

*Unpacking the Backlash to Marriage Equality in Latin America*

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Marriage equality has been legalized throughout Latin America nations of with significant involvement by courts in all many nations, despite strong civil law norms and practices inhibiting judicial policymaking. Colombia and Mexico saw high levels of judicialization in their legalization of marriage equality. Recently, however, each nation has seen significant conservative backlashes to these developments, and scholars have emphasized this backlash (Corrales 2017; Díez 2018). A line of scholarship has emerged in the United States questioning the narrative that litigation concerning marriage equality engendered a damaging backlash, a challenge to the long-dominant view of scholars such as Gerald Rosenberg.

This paper examines the litigation in these countries and the backlash created by the marriage equality policies through the lenses of the judicialization of politics in Latin America and the backlash scholarship to argue that in parts of Latin America, like the U.S., the backlash is not as significant as it may appear. While the primary focus will be on Colombia and Mexico, developments in other nations with significant levels of judicialization or lack of a backlash will be examined. We argue that backlashes do not reverse marriage equality policies, especially in the long run. Rather, they are used by conservative activists for short-term political goals. Public opinion trends in both nations support marriage equality, and opponents are mostly waging fights that may suit their

immediate political needs but will do little to reverse the policies. Legal and institutional factors have also entrenched marriage equality policies. This finding further challenges the backlash thesis and demonstrates that the judiciary may be an independent policymaker even in part of the globe where judicial independence and policymaking are fairly new.

### *The Backlash Thesis and Its Critiques*

Until quite recently, the view of scholars such as Gerald Rosenberg (1991/2008) that courts are relatively weak policymakers and are unable create social change and indeed only create damaging backlash if they act too aggressively, was dominant among public law scholars. This line of scholarship is grounded in the work of critics of rights-based litigation campaigns in the 1970s such as Stuart Scheingold (1974) and even back to the 1950s, with Robert Dahl's (1957) assertion that courts were part of the dominant governing coalition, not a challenge to it. Or, as Scheingold stated, "Power cannot be purged from politics by a legalization of the political process (1974/2004, 214). As a result, liberal activists were counseled to pursue grassroots and legislative campaigns on behalf of their causes. In addition, the thesis of weak, status quo-reinforcing courts and backlashes became entrenched in the academic literature. In the second edition of *The Hollow Hope*, Rosenberg added the case of same-sex marriage litigation, arguing that positive gains had been achieved by positive media coverage, not litigation. The work of Michael Klarman (2004) in the context of African American civil rights also asserts that negative backlash is the result of litigation, not positive social change.

However, by the time of the publication of the second edition of Rosenberg's *The Hollow Hope*, this scholarly consensus was being challenged by many scholars illustrating the limits of the powerless courts theory by pointing to independent policymaking by courts, particularly in the realm of LGBT rights (Ball 2006; Cummings and NeJaime 2010; Keck 2009; Mezey 2007; NeJaime 2011; Pierceson 2005, 2010, 2013). This work drew from a line of scholarship represented by Michael McCann, emphasizing the role of leverage stemming from litigation and the power of legal norms and language (1994; 1999). This line of scholarship demonstrated that litigation was highly sophisticated with connections to grassroots campaigns, led to concrete policy change, was linked to (though not exclusively responsible for) positive shifts in public opinion, and demonstrated that opponents of same-sex marriage would have acted in the political arenas, or engaged in a backlash, regardless of whether the change came from courts or legislatures. Indeed, the issue of same-sex marriage and the fairly rapid change in that policy arena with significant litigation has led many scholars to reassess the long-dominant view of weak or backlash-inducing courts, though many scholars still embrace the model, whole or in-part (Klarman 2013; Posner 2013).

A recent public opinion study also challenges the backlash thesis (Bishin, et al. 2016). While backlash against lesbian and gay rights may be strong in the Religious Right, and has been from the start of the lesbian and gay rights movement, it is not intrinsic to mass public opinion (Bishin, et al. 2016, 628). The study found no evidence of backlash, as measured by public opinion, to same-sex marriage. "Our results call these claims of backlash into question. We find little evidence of backlash among the general public or particular groups. The negative reactions we do observe are very small and

fleeting. The important implication is that neither jurists nor politicians should use fear of backlash as a rationale for failing to act on questions of minority rights (Bishin, et al. 2016, 639).” The authors note that what appears to be backlash is likely to be a product of existing negative public opinion, rather than progressive advances, and they are critical of those who invoke the possibility of backlash as a reason to not pursue rights for marginalized groups (Bishin, et al. 2016, 639).

