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From International Idea to Domestic Policy: Explaining the Emergence of Same-Sex Partnership Recognition in Argentina and Brazil

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From International Idea to Domestic Policy: Explaining the Emergence of Same-Sex Partnership Recognition in Argentina and Brazil

A Dissertation submitted in partial satisfaction of the requirements for the degree of

Doctor of Philosophy

in

Political Science

by

Shawn Richard Schulenberg

June 2010

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University of California, Riverside
ABSTRACT OF THE DISSERTATION

From International Idea to Domestic Policy: Explaining the Emergence of Same-Sex Partnership Recognition in Argentina and Brazil

by

Shawn Richard Schulenberg

Doctor of Philosophy, Graduate Program in Political Science
University of California, Riverside, June 2010
Dr. David Pion-Berlin, Chairperson

This dissertation examines how the international idea of same-sex partnership recognition (SSPR) becomes enacted into domestic policy in Argentina and Brazil. It begins by looking at how the leading LGBT social movements in each country understand and prioritize the battle for same-sex unions. These understandings ultimately determine how far reaching an enacted law may go. Next, it explains what the current constitutional and statutory law is in each nation today and through which avenues it potentially could be changed. The second half of the work systematically compares how the LGBT social movement organizations have engaged with the three branches of government to advance their goals. What it finds is that Brazilian LGBT groups have long had elite allies within
all three branches of government, but these leaders have not had the institutional capacity to affect change. In Argentina, on the other hand, all three branches have significant institutional powers to change the law, but lesbians and gays have had a harder time securing friends in these positions. The result is that movements in both countries have not yet achieved success. However, some recent changes in both of these southern cone nations have made SSPR a real possibility: the Brazilian Supreme Federal Court, with new and expanded powers, may soon decide in favor of stable unions for same-sex couples. Moreover, allies in the Argentine Senate are expected to soon approve a bill granting full same-sex marriage rights. The final chapter concludes with a brief look at how the variables identified in these cases function in three other Latin American countries.
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CHAPTER 1: INTRODUCTION

In recent years, lesbians and gays have won increased acceptance and legal recognition throughout the globe, securing impressive victories on items such as nondiscrimination ordinances, funding for HIV treatments, and same-sex partner recognition laws. Although many of these advances have taken place in first world countries, considerable progress has also been achieved in lesser-developed countries, most notably in Latin America. Nevertheless, most of the literature in political science on lesbian and gay politics focuses on the former and not the latter. This purpose of this dissertation is to contribute to filling this void. By studying the cases of Argentina and Brazil, my research intends to sharpen our understanding of how gay and lesbian social movements in Latin America achieve state recognition of same-sex partnerships.

At first glance the challenges facing sexual minorities in Latin America to pass such legislation appear to be daunting. First, most countries in this region are highly religious, which many studies show impedes the ability for gay and lesbian movements to make progress legislatively (Badgett 2004; Button et al. 1997; Caramagno 2002; Htun 2003; Wald et al. 1996). Moreover, within Latin America traditionally there has been a public/private divide on the issue of homosexuality: it has been tolerated as long as all conduct occurs in private and never entering the public sphere (Pecheny 2003: 257). Legalizing same-sex unions would seem to further violate this agreement. Finally, issues of importance to lesbians and gays are usually not a high priority for politicians or the general public. To an elected official, these minorities have neither the votes nor the money to significantly affect their electoral prospects. It seems logical that politicians
would not risk spending their time passing their initiatives, especially with the possibility of inciting the anger of the much larger and well-funded Catholic opposition and other more radically conservative Protestant denominations.

However, even with all of these difficulties, LGBT groups in Argentina and Brazil have both achieved some remarkable victories while at the same time seen failure in other areas. This work utilizes a comparative approach to explain how same-sex unions have transformed from an idea in the international system to a variety of state-recognized forms of within these two countries.

