseding the legislature

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(*Obergefell v. Hodges*). When Congress failed to meet the 2013 deadline, Colombian conservative groups, including the Office of the Inspector General, publicly challenged the court's 2011 decision, claiming that it was a significant break with traditional heteronormativity embedded in the court's previous decision and that by defining homosexual couples as families, the CCC was ignoring Article 113 of Colombia's Civil Code, which states that only men and women can have families (*Semana* 2011).

The Inspector General also attempted to have the CCC's decision invalidated, arguing that it contained procedural violations (C-577/11). In tandem, Inspector General Alejandro Ordoñez and women's rights representative Ilva Myriam Hoyos successfully blocked the realization of most same-sex civil unions by threatening disciplinary action against any judge or notary who performed same-sex unions and presenting *tutelas* to annul any same-sex unions that had been performed. As a result, Judge Carlos García, from the small town of San Estanislao, was the only judge in Colombia willing to formalize same-sex unions, which he did in secret, so as not to attract the ire of the inspector general (Albarracín and Lemaitre 2016, 103).

Proponents of SSM also faced legal and political mobilization by conservative civil society organizations, including a major conservative movement, Fundación Marido y Mujer, created in 2013 with the goal of challenging SSM across Colombia (Botero 2015). Simultaneously, Liberal Party senator Viviane Morales harnessed public opposition to LGBT rights to initiate a signature drive for a national referendum to reverse the CCC's 2015 decision permitting adoption by same-sex couples (C-683/15).[17] By March 2016, more than 2.1 million valid signatures had been collected, significantly more than the 5 percent of the electoral registry required to demand that the Senate initiate a referendum. Although the measure was accepted by the relevant Senate committee (10–2 in favor) in 2016, it was ultimately rejected in May 2017 (*El Tiempo* 2016; Alsema 2017).

In this context, fighting a rear-guard action against hostile groups inside and outside Congress and still lacking the support of public opinion, the CCC again became a logical arena to claim rights to SSM. In response to a new SSM case, the CCC held public hearings in late 2015 and invited representatives of groups in favor and against SSM to present their cases before the court. In a split decision (6 in favor, 3 against) the CCC ruled SSM constitutional. The court argued that "all people are free to choose independently to start a family in keeping with their sexual orientation . . . receiving equal treatment under the constitution and the law" (Decision SU214-16). According to a former president of the CCC, Manuel José Cepeda, the court's decision consolidated a "trend of respect for equality and elimination of discrimination" (Durán 2016). That trend also included the 2015 decision recognizing the right of same-sex couples to adopt children.

These decisions are particularly significant because a sizable majority of Colombians remained opposed to SSM, and elected politicians successfully and repeatedly blocked SSM and adoption rights legislation.[18] Even though LGBT groups coalesced and professionalized, it remained impossible to legalize SSM and adoption rights through the legislative arena. But coordinated, strategic litigation filed by the

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lawyers of Dejusticia addressed the court using compelling economic evidence and reframing the cases as human rights questions. Moreover, they presented those questions in legal language familiar to CCC magistrates, incorporating the court's previous jurisprudence. Thus they succeeded in overcoming the court's reluctance to legalize SSM and same-sex adoption.

## Changing Arenas in Costa Rica: Failure to Legalize

SSM, already a controversial and unpopular issue in Costa Rica, was successfully framed by its opponents as an attack on religion, religious freedom, and traditional moral values, as well as a redefinition of family and marriage.[19] Therefore it is not surprising that when lawyer Yashin Castrillo, without the support of any LGBT rights organizations, filed a case with the Sala IV in 2003 claiming a constitutional right to marry his same-sex partner, the court rejected the claim in a 5–2 split decision in 2006.[20] The court's majority argued that the Family Code, which defines marriage as being between one man and one woman, was constitutional, and that therefore no right to SSM was contained in the constitution (Resolución No. 2006-07262).[21]

The Costa Rican Sala IV, as did Colombia's CCC, recognized the unequal legal treatment of same-sex couples and instructed the Legislative Assembly to rectify that legal inequality by enacting a same-sex civil unions law (*sociedades de convivencia*). But unlike the 2011 CCC decision, the Sala IV included no deadline or consequences if Congress did not comply. As a result, the small, nascent LGBT groups, acting independently of each other, were forced to pursue a weakened version of SSM in an unfamiliar, hostile arena, where elected deputies had little interest and few incentives to advance any form of marriage equality. Indeed, when the same-sex civil unions bill was placed on the legislative agenda by an LGBT-friendly politician, anti-LGBT deputies thwarted it by using the Assembly's rules and procedures to block the bill's progress and prevent it from passing from the relevant committee to a vote of the full congress.