While courts may cause reactions, this is not the same thing as provoking a backlash and counter-productive laws and policies, as the early backlash literature emphasizes. The reality is that, especially in the U.S., courts are significant policymakers in the LGBT rights arena and many others (Grossmann and Swedlow 2015; Pierceson 2005, 2014; Smith 2008). In other national systems where policymaking is judicialized, findings from the literature critiquing litigation in the U.S. may serve as a useful framework for viewing judicial policymaking and reactions to it in other national contexts, with an appreciation for variation in political culture, political development and institutional arrangements. In particular, we see value in applying this literature to judicialization and LGBT policymaking in Latin America, both to better understand the policymaking in those countries and to add to the literature critical of the backlash thesis. Interestingly, while judicial policymaking has been largely absent in the European context in the realm of LGBT rights, the phenomenon has been more pronounced in the Americas, and, as we will demonstrate, this judicial policymaking is the product of hemispheric legal developments and connections, thus making the use of U.S.-centered literature to Latin America appropriate.

*Judicialization and Same-Sex Marriage in Latin America*

Currently, same-sex relationships are legally recognized in the following Latin American countries: Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Uruguay. Most of the population of South America is covered by these forms of same-sex relationship recognition. Central America and the Caribbean have seen much less policy change. This rapid policy change from the last decade has been influenced by several factors, such as international human rights norms, policy diffusion, changes in leftist opposition to sexual minority rights, increased modernization and secularism, and domestic activism (Corrales 2015, Díez 2015, Encarnación 2016; Piatti-Crocker 2013, Schulenberg 2013) Additionally, judicialization of the politics of marriage equality has played a crucial role in several nations in which change has occurred, and has been largely absent in the regions not experiencing policy change (Pierceson 2013; Corrales 2017). Judicialization is marked by increasing policymaking by courts, especially when those courts utilize the politics and language of rights (Epp 1998; Hirschl 2008; Pierceson 2013, 53). Judicialization played the primary role in the expansion of policy in Colombia and has recently played a large role in Mexico.

To a casual observer, judicially driven policy making might appear to be unusual in Latin America, a region known for its civil law tradition and sharp limits on judicial autonomy. However, the region has witnessed a legal revolution over the past several decades. Javier Cuoso describes the rapid change in the following manner: “The traditional insistence of the superiority of codified and statutory law and the prescription of a modest rule for the judiciary (to apply the law without scrutinizing its fairness) was suddenly replaced by a constitutional discourse emphasizing the relevance of human

rights, constitutional principles, and value-oriented judges (Cuoso 2010: 149).” New rights-based constitutions, newly configured or more assertive courts, lawyers and judges trained in U.S. law schools and carrying activist values back to their home countries, and a growing appreciation for international human rights norms explain much of this shift (Cuoso 2010; Cuoso, et al. 2010; Pierceson 2013). Clearly, the civil law norm of judicial deference is changing throughout the region and quite significantly in some national contexts, particularly those examined in this study.

*Colombia: The Judicial Creation of Same-Sex Relationship Policy and its Backlash*

Of all Latin American countries, Colombia is the site of the earliest and most pronounced judicialization of same-sex marriage (or similar) policy. Several factors have contributed to this high level of judicialization. In a clear rejection of the civil law model, Colombia adopted a new, rights-based constitution in 1991, and the Constitutional Court quickly developed as a rights-based policymaker. This was supported by relatively easy and inexpensive constitutional tools (a lawyer is not required) granting access to the courts through legal challenges claiming violations of constitutional rights called an *acción de tutela*, or *tutela*. Citizens may also bring suits challenging the constitutionality of laws, an *acción pública de inconstitucionalidad*. LGBT rights organizations, such as Colombia Diversa, have aggressively utilized this process and the constitutional provisions concerning equality (Article 13) and personal development (Article 16). First, they established that discrimination on the basis of sexual orientation was contrary to the constitution and that sexual orientation was a legitimate identity, on par with

heterosexuality (Decision C-481/98). Litigation surrounding same-sex relationships followed a decade later.