**Literature Review and Argument**

Same-sex partnership recognition (SSPR) laws have seen remarkable advancements in many parts of the world over the past two decades. Denmark became the first country worldwide to recognize same-sex “registered partnerships” in 1989 and this was followed by a tidal wave of other civil union-like legislation throughout many European countries in the 1990s. Starting with the Netherlands in 1999 a handful of countries have gone one further step and approved legislation granting same-sex couples full marriage rights. However, this activity has not been confined to Europe. A number of countries, such as Canada and South Africa, and a number of states and localities within the United States, Mexico, Argentina, and Brazil (just to name a few) have also granted some types of recognition to same-sex couples. This has all happened while governments in other regions have passed referendums banning same-sex marriage within their borders. Clearly, this is a highly contentious political issue in many parts of the world.
These struggles have not gone unnoticed by political scientists: a rising number of studies within the past ten years have examined the political processes underlying same-sex partnership recognition battles. Within the United States, the 2004 national election included many ballot initiatives to ban same-sex marriage in an unprecedented number of states, and a number of studies tried to explain why these ballot initiatives passed or failed and their overall impact on the presidential race (e.g. Lewis 2005). Other works have scrutinized the state-by-state variations we see in same-sex marriage laws in the United States (Babst et al. 2009; Merin 2002; Rimmerman and Wilcox 2007). Taken together, these studies have helped us understand why same-sex partners are recognized in some localities but not in other. However, because of important differences in the political cultures and institutional structures in Argentina and Brazil, it is not clear that these lessons from the United States can explain the variations in partnership recognition in this part of the world.

Moving beyond the United States, another body of research attempts to explain international variation in same-sex union laws. In “Variations on an Equitable Theme: Explaining International Same-Sex Partner Recognition Laws,” M. V. Lee Badgett (2004) uses a mixture of qualitative and statistical techniques to study why some countries adopt same-sex partnership recognition laws while others do no. Overall, she finds that tolerant attitudes toward homosexuality, low religiosity, and high levels of cohabitation are all likely indicators that a country will recognize same-sex partnerships.

Although this study is useful for showing international trends between these variables, its utility for explaining variation in Argentina and Brazil is limited for a
number of reasons. First, all of the data in her study comes from OECD countries, so we cannot say with certainty that her conclusions will travel to countries with lower levels of economic development. Second, she takes the country as a whole as the unit of analysis making it impossible for us to understand sub-national variation or variations among the different branches of government. Finally, because she is primarily noting statistical relationships between these variables, they do not help us to understand causal connections. The aim of her study is to predict where same-sex unions might emerge, but it says nothing about how a country can actually make it happen. For example, we already know that both Argentina and Brazil are highly religious; so according to her argument passage of SSPR is not likely in either country. This does little to inform us about how LGBT movements might be able to navigate within this situation to achieve success.

In “Same-Sex Unions: The Globalization of an Idea,” Kelly Kollman (2007) also aims to explain the international dissemination of state recognition of same-sex unions. She finds that transnational advocacy networks have helped spread of the idea, but domestic religiosity and the perceived legitimacy of international norms by national elites and publics ultimately determine whether a country will adopt a law and, if so, what it will look like. This study is extremely useful for our purposes because it tries to explain the relationships between the international idea of SSPR and how domestic considerations ultimately influence how this legislation will take shape. However, her study (self-admittedly) only looks at Western European countries; therefore, like Badgett’s work, it is not immediately apparent that her findings will travel to South
America. Moreover, Kollman readily acknowledges that because her results are based on statistical findings, they do not necessarily show the causal mechanisms by which these outcomes occur. She concludes, “case study research will be necessary to reveal what additional factors influence a government’s decision to grant marriage rights” (335).

As of now, no work has attempted to systematically explain disparities in same-sex partnership recognition laws outside of North America and Western Europe. This dissertation hopes to fill some of this void. Trying to explain the rest of the world is beyond the scope of this project in terms of time and resources; to make this more manageable, I have focused on two Latin American countries, Argentina and Brazil. Leveraging the advantages of a small-n, qualitative research design, this dissertation explains the process—from start to finish—of how same-sex unions did or did not become recognized by the state in two Latin American countries. Essentially, this process happens in two steps: 1) from an international idea to proposed policy, and 2) from a proposed policy to an adopted policy. How it moves through this process dictates what shape the proposal will eventually take and whether it gets adopted by the state.

**Step One: International Idea ➔ Proposed Domestic Policy**

Same-sex desire has manifested itself throughout time and space in a wide variety of ways (Murray 1995). As a category in its modern form, the “homosexual” is a relatively new social construct in the West: only within the last century have we begun to associate a desire and a behavior with an identity (Foucault 1978; Katz 1995; Weeks 1995). The advent of the modern capitalist global order has allowed this understanding of homosexuality to be transmitted to countries throughout the globe, setting up battle
between global and local understandings (Adam et al. 1999; Cruz-Malavé and Manalansan 2002).