The court, though, did not retreat from its role as protector of all citizens' constitutional rights. It still routinely ruled in favor of many other LGBT rights claims. For example, in 2010, the anti-SSM organization Observatorio Ciudadano collected more than 150,000 signatures (more than the required 5 percent of the electoral register) to initiate a national referendum to amend Article 52 of the constitution to explicitly ban SSM. The Tribunal Supremo de Elecciones (TSE) accepted the petition, validated the signatures, and began to plan the referendum. The Sala IV, though, blocked the referendum, declaring that minority rights "cannot be subjected to a referendum process where majorities rule." The court also noted that people in same-sex relationships were a "disadvantaged group and are the object of discrimination that requires the support of government agencies for the recognition of their constitutional and other rights under the Constitution" (Resolution No. 13313-10).

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While this was a major, unpopular ruling in defense of LGBT rights, the court still contended that SSM remained a political issue to be resolved by the elected Legislative Assembly. Similarly, in 2011, the court ruled in favor of same-sex conjugal visits for prisoners (Resolution No. 2011-13800), and in 2017, it unanimously rejected Evangelical deputies' challenge to the constitutionality of pro-LGBT presidential decrees (Muñoz 2017), which illustrates the court's continued support of the first group of LGBT rights, even while equivocating on the second group.

The apparent closing of the litigation arena for SSM forced atomized LGBT groups to engage with politicians in the legislative arena, which, in turn, required a very different strategy: one focused on movement building, alliances with political elites, and efforts to change the public's negative opinions about the LGBT community. And as in Colombia, entering the legislative arena forced a political compromise, seeking same-sex civil unions rather than full marriage equality. The bill, Expediente No. 16,390, Ley de unión civil entre personas del mismo sexo, was filed on September 27, 2006, within months of the failed SSM litigation. The bill, though, quickly became immobilized in congressional committees, where it (and subsequent bills) remains, more than a decade later.

The rules and procedures of the Costa Rican Legislative Assembly allow even widely popular bills that enjoy majority support inside and outside Congress to be blocked or delayed by small numbers of deputies who disagree.[22] An increasingly common tactic is that legislators will file large numbers of amendments to bills and use their guaranteed 15 minutes to address each motion individually, effectively preventing the bill from advancing out of the relevant subcommittee. As a result, individual deputies can easily delay bills, even if a supermajority of their peers wants to approve them (Borges 2014, 128–29).

Even if a bill reaches the plenary of the Assembly, deputies have numerous points at which to block or delay it: each legislator has the right to speak for 30 minutes during the first debate, 15 minutes in the second debate, and a further 10 minutes each to justify his or her vote. These kinds of filibusters are a frequently used, low-cost, high-power tool to block legislation.[23] Coupled with a recent practice of deliberately breaking the quorum, they are part of the arsenal used by small, nongovernmental parties to delay or stop bills they dislike (Borges 2014, 129).

The failure of the SSM litigation and the difficulties of pursuing a legislative strategy were compounded during the 2006 presidential election, when all presidential candidates declared their opposition to legalizing SSM. The winning candidate, Oscar Arias Sánchez (PLN, 2006–10), although he opposed SSM, did soften his administration's hostility, and used executive powers to diminish some areas of anti-LGBT discrimination. In 2007, for example, he removed the ban on LGBT people donating blood, and in 2008, through Executive Decree No. 34399–S, he inaugurated an annual national day (May 17) against homophobia, lesbophobia, and transphobia to highlight and end discrimination against LGBT people. Many executive agencies, including the TSE, the Ministry of Health, the Presidency, and the public universities, joined the nondiscrimination efforts and now claim to be free of discrimination.[24] These actions illustrate the incremental political progress made by the

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small LGBT rights groups via lobbying, executive orders, and administrative decisions on significant issues, but not on SSM or adoption questions.