### Early Developments

This turn toward an almost-exclusive reliance on litigation occurred in response to resistance in the legislative arena, connected to the influence of the Catholic Church and the increasing political clout of Evangelical Protestants in many Latin American countries, including Colombia. For instance, legislation designed to grant some rights to same-sex couples, first introduced in 2003, failed in the Congress after significant lobbying by the Church and conservative perspectives in the legislature (Pierceson 2013: 57; Albarracín Caballero 2011: 15). Interestingly, the turn to litigation reversed an earlier tactic of the movement of focusing on the legislative arena, given a lack of support for the rights of same-sex couples from the Constitutional Court. While the Court in the late-1990s found discrimination on the basis of sexual orientation to be unconstitutional, it rebuffed efforts to apply this approach to couples (Bonilla 2013: 111; Albarracín Caballero 2011: 15). Colombia Diversa was founded in 2004 after both avenues for progress, legislative and legal, were seemingly closed in the short-term. While activists decided to continue to engage the legislative process, a sophisticated and coordinated legal strategy was devised, in conjunction with legal activist groups (Albarracín Caballero 2011). This was an effective tactic—the Constitutional Court became the ally of same-sex couples, not the legislature.

The first phase of successful litigation began in 2007. In that year, the Constitutional Court ruled that cohabitating, or *de facto*, same-sex couples were entitled

to some of the benefits granted to de facto opposite-sex couples. In a series of cases that followed, the Court granted more rights to same-sex couples, but stopped short of mandating same-sex marriage. In 2009, the Court ruled that same-sex de facto couples must be treated identically to opposite-sex de facto couples under all relevant areas of the law (C-029/09). Activists and the Court were framing their arguments in terms of de facto legal recognition, because Article 42 of the Constitution defines marriage heterosexually (“the free decision of a man and a woman”). However, the Court was clearly laying a jurisprudential foundation, and this would soon be used by legal activists to attack the heterosexual marriage norm in the constitution. As it states in the ruling on de facto couples, C-075/07, “the absence of protection in the patrimonial area for the homosexual couple is harmful to the dignity of the human person, is contrary to the right to free development of personality and functions as a form of discrimination prohibited by the Constitution (Bonilla 2013, 114).”

These successes were the result of an effective legal and social movement strategy, harnessing the country’s strong constitutional principles and rights-based politics. While non-judicial forms of politics were utilized by activists, the legal strategy and frame was paramount. According to Mauricio Albarracín Caballero, “A crucial element that can be observed in this period is the important role played by lawyers, law professors, and other professionals who acted as allies and participants in this strategy. The legal professionals acted as intermediaries, helping to translate social demands into the language of constitutional law.” This legal frame was presented both to courts and the public by activists (Albarracín Caballero 2011, 21-22).



### The Push for Same-Sex Marriage

Reflecting this rights-based activism and leveraging these decisions and highly supportive jurisprudence, activists challenged the prohibition on same-sex marriage. They were using the rights outlined in the Constitution to challenge the document's heterosexism—seemingly a more daunting challenge than merely arguing for equal treatment for cohabitating couples. Indeed, the de facto couple litigation was met with muted opposition, given that it did not challenge the heterosexist definition of marriage. President Álvaro Uribe ran for reelection in 2006 on a platform of opposition of marriage and adoption rights for same-sex couples but support for some economic and social welfare rights for those couples (Albarracín Caballero, 15, 22). Arguably, then, the Constitutional Court was not venturing too far outside the parameters of electoral politics in its de facto cases. However, activists were now asking the Court for full marriage equality in a nation with minority support for the policy. In 2010, support for same-sex marriage, as measured by public opinion surveys, was only around 35 percent (Lodola and Corral 2013: 43).

A provisional decision by the Constitutional Court in favor of same-sex marriage in 2011 led to several years of political and legal wrangling on the question until the Court ruled definitively in 2016 that same-sex marriage was required by the constitution and that judges and notaries were not legally allowed to refuse to marry same-sex couples. In the 2011 decision, the Constitutional Court held that Article 42 should be understood as protecting a range of families, including same-sex couples. The Court clearly invoked an evolutionary understanding of that provision and admitted that they were updating the Constitution to changing social circumstances (Ramirez-Bustamante

2015, 116-117; C-577/11). However, perhaps recognizing the political ramifications of its judicial innovation, the Court granted the Congress two years to enact legislation allowing for same-sex marriage. If the Congress did not act, the Court authorized legal officials to grant same-sex marriages when requested, under Court's authority.