A similar process of dissemination is happening around the globe today with the legal recognition of same-sex partnerships: a small handful of nations in Western Europe began to recognize same-sex unions and many other countries and localities around the globe have followed the same suit. However, we should be careful not to assume that all countries around the world will just follow in lock-step with Western countries: although the construction of homosexuality and the idea of civil unions or marriage may originate in developed countries, it does not mean that LGBT social movements in developing countries will necessarily adopt it in exactly the same manner.

On the contrary, there are likely to be variations in how it is understood from country to country, even among LGBT individuals and movement leaders within the same country: some might not view a lack of legal SSPR as a problem that needs to be addressed while others might insist that it is a pressing issue. The personal opinions of SMO activist leaders then will ultimately determine whether a policy solution is proposed, and if so, what form it will eventually take. Because the state is not very likely to give these movements more than what they ask for (i.e. marriage if they only ask for civil unions), their policy proposal represents the most that can be achieved in their respective country.¹ This leads to my first hypothesis:

$$H_1: \text{The dominant LGBT organization’s policy proposal represents the maximum SSPR policy that can be adopted in a country at that time.}$$

¹ LGBT social movements may disagree about what is “the most” that they could achieve (i.e. what is more progressive: civil unions or marriage), but here I am looking at this from the opposition’s perspective. Universally around the world SSPR opponents would contend that marriage is more far reaching than civil unions. For more on this, see chapter two.
The policy proposed by LGBT social movement organizations plays an incredibly important role in constructing the short-term limits of “what is possible” in terms of creating change. Table 1.1 explains how these variables interact with the cases in this study.

Table 1.1: What SSPR Policies Are Possible within Each Country?

<table>
<thead>
<tr>
<th>DV: Possible SSPR Policy Adoption</th>
<th>Civil Union</th>
<th>Marriage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Union</td>
<td>Brazil</td>
<td>Argentina</td>
</tr>
<tr>
<td>Marriage</td>
<td>Not Possible</td>
<td>Argentina</td>
</tr>
</tbody>
</table>

In the case of Brazil, the dominant LGBT organizations believe that civil unions are an important enough advancement to achieving equal rights—they are not seeking same-sex marriage; therefore, it is highly unlikely that they will achieve anything beyond civil unions unless they specifically begin to push for it. In Argentina, on the other hand, the LGBT groups today are pushing for full marriage rights for same-sex couples, essentially placing a higher boundary on what is possible to achieve. However, the door is still open to civil unions in Argentina as this could come about as a possible compromise with opponents to marriage. Regardless of whether a movement ultimately sets its sights on domestic partnerships, stable unions, civil unions, or marriage, the movements then must confront the reality of the political institutions and those who wield power within them. This leads to the next step in the process as LGBT movements must ultimately push for their initiatives within the institutions of the state.
**Step Two: Proposed Domestic Policy → Adopted Domestic Policy**

While culture factors set the limit for what LGBT groups can achieve (what *could* pass), institutions ultimately determine how close they can come to realizing their goal (what *will* pass). As David Pion-Berlin argues “the translation from power to policy is an indirect one that occurs through the medium of institutions” (1997: 2). Regardless of how powerful the interests are, or how the society as a whole thinks about same-sex unions, institutions—and the actors who control them—will ultimately determine which policies succeed and which policies fail in a democratic system. Institutions are the battleground where ideas become policy so one must examine them closely to understand why policies are approved in some areas but fail in others.

Theories of political opportunity structure (POS) attempt to explain when social movements will be successful in engaging with governmental institutions. Political opportunity structure can be defined as “the broader set of political constraints and opportunities unique to the national context in which they are embedded” (McAdam et al. 1996: 3). As opposed to just examining the lesbian and gay organizations themselves, this perspective focuses on the characteristics of the broader structural environment within which social movements operate to explain when they will achieve success (McAdam 1982; Tarrow 1983; Tilly 1978). Without an adequate understanding of the larger structural framework within which movements operate, it is difficult to predict when they can advance their public policies.