The administration of President Luis Guillermo Solís Rivera (PAC, 2014–18) was more supportive of LGBT rights than previous administrations. It became the first administration to fly the "rainbow flag" at the presidential palace each May 17 and encouraged all executive agencies to accommodate LGBT individuals' and couples' rights wherever possible. While Solís supported the same-sex civil unions bill in Congress, his lack of a congressional majority and the use of parliamentary procedures by deputies from minor Christian parties blocked the bill's progress, leaving it trapped in congressional committees they controlled.

While the organizational capacities of LGBT movements improved, and the groups were able to help reframe public dialogue about LGBT rights, cement political alliances, and humanize their cause, they had no corresponding coordinated umbrella organization or link to professional litigation organizations, like those in Colombia, that could strategize and coordinate litigation. Instead, LGBT organizations, like many social movements in Costa Rica, remained small, atomistic, and uncoordinated, lacking funds, membership, and a clear common strategy.[25] These distinct LGBT groups' efforts to affect public discourse and win support for same-sex civil unions have produced some fruit: in the decade since the Sala IV's decision against SSM, the tone of news stories in print and digital media has become significantly more positive, public opinion about LGBT people has improved, and some sitting deputies have publically supported same-sex civil unions. But Congress's operational rules prevent legislative progress.[26] Indeed, in the 11 years since the first same-sex civil union bill was sent to Congress, no bill has progressed beyond the committee stage in any of the three congressional cohorts that have been elected since 2006.

The difficulty of moving the legislation through Congress was made clear in the final year of the Solís administration, when party political jockeying to control the congressional agenda resulted in the election of Gonzalo Ramírez, a deputy from the Partido Renovación Costarricense (PRC), a very small, extremist Evangelical party with just two deputies, to the presidency of Congress. This was considered a guarantee that SSM or SSCU would not advance during the remaining period of the current term. As the campaign for the next presidential election gathered steam, only one candidate, Carlos Alvarado Quesada (PAC), a former deputy minister of work and social security, supported legalizing SSM (Arrieta 2016). The prospects for a legislative solution to marriage equality in the next congress appeared unpromising.

In response to the legislative immobility on the civil unions bill, the executive branch, entering its final year in office under Solís, took the unusual step, in May 2016, of requesting a consultation from the Inter-American Court of Human Rights (IACtHR) on the legal rights of LGBT people. The consult requested a ruling by the IACtHR on the status of Costa Rican gender identity law and SSM in the context of the articles of the American Convention of Human Rights (ACHR), to which Costa Rica is a signatory.[27] The potential utility of this approach was amplified by recent decisions from other international tribunals (such as the UNHRC) and the increas-

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ing willingness of the IACtHR to consider cases on social rights issues, including issues of family and same-sex relationships. For example, in 2012, the IACtHR ruled against a Chilean court's decision to remove children from a lesbian mother (*Atala Riffo y Niñas vs. Chile*), a fundamentally important decision that clarified the rights of LGBT families for all member states in the Americas. That case, though, took over a decade to move through the Chilean courts and then the Inter-American Commission on Human Rights before it was finally decided by the IACtHR.

The current Costa Rican consult, because it was filed by the Costa Rican state and is not a legal appeal, has sped up the process considerably. The consult was filed in May 2016, public hearings were held in May 2017, and in January 2018 the court issued a decision.

In its advisory opinion, the IACtHR required all signatory states to legalize SSM and recognize transgender rights, which the executive branch argued was a mandatory ruling that had to be respected. LGBT groups responded euphorically, believing that the IACtHR's decision made SSM and transgender rights a reality in Costa Rica. The euphoria, though, was short-lived; the first planned marriages were unable to proceed, due to legal impediments (Arrieta 2018), and the ongoing 2018 election was upended when the question of SSM became the only salient issue (Villarreal and Wilson 2018a). In response, a minor party candidate's support rocketed from less than 3 percent to winning the first round of the general election on February 4, 2018 with approximately 26 percent of the vote. The candidate, Fabricio Alvarado, an Evangelical pastor, singer, and former one-term deputy, successfully channeled animus toward SSM and LGBT people, promising not to comply with the Inter-American Court of Human Rights' decision and to take Costa Rica out of the Inter-American System (Villarreal and Wilson 2018b). Although Fabricio Alvarado lost the April runoff election to Carlos Alvarado (PAC), his first-round support resulted in his party's representation increasing in the parliament from one deputy in the 2014–18 Congress to 14 deputies, which grants them significant power to use parliamentary and legal strategies to challenge the rights of LGBT people.