Ultimately, the Congress did not act, as conservative members of the legislature successfully blocked legislative proposals derived from the Court mandate. In fact, the Senate defeated a same-sex marriage bill by a margin of 51 to 17 (Johnson 2013). This was clearly a backlash, but one that was allowed by the Court in shifting the arena to Congress. As will be shown, this backlash and other forms of backlash, such as opposition from government officials, would not prevent the Constitutional Court from legalizing same-sex marriage. After the two-year window passed, same-sex couples began to request marriages. Some legal officials (notaries and judges) granted them while others refused. While President Juan Manuel Santos supported same-sex marriage in his successful 2014 reelection bid (his administration also supported same-sex marriage in litigation before the Constitutional Court soon after this), another government official, conservative and strongly Catholic Inspector General Alejandro Ordóñez Maldonado, took legal action to nullify the sanctioned same-sex marriages and couples brought legal action to contest his actions (Lavers 2014). Ultimately, the Constitutional Court settled the legal confusion in the wake of Congressional inaction by ruling in 2016 that same-sex marriage was required by the Constitution (Sentencia SU214/16). The gradualist, yet clear, jurisprudential path taken by the court over a decade had accomplished what the political process in Colombia could not do: fully and equally protect same-sex couples under the law.

While the approach of the Constitutional Court was gradualist for much of the process, the hearing held by the Court in advance of its sweeping 2016 decision reflects high levels of judicialization and the influence of international legal norms. The hearing took place just over a month after the United States Supreme Court ruled that the U.S. Constitution required same-sex marriage in *Obergefell v. Hodges* (2015). The Court requested testimony from the office of the United Nations High Commissioner for Human Rights and Albie Sachs who was chief justice of the South African Constitutional Court when it mandated same-sex marriage in that country. Opponents of same-sex marriage also testified, including the U.S.-based Alliance Defending Freedom and Colombia's attorney general. However, the overall thrust of the day of testimony pointed in the direction of sanctioning same-sex marriage under Colombian and international law. As journalist J. Lester Feder assessed the situation: "But the testimony of the day certainly left the impression that it [the Constitutional Court] wants to decide a much larger question [than same-sex marriage in Colombia only], and perhaps that it wants to nudge the consensus in international human rights law further towards marriage equality (Feder 2015)."

### Backlash?

However, while public support has increased, there is still a lack of majority support for same-sex marriage in the country. A recent Gallup survey found 40 percent support (No author/Gallup 2016), and homophobia and gender traditionalism are still prominent in the nation's culture. This was clearly on display in 2016 in a seemingly unrelated political battle over the government's attempts to approve a peace accord with

the Revolutionary Armed Forces of Colombia (FARC), a group engaged in a civil war with the government for decades. This debate was combined by conservatives with concurrent attempts by the government to be more inclusive of LGBT students and perspectives in public schools. This was a clear example of conservative activism, but it is not clear that it was the type of backlash that will lead to overturning LGBT rights advances in Colombia, especially those that are judicially driven.

As a part of the peace negotiation process, LGBT advocacy groups were involved. They focused on the violence and harassment faced by the community both by the leftist FARC and by right wing paramilitary groups. The final draft of the peace accord referenced this violence and included statements of support for LGBT rights. Also in 2016, the education ministry published a teaching handbook that was supportive of LGBT rights, with a passage endorsing the notion that gender is not a binary, nor even biologically determined. It read: “One isn’t born a man or a woman, but rather learns to be one, according to the society and age in which they grow up (O’Boyle 2016).” In addition, to the consternation of conservatives, the education minister was a lesbian, Gina Parody. President Santos then appointed Parody to be one of the leaders of the “yes” campaign for the peace deal. The peace accord was to be approved by voters in a popular referendum (O’Boyle 2016).

The state of affairs allowed conservative opponents of LGBT rights and the accord, led by former President Uribe, to merge the two issues in a targeted campaign to Evangelicals and conservative Catholics. The measure supporting the peace accord narrowly failed. While it was not the sole cause of the failure, it certainly played a part. According to one observer, “The opposition used that [conservative] argument against

gay marriage, abortion, religion to attract and rally against the peace accords. It was an effective strategy to drive the most conservative voters against the peace agreement (Casey 2016).” Much of the opposition, though, was driven by sentiment that the agreement was too lenient toward FARC rebels. However, Congress later approved a revised peace accord.

Thus, Uribe used opposition to LGBT rights strategically to defeat the accord, but neither was the accord defeated in the end, nor were LGBT rights were diminished in a significant way. The robust jurisprudence of the Constitutional Court still stands. While homophobia and heterosexism are still a strong part of Colombian political dynamics, they are for most nations. However, the institutional and legal setting in Colombia is a counter-weight to this. While it may be too soon to definitively declare that the court-driven changes are secure, that appears to be the case for now.

*The Case of Mexico: Sub-national Legislation, Court Decisions, and Administrative Regulations for Same-Sex Couples*

Unlike several other Latin American countries (Argentina, Brazil, Chile, Ecuador, Uruguay, and more recently Colombia) Mexico does not have a federal law allowing same-sex marriage or unions for same-sex couples; yet several states and local-level districts have adopted some type of mechanism for same-sex couples. Indeed, policies for same-sex couples have been enforced at subnational levels in three manners: by law, administrative regulation, and in several cases as a result of court decisions. In Mexico, family law is defined at the subnational level, in contrast to Colombia and most Latin American nations.