In most countries—and Argentina and Brazil are no exceptions—the state is a very porous structure where interest groups and individuals can push for policy change
through many different avenues. Therefore, there is potential for all three branches of the federal government, as well as some spaces at the sub-national level, to present openings for the LGBT movement to expand legal partnership recognition to same-sex couples. According to Theda Skocpol, the “degrees of success in achieving political goals—including the enactment of social legislation—depend on the relative opportunities that existing political institutions offer to the group of movement in question (and simultaneously deny to its opponents and competitors)” (1992: 54).

Moreover, LGBT activists and leaders are rational actors: they will pursue whichever possible opportunities might present them with a possibility of success. Many studies have scrutinized the efficacy of legislative vs. judicial strategies by LGBT movements as a means to bring about policy change. However, much of what we know about this topic comes from research focused solely within the context of the United States, and very little has looked at this matter within the structural frameworks we see in other countries. For instance, Latin America has a long history of strong presidentialism, suggesting that the executive branch might be another possible avenue for success. An analysis of institutions is incomplete if it does not look at all possible openings within the state. As a result, this work will examine the processes through which both individuals and lesbian and gay social movement organizations have petitioned for these rights using the executive, legislative, and judicial branches of government.

One POS approach, known as the “elite access model,” focuses on the connections between interest group and political elites and predicts that interest groups have more sway when they have strong connections with policymakers (McAdam et al.
1996). Accordingly, a social movement’s success often hinges on its ability to secure the help from third-party “insiders” to pass legislation (Tarrow 1998). This dissertation argues that elite allies play an incredibly strong role in whether a proposed SSPR proposal eventually gets passed, leading to my next hypothesis:

\[ H_2: \textit{As the number of elite allies within the state who support SSPR grows, so does the likelihood that it will be added to the governmental agenda as a policy proposal.} \]

Here is where we see an important variation between both cases of this study. In Brazil, the LGBT movement has had elite allies in many important positions within the federal government stretching back decades. Some political parties, including the ruling Worker’s Party (PT), have been sympathetic to initiatives from the LGBT community. In 1995, it was the first county in all of Latin America to see a civil union bill introduced in a national legislative body. Moreover, President Luiz Inácio da Silva (Lula) has spoken out forcefully against discrimination of LGBT individuals. Lesbians and gays also have many vocal allies within the judicial system. As a result, we have a plethora of proposals to recognize same-sex couples in all three branches of the Brazilian political system.

Argentina, on the other hand, has been a different story. Ever since Argentina’s first modern gay rights organization formed in 1983, both major political parties (the Radicals and the Peronists), and even smaller parties, have shunned their cause (Brown 2002: 124). Consequently, LGBT groups here have seen very little initiative through the all three branches of government. All chief executives since the return to democracy have been anti-gay (at worst) or ambivalent or disinterested (at best) to their cause. Likewise, even though Brazil saw its first civil union bill in 1995, no legislators in Argentina had introduced a bill recognizing same-sex relationships until just very recently. Finally, no
national judges have ruled in favor of or spoken out for the need to recognize same-sex relationships. As a result, in Argentina there have been no proposals for nation-wide SSPR in Argentina until very recently.

Getting a policy proposed and placed on the governmental agenda is just the first step in the policy process—it does not guarantee that a policy will actually become law. In this struggle, gays and lesbians face an uphill battle because they are the ones who want to change the status quo. Moreover, we have to remember that LGBT social movements are not operating within a vacuum. There will always be a great deal of opposition to their proposals, usually from very wealthy and electorally significant actors, such as the Catholic Church and other “pro-family” groups.

The Catholic Church is an especially formidable adversary to same-sex partner recognition. In her study of women’s issues in Latin America, Mala Htun argues that the church is an especially powerful actor influencing the outcome of family-related policies. Building off of Lowi’s work which says different policies will engender different types of disputes, Htun argues that the Catholic Church distinguishes between what she calls “technical” and “absolutist” policies. Technical issues are those best sorted out by experts and often deal with minor or technical changes in policies. The church’s position on absolutist policies, on other hand, is usually determined by a gut response because the policy aims to change something fundamental society on which the church has a strong position. Htun ultimately argues that the Church tends to get its way when it is dealing with absolutist policies, especially when its relationship to the state is strong (2003: 24).
Importing this typology to my case, same-sex marriage and civil unions would fall under the category of “absolutist” policies because the Catholic Church has grown accustomed to having a strong stake for many centuries in the family and the institution of marriage. Consequently, her model if applied to same-sex partnership recognition would probably predict failure for LGBT groups. Moreover, scholars usually recognize that the battle over gay rights on moral grounds is a “stalemate,” meaning that true believers on both sides will not likely to accede to the other side’s position anytime soon (Caramagno 2002).