## Discussion and Conclusions

The two cases presented here illuminate improvements and setbacks of LGBT rights in Colombia and Costa Rica. They also add to our theoretical understanding of how historically marginalized groups and individuals unable to persuade popularly elected bodies to advance their rights and interests can, under certain conditions, successfully use strategic litigation. This research also reveals the potential limitations of a court-focused strategy that lacks well-organized, deep-pocketed social movements to support its agenda when pursuing SSM.

The analysis shows that some institutional designs, even in hostile political contexts where public opinion is overwhelmingly against protecting marginalized minorities' rights, courts can and do play a central role in recognizing, protecting, and enforcing those fundamental rights. The two case studies, moreover, reveal that

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the existence of open LOS can create effective avenues through which to make rights claims, but when litigated claims challenge deeply held religious beliefs or traditions, courts are more inclined to defer to popularly elected branches of government. In these two cases, the courts did this in very different ways. In Costa Rica, the court showed complete deference to Congress, while in Colombia, the court's deference came with conditions, deadlines, and consequences.

Courts in the two countries had different origins and modi operandi. The design and creation of the CCC was a response to the "exclusion, lack of participation and weakness of human rights protection" and an attempt to "broaden democracy" (Uprimny 2007, 59) in Colombia in the 1980s.[28] As a consequence, the CCC gradually developed a method to deal with divisive, politically sensitive cases by holding public hearings and allowing all interested groups to voice their concerns. The CCC also regularly includes deadlines and consequences in its decisions, which forces actors to attempt to comply with the decision in a comprehensive and timely manner. These mechanisms enhance the democratic legitimacy of CCC interventions and keep all actors' attention focused on resolving the issue, following a specified timeline.

The Sala IV, by contrast, was created in a well-functioning democracy and has generally, as a result, tended to be more deferential to the popularly elected branches and less willing to rule on what it considers to be political questions. This case study reveals that the Sala IV's 2006 SSM decision required Congress to address the legal inequality experienced by same-sex couples but did not add deadlines or consequences of noncompliance. Thus, unlike Colombia, where SSM would become constitutional if Congress did not address the inequality facing same-sex couples before the deadline, in Costa Rica the congress has no deadlines, potential sanctions, or incentives to pass legislation to address the inequality, and consequently has made little progress in the decade since the Sala IV's 2006 decision.

Costa Rica and Colombia, with their low-cost, broad access to rights-conscious apex courts, diminished the need for careful litigation strategies or the creation of and reliance on deep-pocketed social movements to advance their rights agendas. Even without well-funded support networks, they were among the earliest and most successful countries to improve the rights and interests of groups lacking political support to advance their agendas through democratic representative institutions. But the two case studies also reveal that when the litigated rights claims were thought to challenge the interests of vocal, well-organized religious groups, churches, or conservative political parties, the absence of the deep-pocketed social movements to fund access to experienced lawyers could harm the further realization of more profound fundamental rights.

In Colombia, nascent LGBT rights groups came together and formed an umbrella LGBT organization, Colombia Diversa; successfully reframed SSM as a human right; and launched a two-pronged strategy, lobbying elected representatives and filing coordinated, sophisticated strategic litigation with the CCC.[29] Colombia Diversa's cooperation with the specialized, highly skilled public interest lawyers of Dejusticia allowed it to file cases strategically with the CCC and engage with the

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court in a dialogue using legal arguments, previous court jurisprudence, and compelling economic data relevant to the cases at hand in a manner the magistrates understood. These changes in the organization of LGBT movements and their allies in Colombia did not result in successful legislation, but did allow them to maximize their impact in framing their cases and provide comprehensive evidence at the CCC's public hearings. As a result, after an initial period of significant improvements in LGBT rights followed by a series of frustrating political decisions, the CCC finally legalized SSM in 2016.

The Costa Rican case clarifies the analysis of LGBT rights advances in Colombia because the two countries' experiences run parallel throughout the 2000s. Both countries experienced similar wildcat litigation and lacked well-organized social movement or political party support for LGBT rights. The two countries' paths diverge with the SSM litigation: losing the SSM case in Costa Rica in 2006 did not lead to a profound reorganization of LGBT groups. Some alliance building with politicians and civil society began to occur, but uncoordinated wildcat litigation by individuals remained the norm. Unlike what happened in Colombia, no amount of political and social alliance building would have succeeded in advancing SSM legislation in the popularly elected Legislative Assembly.