Mexican policies at subnational level are varied in nature and scope. For example, several states initially recognized same-sex unions, each granting different rights to same-sex couples such as solidarity pacts in the State of Coahuila and civil unions in Mexico City (Vela Barba 2015). Others have adopted same-sex marriage by legislation or by administrative regulation, a trend that seems to be diffusing more recently. Furthermore, despite a recent attempt by the current President Enrique Peña Nieto to introduce a bill that would have made Mexico the 7<sup>th</sup> Latin American country to adopt national level legislation for same-sex couples, the proposal was rejected in 2016 by a majority of the parties (including the president's own), and by public opinion, due to the unpopularity of the current Mexican president and the role of the Catholic Church and other NGOs in rallying against such proposal. Still, Mexico has made major strides in adopting policies benefitting same-sex couples at subnational levels due to real society needs, and this trend is still ongoing. Currently, 13 states (out of 31) and Mexico City have legalized same-sex marriage, but same-sex couples can be married anywhere in the country if they file a legal challenge.

According to the National Institute of Statistics and Geography (INEGI) in 2010, 689 same-sex marriages were registered, of which 55.2% were of men and 44.8% of women. At the time, Mexico City was the only entity where same-sex marriages were legal. In 2015 there was an increase of 153.8% of same-sex marriages (in contrast to opposite-sex marriages, which have declined), and this is due to the fact that same-sex marriages had been legalized in various parts of the country. In 2017, INEGI claims that there were 1,749 same-sex marriages registered in the country (INEGI 2017). Hence,

there is a real need in Mexico for a comprehensive bill that would allow same-sex marriage throughout the country, or at least more subnational recognition.

This section will explore same-sex legislation and other administrative mechanisms in several Mexican states and local districts, and the role of the Mexican Courts in upholding legislation for same-sex couples. Finally, this section will discuss the most recent government proposal that would have introduced same-sex marriage legislation at national level and the reaction that ensued.

### The Road to Same-Sex Legislation in the *Distrito Federal* (DF)

The bill known in Mexico as *Sociedades de Convivencia* introduced civil unions for both same-sex and opposite sex couples for the first time in the country in 2001. The bill was promoted by lesbian congresswoman Enoé Uranga and supported by a group of lesbian activists.<sup>1</sup> Yet, despite these efforts, it would take five more years for the bill to pass as law.

The Revolutionary Democratic Party (*Partido Revolucionario Democrático-PRD*), which has been the ruling party in DF since 1997 was then led by Andres Manuel López Obrador (AMLO). As Mayor (2000 -2005) AMLO did not support the legislation because, as noted by Genaro Lozano, public opinion at the time seemed to be opposed to the bill (Lozano 2013). But when Marcelo Ebrard (also from the PRD) became Mayor of DF in 2006, the bill received his backing and that of his party in the legislature, and soon became law. The *Sociedades de Convivencia* was the first legal mechanism to recognizing same-sex unions in Mexico. The law also recognized inheritance and pension

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<sup>1</sup> One of the key organizations sponsoring the bill was the Enlace Lésbico Feminista. For more, see Lozano 2010.

rights, among other social benefits. However, the law was limited in scope in that it did not change the legal status of the partners after the union, and extent, since it was valid in Mexico City exclusively (Lozano 2010, 148). The legislature approved the measure by a vote of 43 legislators in favor, five abstentions, and 17 negative votes cast by the conservative National Action Party.

### From Civil Unions to Same-Sex Marriage

Given the limitations of the DF's civil union law, a same-sex marriage bill was introduced to the city's legislature in 2009 with the support of the ruling PRD and the Social Democratic Party. Yet, whereas some members of PRD supported a same-sex marriage bill, they were opposed to granting same-sex couples adoption rights, which were also provided on the bill. This created outrage among members of LGBT community and several legislators, who rejected any bill that would discriminate same-sex couples on those bases. In addition, the Catholic Church, and Catholic NGOs such as One (Man) + One (Woman) = marriage, along with members of the Conservative PAN were opposed to the bill as a whole (Echeverria Garcia 2016).