What does this mean for LGBT groups in these countries? In order to make long-term progress, changing people’s minds is obviously very important—lesbian and gay groups today would not have made so much progress today if they did not influence how people think about it. But, in the short-term, there will always be many staunch opponents to equal rights for same-sex couples who will always say no to same-sex unions no matter how much persuasion they receive. The next challenge then for gay and lesbian movements is to circumvent any potential opponents. Why? Even if LGBT groups can get their items on the governmental agenda, this doesn’t guarantee success because their “[o]pponents need only one victory in the policy process to prevail” (Cobb and Ross 1997: 19). This means that the short-term strategy of LGBT groups should not be to change their minds, but to find a way to bypass their objections. Or put another way, a civil union bill will be difficult to pass if opponents hold a “veto player” role in the political system (Ames 2001).
What exactly is a veto player? George Tsebelis (2002) defines them as those “individual or collective actors whose agreement is necessary for a change in the status quo” (19). His central argument is that as the number of veto players in a political system increases, so too does the degree of policy stability. He presents a detailed typology of different types of veto players in each political system: those created by the Constitution (institutional veto players) and those created by the political game (partisan veto players). He does concede that just looking at the number of veto players in a political system does not have perfect predictive capability: a lot depends on how political players within a system navigate within institutional boundaries. However, for our purposes, it can shed light on the types of hurdles that proponents of SSPR might face within their political systems. According to Tsebelis, “a change in the status quo requires a unanimous decision of all veto players” (19). If one veto player in the process says no, the possibility of legally recognizing same-sex couples dies. Consequently, this dissertation will study this variable of veto player very diffusely: once a proposal is made within the government to recognize same-sex unions, how many actors (institutional and partisan veto players) have the power to stop it. I propose that political systems with more veto players carry with it greater risk that opponents to SSPR will occupy some of these offices and such legislation will be harder to pass. This leads to my third hypothesis:

\[ H_3: \text{The state is more likely to change the law to recognize same-sex unions in political systems with few veto players.} \]

Taking Hypotheses 2 and 3 sequentially, we can predict whether or not a country will likely modify the law to recognize same-sex relationships: LGBT movements are more likely to be successful if they have elite allies within political systems with few veto
players (see Table 1.2). Considering Hypothesis 2, SSPR legislation never gets added to the governmental agenda in the absence of elite allies. Elite allies are essentially for adding it to the governmental agenda and carrying it through from start to finish.

However, they are a necessary, but insufficient, condition. Once some elites within the political system take it under their wing, it will only pass into law if they have no other actors who can stand in their way. As stated earlier, there will always be political actors who, based on their religious or moral convictions (or simply political affiliations with such groups), are staunchly opposed to recognizing same-sex relationships. Consequently, LGBT movements are only likely to be successful in political systems where there are fewer opportunities for these opponents to directly stop such legislation.

<table>
<thead>
<tr>
<th>Table 1.2: Will Same-Sex Partnerships Be Legally Recognized by the State?</th>
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<tr>
<td><strong>H3: Political System with Few Veto Players</strong></td>
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<tr>
<td><strong>SSPR Proposed, and Adopted</strong></td>
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<tr>
<td><strong>SSPR Proposed, but Not Adopted</strong></td>
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</tbody>
</table>

Although the Brazilian movement has had allies in all three branches of government for many years now, its political system is littered with veto players making it nearly impossible for far-reaching laws recognizing same-sex couples. The Brazilian Chamber of Deputies is notorious for being unable to pass even those pieces of legislation among which there is wide consensus because of the power of veto players.
Moreover, even though the President has significant decree power, this ability has been curtailed in recent years and does not apply to legislation on social policy. Finally, the courts have not had strong oversight powers, meaning that they could not actually change the law even if they wanted to do so. In all three branches of government, there have been proposals to recognize civil unions for many years, but none of the main elite institutional actors have had the power to change the law.