The battle for the recognition of SSM in Latin America shows that even in contexts in which politicians have supported rights equality for LGBT people, court interventions have been centrally important in guaranteeing the principle of equality, something that has been frequently sacrificed in democracies, even by sympathetic, democratically elected politicians who need to seek re-election. Court rulings in Colombia provided legal background that allowed the country to advance from same-sex civil unions to SSM, as Mexico and Argentina did.

This article has examined only two cases, and it makes no claim that strategic litigation is the only path for contesting social inequities. Yet these cases do show that despite their limitations, litigation strategies have advanced rather than harmed the situation of LGBT people in these countries. The admonishment that elected politicians, not judges, should determine the fate of SSM and other social rights questions falls short; the need for countermajoritarian agencies, such as apex courts, to protect the rights of disliked minorities from the tyranny of the majority is illustrated clearly. Accessible apex courts, populated by rights-conscious magistrates, allowed (and continue to allow) individuals and groups, even when lacking strong financial and political support structures, to successfully advance many of their fundamental rights.

The cases also challenge the explanatory power of transnationalism as a core element to explain these rights revolutions. While we make no claim that Colombian or Costa Rican judges are unaware of jurisprudence from other countries, careful analysis of the courts' written decisions shows no explicit reference to foreign jurisprudence. In the two Colombian SSM cases, the CCC only notes some changes in the LGBT people's legal situation in other countries. What these cases show is the need to produce legal arguments contextualized for the domestic case rather than relying on foreign courts' jurisprudence.

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These findings also challenge Mark Tushnet's 2009 argument that weak court decisions are more effective than strong court decisions. In these cases it is the strong, conditional decisions of the CCC that produced SSM, while the weaker, unconditional decision of the Sala IV resulted in a political stalemate. Despite the shortcomings in the implementation of LGBT rights, judicial decisions in both Colombia and Costa Rica have produced positive direct effects, recognizing and protecting rights that democratically elected legislative arenas were unwilling or unable to protect.

Finally, the backlash against SSM in both countries might be, as Keck (2009) argues, just an unavoidable consequence of claiming rights by disliked minorities who cannot prevail in the political arena and therefore have no alternative option but to seek protection and advance their rights through the courts. More profound, controversial claims appear to require a more organized, professional social movement that could present sophisticated, coordinated litigation, building on the domestic courts' existing jurisprudence to effectively dialogue with the courts and win those rights. That the LGBT organizations became consolidated in Colombia Diversa, were able to harness the legal expertise of Dejusticia, and could maximize their impact through the CCC's open discussions on issues helped legalize both SSM and same-sex adoptions. In contrast, no similar transformation took place in Costa Rica, which has left marriage equality stuck in an unfriendly legislative impasse. One glimmer of hope in Costa Rica, though, comes from an LGBT-friendly executive branch that, although thwarted in its goal of legalizing same-sex civil unions, has sought to harness the power of the Inter-American Court of Human Rights to bolster the legal claim for LGBT rights in Costa Rica.

## Notes

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1. We refer here to the Third Wave, starting in 1978 with the Dominican Republic election of Antonio Guzmán Fernández and ending with the 1990 Chilean election of Patrico Aylwin.

2. See CIDH 2011; Yashar 1999; Lemaitre and Sandvik 2015 on internally displaced women; Yamin and Gloppen 2011 on health; Colombia Diversa 2010 on LGBT people.

3. We use the acronym LGBT as a proxy for all parts of the extended community of lesbians, gays, bisexuals, transgender, intersex, and queers.

4. We are not arguing that this "rainbow revolution" touched all Latin American countries equally. There are significant variations within countries over time, as well as disparities in the treatment of the groups within the LGBT community. Legal recognition does not necessarily generate societal acceptance of LGBT people's rights or bring an end to discrimination or anti-LGBT violence (see, e.g., Carroll and Mendos 2017; IACHR 2015; A. Rosenberg 2009; CIEDHAL 1996; Wilkinson 2015).

5. SSM is not a universally accepted goal in the LGBT community (see Josephson 2005; Boyd 2013), but most observers recognize its legalization as a profound achievement that animates many other laws that bring same-sex partners closer to legal equality with their heterosexual compatriots (Pierceson et al. 2013).