After the controversial adoption ban was finally withdrawn, the bill received the overwhelming support of all 34 PRD legislators. Along with legislators from the PRI and the Workers Party (PT) the bill finally passed as law in December 2009. Mexico City's same-sex law reforms Article 146 of its Civil Code allowing same-sex marriage and granting also adoption rights (Article 391 of the Civil Code) to same-sex couples. However, as it will be discussed below, the law was later challenged in the Supreme Court by members of PAN (Lozano 2013, 161).



### Civil Unions and Same-Sex Marriage in Mexican States and Localities: Coahuila and Beyond

Unlike the obstacles that the LGBTQ community had to face in Mexico City before same-sex unions and marriage were adopted, the passage of a civil union bill proposed by the PRI in the Northern State of Coahuila, was remarkably easy (Lozano 2010, 149). This despite the fact that Coahuila has been traditionally a conservative state much like Texas, its neighbor to the North. The state initiative was proposed by Julieta López Fuentes (PRI) and endorsed by local LGBT organizations. However, the bill was also scrutinized in its original form since it would exclude people living with HIV-AIDS from legally joining a union. In addition, the bill did not include adoption rights for partners of the union. Whereas the HIV-AIDS contingency was later withdrawn, the ban on adoption rights was kept intact (Lozano 2013).

Still, the bill that became law in 2007 was narrower in its outset than the *Pacto de Convivencia* in the DF discussed above. Known as the *Pacto de Solidaridad* (Solidarity Pact), the civil union bill in Coahuila was designed exclusively to apply to same-sex couples, but unlike the *Pacto de Convivencia* in the DF, the Solidarity Pact altered the couple's civil status as it was established on the state's civil code. The DF "civil unions could be dissolved, for instance, by marrying another person; a solidarity pact could not be dissolved that way" (Vela Barba 2015). In addition and as discussed above, the Solidarity Pact excluded the right of same-sex couples to adopt (Lozano 2010, 151).

Given the limitations of this Pact, Coahuila was the first state (second subnational district) to adopt same-sex marriage. The 2014 law now allows marriage as "the free union with full consent of two people" and also includes parental rights or "the possibility

of procreation or adoption." State Legislator Samuel Acevedo, who proposed the bill, claimed that he encountered opposition from conservative groups, including the Catholic Church. But he also asserted that the changes in the civil code, were "a great step forward" and received overwhelming support by the state legislature, with 19 votes in favor of the bill to three against (BBC 2014).

### Beyond Coahuila: From Civil Unions to Same-Sex Marriage in the Mexican States and Districts.

Soon after Coahuila several states adopted different variations of civil unions. For example, in 2013 Jalisco adopted the Free Coexistence Act (*Ley de Libre Convivencia*), which allowed same-sex civil unions. However, much like in Coahuila no adoption was allowed (Animal Politico 2013). During the same year, Colima approved an amendment to Article 147 of the state constitution, which legalized same-sex civil unions. An appeal of constitutionality to Colima's same-sex unions was filed and the Supreme Court of the Nation agreed in August 2014 to review it and ruled in favor of same-sex unions in the state a year later (Zamora Briseño 2015).

More recently, same-sex marriage rather than unions seem to be an ongoing policy trend in Mexico given the limitations of unions seen above. Indeed, short of a national law, same-sex marriage has been enforced both at state or local levels, and by legislation or administrative regulations. In 2014 the state of Chihuahua was the second state to recognize same-sex marriage. More recently, five other states, including Jalisco (2016) Colima (2016), Campeche (2016), Michoacán (2016), and Morelos (2016), apart from DF and Coahuila have implemented legislation allowing both same-sex marriage and adoption rights for same sex-couples.

In addition, there are a number of local level administrative regulations, which have stopped enforcing state bans on marriage equality, including Santiago de Querétaro, capital of Querétaro state, and San Pedro Cholula in Puebla state, among several others, a trend that seems to be diffusing rapidly in Mexico (Wockner 2016). Same-sex marriages have also been taking place at local level in the southern state of Quintana Roo, with couples taking advantage of the fact that the state's civil code does not specify sex or gender requirements for marriage (BBC 2014). Several Supreme Court decisions, including the one in 2010 discussed further below and other similar decisions since then, have upheld the constitutionality of same-sex marriage, leading to a rapid trend of the still ongoing same-sex marriage legalization in Mexico's subunits.