Argentina’s story has been the opposite: there are many fewer veto players but also fewer allies making SSPR a priority. Since the transition to democracy in 1983, Presidents have had quite a bit of power to move their proposals though the Congress. Likewise, the Congressional leadership has more power than their counterparts in Brazil to navigate their preferred bills through the legislative bodies. Finally, the courts have not been shy to use their power to declare certain laws unconstitutional. Unfortunately, none of these groups have been willing to use their power to advance SSPR.

The three hypotheses of this dissertation look at ideas, actors, and institutions to explain the status of same-sex partnership recognition in Argentina and Brazil. So far neither country has adopted a nation-wide policy recognizing same-sex partnerships, but this is not to imply that they are both in the same position. LGBT SMOs in Brazil have elite allies supporting their bid for civil unions, but the institutional structure of the state has thus far not allowed them bring any proposals to fruition. In order for the law to change here, LGBT groups must overcome their main hurdle: changing political institutions. Lesbian and gay groups in Argentina have the opposite problem: even though the institutions of the state empower more actors to change the law, few of the
people in these offices have been supportive of their cause. Consequently, their main hurdle then is getting more politicians on their side: finding elite allies.

Recent developments in both countries suggest that each may be growing closer to recognizing same-sex unions. In both Argentina and Brazil, significant changes within the judiciary have led to openings for LGBT movements to overcome the hurdles just described in the last paragraph. In 2004, the Brazilian Constitution was amended to give expand the Supreme Court’s power of constitutional review. In essence, this may allow a sympathetic high court to declare that the state must recognize same-sex civil unions on grounds that not doing so constitutes discrimination. Likewise, the Supreme Court in Argentina may also soon be on the verge of recognizing same-sex marriage as two cases are currently awaiting decision and there are some signals that the Court is now favorable to their cause, the least of which being that one of courts own members is openly gay. Also, many allies in the Argentina legislature are now stepping forward and passage here seems eminent.

**Methodology**

Since the primary goal of this work is not just to explain *which* variables lead to same-sex partnership recognition by the state, but also *how*, qualitative methodologies seem especially adept to understand the processes at work. This is because quantitative “correlations between contemporary social, economic, and political indicators…give no clues whatever as to the direction, if any, of causality” (Rustow 1968: 48). This study utilizes process tracing, a Most Similar Systems (MSS) research design, and dichromatic comparisons all situated within what James Mahoney and Dietrich Rueschemeyer (2003)
call “comparative historical analysis” to control for competing explanations and explain this process from start to finish.

Mahoney and Rueschmeyer argue that comparative historical analysis may take many shapes and forms, but all research under this banner shares three features. First, it is “fundamentally concerned with explanation and the identification of causal configurations that produce the major outcomes of interest” as opposed to other primary goals such as interpretation or showing statistical correlation (11). To understand how LGBT SMOs took the international idea of same-sex partnership recognition, transformed it into a grievance and proposed solution based on personal ideologies, and finally into a specific policy implemented by one of the three branches of government, this study utilizes process tracing. Originally articulated by George and McKeown (1985), process tracing allows us “identify the intervening causal process—the causal chain and causal mechanism—between an independent variable (or variables) and the outcome of the dependent variable” (George and Bennett 2005: 206). Only a close examination of every step along this process will allow us to see how this idea gets transformed into a specific type of policy.

A second characteristic of comparative historical analysis is that it relies on “systemic and contextualized comparisons of similar and contrasting cases” (Mahoney and Rueschemeyer 2003: 13). Qualitative research designs, generally, may be susceptible to the “many variables, small N” problem: since there are only a few observations, it may be hard to control for competing explanations. As a result, I have made use of one of the solutions that Arend Lijphart (1971) proposes to alleviate this danger: looking at
comparable cases. More specifically, I control for competing explanations using what Adam Przeworski and Henry Teune (1970) call Most Similar Systems (MSS). Similar to John Stuart Mill’s Method of Difference, this approach works by comparing two systems with as many similarities as possible and leaving their only variance to the values of their independent and dependent variables. The logic behind this design is that “[c]ommon systemic characteristics are conceived as ‘controlled for,’ whereas intersystemic differences are viewed as explanatory variables” (33). Argentina and Brazil represent Most Similar Systems because they share many similar characteristics that allow us to control for many competing explanations (the next section will explain these controls).