6. Legal opportunity structures refers to arenas where individuals and social movements can readily access and harness the power of receptive courts to pursue previously unrealized rights claims through litigation of justiciable rights, and where court decisions are complied with. LOS are now frequently used by social movements and individuals to enhance or replace existing political strategies to affect policies (Hilson 2002; Wilson and Rodríguez 2006; Vanhala 2012).

7. This is the core of Bickel's 1986 unresolved "countermajoritarian difficulty," in which unelected judges can exercise judicial review powers to overturn laws passed by elected politicians.

8. For a discussion of the expansive literature on the impact of public opinion on court behavior, see Epstein 2017.

9. Even well-established courts with high levels of legitimacy are concerned with their legitimacy. See Breyer 2010.

10. While accepting that backlashes against unpopular litigation victories can generate harmful political consequences for the litigation victors, Keck (2009) argues that litigation strategies have nonetheless been able to change public policies.

11. Mark Tushnet (2009) argues that courts strengthen social rights through "weak-form" decisions that elected officials can publicly reject, permitting more public discourse.

12. When the Mexican Supreme Court legalized SSM, 49 percent of the population opposed the decision and only 43 percent favored it (Alée 2016).

13. Standing is the ability of a party to bring a lawsuit in court based on their connection to and potential harm from the law or action challenged.

14. Cepeda (2011, 1699) notes, "We have a very strong tradition of judicial independence, and the court has built on this independence. . . . the constitutional court in Colombia has a very broad jurisdiction that permanently involves the court in structural problems because the court not only decides on concrete cases but has to face judicial review in the abstract of all kinds of statutes approved by congress."

15. By 2007, SSM was legal in five countries: The Netherlands (2001), Belgium (2003), Spain (2005), Canada (2005), and South Africa (2006).

16. At that time, CCC relations with Congress were very tense because the court had recently ruled unconstitutional President Uribe's goal of seeking a third presidential term.

17. At the time of the initial call for the referendum, over 80 percent of the population opposed the CCC's decision on same-sex adoption. That number had dropped to 60 percent by May 2017, when the Senate rejected the referendum (Alsema 2017).

18. While a majority of people in the city of Bogotá supported SSM, national support hovered around 40 percent, even once it was legalized by the CCC (Gallup 2016).

19. In 2003, popular support for SSM was less than 9 percent, and has never surpassed 30 percent (Madrigal 2017).

20. Personal correspondence with the author, April 23 and 24, 2014.

21. When the case was filed in 2003, SSM was legal in only two countries, and at the time of the decision in 2006, in four.

22. A recent example is the Assembly's inability to relegalize in vitro fertilization (IVF) in accordance with an Inter-American Court of Human Rights ruling that enjoyed widespread popular support (Mata Blanco 2014).

23. Other delaying tactics include requesting a constitutional consult from the Sala IV, which requires just ten deputies' signatures.

24. The IACHR (2015, 165) notes that Costa Rica is one of only a handful of countries in the Americas that grant refugee status to people persecuted because of their sexual orientation or gender identity. The Ombudsman's Office similarly championed the cause of ending LGBT discrimination in all parts of the country; the effort included social media campaigns (http://www.contaconmigocr.org).

25. Costa Rican civil society participation is among the weakest in Central America (Bowen 2017).

26. The rise of small Christian parties, including the Partido Restauración Nacional (two deputies) and the Partido Alianza Demócrata Cristiana (one deputy), is related to a seismic political event, sparked by corruption scandals, that resulted in the collapse of the long-standing two-party political system (Wilson and Villarreal 2017; Wilson and Rodríguez 2011; Wilson 2007, 2003). These parties describe their main priorities as halting the passage of any law that contradicts their religious ideology, including any bills that might favor abortion, gay marriage, or in vitro fertilization (Mata Blanco 2014).

27. As a member of the Inter-American System, Costa Rica has the right to make such a request. Specifically, the executive asked about gender identity changes and same-sex marriage rights.

28. Bernal Pulido (2006) amplifies this explanation: the CCC was designed to replicate the positive impact of similar apex courts during difficult political transitions in Spain and Germany.

29. Here we refer to legal strategies that coordinated litigation to form part of a coherent, compelling, effective challenge to specific laws and regulations in a predesigned order to maximize the overall impact of the litigation. Early SSM cases in both countries were the antithesis of sophisticated litigation strategies; they were wildcat, uncoordinated litigation-seeking rights for which the necessary legal groundwork had not been accomplished.

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