#### Mexico's Supreme Court: A Key Decision That Set a Trend

As discussed briefly earlier in this section, the DF's same-sex marriage law of 2009 was challenged at the Supreme Court through an *acción de inconstitucionalidad* (unconstitutionality claim), a judicial review mechanism that requires a supermajority of 8 Justices –out of 11– to strike down the challenged law (Vela Barba 2015). The Law was challenged by the country's Attorney General in January 2010 on the basis that it violated Article 4 of the Federal Constitution, which provides for the protection of the Mexican "family" (Mexican Constitution 1917). The attorney general's office contended that the law breached the concept of family and the "best interest of the child" guaranteed in the constitution by allowing LGBT couples to marry and adopt (Human Rights Watch 2010). In addition, six other States challenged DF's marriage equality law through a mechanism known as the *controversia constitucional* (constitutional controversy), as they

perceived that same-sex marriage in Mexico City would be an infringement of superior federal law that prohibited it (Vela Barba 2015). Finally, these States claimed that the adoption of same-sex marriage in Mexico City would force them to recognize these marriages in their States, when these states neither recognized nor explicitly prohibited marriage equality (Vela Barba 2015).

The Supreme Court's 9-2 decision was significant in that it upheld the constitutionality of DF's same-sex marriage law on the following main grounds. First, the majority argued that Article 4, paragraph 1 of the Federal Constitution mandated the protection of all families and it interpreted this concept as implying not only couples (both opposite and same-sex), but unions and single-family units rather than restricting the concept of family to one formed by a man and woman, as argued by the Federal State (Barba 2015; Human Rights Watch 2010; Nexos 2010). The Court stated that whereas the constitution does protect the family it does not protect a "particular model of it" (Nexos 2010). In addition, the Court based its decision on international human rights treaties and more particularly, international clauses that protect against discriminatory treatment, and such individual rights as self-expression and identity. The Court concluded that international treaties did not protect exclusively heterosexual couples (Vela Barba 2015).

Overall, the Court's decision not only supported the legal basis for same-sex marriage in Mexico City but also dismissed States' claims that same-sex marriage in Mexico City could not be recognize in other states. In this case, the Court argued that on the basis that Article 121, clause IV, which requires that "Acts of a civil nature done in accordance with the laws of one State shall have validity in the others," Mexican States were constitutionally obligated to recognize Mexico City's marriages (Mexican

Constitution 1917 and reforms; Vela Barba 2015). As a result of this decision, same-sex couples can seek an injunction against a marriage ban (an *amparo*) and be granted a marriage license (Wocker 2016).

Despite the legal significance of the Supreme Court decision, in the sense that the DF's law on same-sex marriage was upheld, since Mexico follows the civil legal system, the Court's decision was uniquely held for this case. Indeed, unlike the U.S. system, a single ruling from the highest court cannot overturn same-sex marriage bans nationwide. Thus, decisions are reached on a case-by-case basis. For example, the Supreme Court voted unanimously to declare Jalisco's Civil Code unconstitutional for limiting marriage to heterosexual couples (Expansión 2015). The Supreme Court can create a precedent, but only through several similar rulings. This legal limitation was the main justification of President Peña Nieto's recent attempt to introduce a bill that would allow same-sex marriage nationally, which we will turn to discuss next.

However, activists have pushed Mexico's civil law system to the fullest extent possible to change policy through a coordination litigation campaign. This has been described as a "quiet marriage equality revolution" (Feder 2015a). Marriage Equality Mexico has coordinated the litigation strategy under the leadership of an activist attorney, Alex Alí Méndez Díaz (Wockner 2016). The Supreme Court has also seen itself as part of a trend in international law and has cited United States Supreme Court cases. In its 2012 decision granting same-sex marriage in Oaxaca (a case brought by Méndez Díaz), it cited *Brown v. Board of Education* (1954) and *Loving v. Virginia* (1967), comparing the racial discrimination of those cases to the discrimination against same-sex couples (Encarnación 2016, 38).

### From the Mexican States to the Nation?

Due to the juridical limitations of Mexico's court decisions and in order to expand same-sex marriage legislation to all states, President Enrique Peña Nieto (PRI) proposed a bill in 2016 that would have amended Article 4 of the Federal Constitution. The bill would have recognized marriage as a human right and "without discrimination on grounds of ethnic or national origin, disability, social status, health conditions, religion, gender or sexual preferences" (Animal Político 2016). The Executive bill also proposed to reform the Federal Civil Code, recognizing a right to gender identity, as well as recognizing equal conditions of adoption rights despite sexual orientation and / or gender identity (Expansión Nacional 2016).