Moreover, this dissertation also will treat the three national branches of government in each country—legislative, executive, and judicial—as unique tests of the main hypothesis of this dissertation. As King, Keohane, and Verba argue, “[t]heories that apply to the nation-state might also be tested on government agencies or in the framework of particular decisions” (1994: 220). Each branch at times has the power to effect policy change on its own; therefore, they provide us with an opportunity to test the hypothesis within three institutional arenas, thereby increasing the number of observations within each case.

Finally, the third feature that all comparative historical analyses have in common is that they “take seriously the unfolding of processes over time” (Mahoney and Rueschemeyer 2003: 12). Countries are not static entities over time—variables within them change. As a result, this dissertation will also utilize what John Gerring (2007) calls diachronic comparisons—observations within each case at more than one point over time.
This provides yet another way for a study to increase the number of observations and places additional controls on alternative explanations. This strategy uses the same logic as MSS: we would assume that most relevant variables within a single country remain the same over time (although Lijphart admits that “the same country is not really the same at different times”). Therefore, if there is any variation in our independent variable, it likely is accounting for the change in our dependent variable. In a few instances in our cases, we do see change over time in the values of the independent variables and this clearly results in change of the dependent variables.

Utilizing these methodologies, the data for this dissertation was collected from a number of sources. I conducted interviews with LGBT social movement activists, NGO leaders, legislators, bureaucrats, judges, and everyday citizens in Argentina and Brazil during on-site fieldwork during three periods: August-September 2005, August 2007-July 2008, and September 2009. At times, I asked additional questions through follow up emails and telephone interviews. Local newspapers also helped informed me of new development on the topic as well as provided quotes from important people while events were happening. Finally, government websites often provided text of proposed legislation and enacted laws as well as minutes where specific topics were debated, and websites from LGBT NGOs contained issue statements and links to proposed pieces of legislation.

**Alternative Explanations and Controls**

By using a most similar systems case design, this project controls for a number of other competing explanations that could explain whether a country adopts same-sex partnership laws.
Public Opinion. Paul Burstein (1999) uses what he calls the “theory of democratic representation” to argue that social movements usually do not, and should not, influence policy decisions in democratic societies when their position are at odds with majority. Instead, he believes that public opinion is a much more important variable. Since politicians are primarily concerned with reelection, it would be politically dangerous for them to defy the majority in favor of minority interests (Krehbiel 1991). A number of studies confirm that the opinion-policy link is important (Burstein and Linton 2002; Burstein 1999, 1998, 1985; Costain and Majstorovic 1994; Burstein 2003; Erikson 1976; Giugni and Passy 1998; Page and Shapiro 1983; Page 1994).

This study does not disagree that public opinion may be important; however, while favorable public opinion might be help to pass a law, it is by no means sufficient to carry it though the institutions of government. If anything, it is just one of many thing politicians consider when they decide whether or not to support same-sex unions. Moreover, it is very easy to come up with counterfactual examples to break apart this link between opinion and policy: there are many issues that the public strongly supports, yet politicians waste little to no time on. Finally, a variable like public opinion is not very useful if we’re trying to understand through which branch of government a law is likely to pass first.

With the exception of same-sex marriage, gay and lesbian movements in Latin America in recent years have had public opinion on their side on a wide range of issues including civil unions. Unfortunately, there is very little information on public opinion on the topic of same-sex civil unions and marriage in Argentina and Brazil so we are forced
to rely on the small handful of polls that exist. According to an opinion poll conducted by the newspaper *Folha de São Paulo* in 2007, 45 percent of the country is in favor of civil union legislation (Castilhos 2008). Likewise, a private polling firm in Argentina, MORI, found that 48 percent of Argentines felt the same in 2002. Based on this limited data, there does not appear to be wide variation on this issue.

**Leftism.** Another competing hypothesis is that these civil union bills are just part of a broader trend of social liberalization that is taking place in many Latin American countries. Lately, we have seen a resurgence of the Left in Latin America, as left-leaning parties have had a great deal of success at the polls. This study controls for this as the dominant parties in both countries, the PT in Brazil and the FPV-PJ in Argentina, have controlled the presidencies and held on to sizeable share in their national legislatures for several years now. This study will incorporate how LGBT movements in each country interact with these political parties, but one cannot just say a general upswing in leftism can account for SSPR laws.