The bill had several problems from the start. First, the firm opposition of the conservative right, and particularly of the National Front for the Family, a coalition of conservative religious groups, which called for street protests. In addition, Mexico's Catholic Church was also adamant against marriage equality, despite the fact that Pope Francis-the highest authority of the Catholic Church- had warned against "hostile" anti-marriage equality demonstrations, which were held in Mexico City in November of last year (Martinez Ahrenz 2016 a, Martinez Ahrenz 2016 b). Furthermore, Peña Nieto's public support had reached an all-time low by 2015 according to the Pew Research Center, due to allegations of corruption and Mexico's rise in violent crime (Cuddington and Wike 2015) and his popularity still remains low (De Cordoba 2017). Despite the progressive nature of this bill, members of his own party did not support it (CNN 2016). Thus, the proposed bill stalled in Mexico's legislature. Jordi Díez describes Peña Nieto's

move as unnecessary, given the legal progress, and as a strategic blunder that emboldened conservatives (Díez 2018, 34-35). Without the proposed legislation, conservative counter-mobilization would likely not have been as pronounced. The less visible and more diffuse legal strategy was not provoking such a reaction. This episode also demonstrates that strong conservative reactions are not only caused by aggressive judicial decisions.

Overall, despite some limitations, Mexico has made major strides in protecting same-sex couples at subnational levels either by legislation, administrative regulation, or the court system. Even if Mexico is unable to adopt national-level legislation, it is likely that Mexican states and localities will continue on the recent trend of legalizing or implementing marriage equality policies. A Pew Poll from 2014 showed 49 percent support for same-sex marriage in Mexico, placing the country in the top five supportive nations, including Uruguay (62 percent), Argentina (52 percent), Chile (46 percent), and Brazil (45 percent).

#### *Additional Illustrative Cases from South America*

Outside of Colombia and Mexico, Brazil the nation also possessing a high level of judicialization in the creating of its same-sex marriage policy. Standing in way of a legislative path to marriage equality in the country were its highly decentralized political system with many veto points, very high levels of homophobia and transphobia and corresponding high levels of violence, and a potent conservative religious community of Catholics and Evangelical Protestants (Encarnación 2016; Schulenberg 2010). In 2011, the Federal Supreme Court utilized the Constitution's strong equality provisions to rule

unanimously that same-sex couples were entitled to “stable unions,” or the country’s version of cohabitation-based legal unions. Lower courts and notary publics soon began to grant same-sex marriages based upon this decision, and body that oversees the administration of courts in Brazil, the National Council of Justice, asserted that the 2011 ruling allowed for same-sex marriage nationwide in 2013. It ordered all notary publics to grant same-sex marriage licenses (Encarnación 2016, 182). Many conservative critics in Congress have vowed to reverse this state of affairs, but the same decentralized system that pushed marriage equality activists to the courts also blocks conservative opponents of same-sex marriage (Benvindo 2015). However, the legalization of same-sex marriage has done little so far to displace the deep homophobia in Brazil, and some observers feel that legalization has increased homophobia (Encarnación 2016, 186). If true, this also would likely been the result from a legislative path to marriage equality. Evangelical legislators have worked to quash pro-LGBT policies and programs (Encarnación 2016, 183), but they have done this as a part of their conservative, homophobic, and transphobic agenda—not simply because same-sex marriage was legalized by the courts.

Civil unions and same-sex marriage were created in Uruguay through the legislative arena with the support of left-wing parties, and these policies are supported by strong public opinion (Lodola and Corral 2013; Sempol 2013). There is no serious movement to undermine or undo the nation’s same-sex marriage policy. Uruguay has become one of the most progressive and secularized nations in South America, and there are no signs that this will be reversed. Uruguay’s neighbor, Argentina was the first nation in Latin America to enact same-sex marriage in 2010. This process occurred largely through legislative process after years of activism and lobbying, but newly aggressive



courts also contributed to the process (Gracia Andía 2013). Support for same-sex marriage in Latin America is highest in Argentina (Lodola and Corral 2013). Since then, LGBT rights in Argentina have been on an upward trajectory, with little effective resistance. The Congress enacted a groundbreaking transgender rights law in 2012.

### *Conclusion*

An examination of same-sex marriage developments in Latin America, especially Colombia and Mexico, appears to further support the notion that the backlash thesis is empirically suspect. We find that high levels of judicialization have led to policy change, and, while opposition has been generated, it has been invoked for a variety of reasons, including being deployed for strategic domestic political purposes. This opposition has not resulted in rollbacks on same-sex marriage policy. Certainly, gender and sexual orientation conservatism are still powerful forces in Latin America, but so is judicialization. Perhaps instead of referring to this opposition as “backlash,” it is more useful to describe it as a “lash,” or expected opposition to progress on LGBT rights. This lash does not necessarily involve a regression of policy progress, as so much of the backlash literature assumes.

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