**Religiosity.** Many studies on same-sex partner recognition find that civil union bills are less likely to pass in areas with highly religious populations (Badgett 2004). Because marriage has strong historical links to organized Christianity, many religions feel that marriage, or any form of relations between two persons analogous to marriage, should only be recognized by the church and the state when it is between one man and one woman (Vatican 2003). While of the most research on same-sex partner recognition has focused on more-secular Europe, both of the countries in this project are highly religious: Argentina is 92 percent Roman Catholic while Brazil is 74 percent Roman
Catholic and 15 percent Protestant (Central Intelligence Agency 2010). Although they are about 90 Christian, one might argue that Brazil’s large Protestant minority might make a difference. However, this work will show how religiosity has translated into similar anti-gay political organizing in both countries. The Catholic and Protestant Churches in both countries have lobbied very strongly to keep same-sex unions becoming law.

**Urbanity.** Another explanation argues level of urbanity best predicts where civil union bills will emerge. According to this line of argument, many innovative changes often take place in urban areas and then are gradually disseminated elsewhere if successful (Skocpol et al. 1993: 693). This relationship was deemed especially important for the emergence of gay and lesbian organizing within the United States (D'Emilio 1983). However, both of the countries in this study have relatively the same amount of urbanity: 86% of Brazilians live in areas while in Argentina the number is slightly, but insignificantly, higher at 92% (Central Intelligence Agency 2010). This supports Wald, Button, and Rienzo’s (1996) finding that other variables often associated with urbanism have better predictive power.

**Standard of Living.** Another line of argument proposes that countries with higher standards of living will pass same-sex partner recognition bills first. According to this perspective, recognizing the rights of gays and lesbians is a post-material concern so countries are more likely to attend to it once they have reached a certain standard of living. Antidotal evidence also seems to support this theory: civil union bills originated first in the world’s richest countries (Western Europe and the United States).
However, all of the countries in this study are middle-upper income countries with fairly similar standards of living. One of the best ways of measuring standard of living is purchasing power parity per capita (in $US) based on data from the World Bank (2009). For the most part, both countries in this study have had similar standards of living. In 2008 Argentina had a PPP$US/capita of roughly $14,020 while Brazil had a lower amount of just $10,070. However, this disparity has only grown within the last couple of years: going back to just few years ago their difference was only about $2,000. This means that these two countries really are not all that much different when it comes to income levels.

Others may contend that HDI might be a better measure of standard of living because it also takes some social conditions into account, but the results here also demonstrate that Brazil and Argentina are fairly similar. Overall, both have very high HDIs: in 2008, Brazil’s was 0.807 while in Argentina it was just slightly higher at 0.860 (United Nations 2010). The UN classifies both of these countries within the category of “High Human Development.”

**Social Movement Organization Strength.** Finally, some might argue that one needs to look more closely at the strength of social movement organizations themselves, specifically paying attention to variables such as capable leadership, strong organizational capacity, and wealth (Rimmerman 2002: 8). Social movements should be more successful in influencing public policy when they have strong organizations fighting for their interests. What we see in the cases of Argentina and Brazil is their movements share many characteristics.
A brief sketch of the gay and lesbian SMOs in Argentina tells us a lot about their potential to influence public policy. In 1984, *Comunidad Homosexual Argentina* (CHA) was the first large SMO to represent gays and lesbians in Argentina after the return to democracy with most of the gay and lesbian activists unified under its banner. However, in 1991, because of disputes over the goals and direction of the organization, many members left to form their own groups and the movement became fractured (Brown 2002: 122). In the past couple of years, however, a new umbrella organization, *Federación Argentina de LGBT* (FALGBT), has formed and provided a means for communication and coordination among many diverse sexual minority organizations. Although CHA is not a member, it does at times communicate and work with FALGBT.

The movement in Brazil has had a similar history and is structured along similar lines. The first organization, *Somos: Grupo de Afirmação Homossexual*, formed in São Paulo in 1978 but after just a few short years, it splintered into several different groups because of internal disputes over direction and leadership (Green 1999b; MacRae 1992). After a long lull in organizing, the movement again began to come together in the mid-1990s. In 1995, a diverse array of LGBT, human rights, and AIDS organizations came together to create the Brazilian Association of Gays, Lesbian, Bisexuals, Travestis and Transsexuals (ABGLT), a loose federation of groups united around cause of LGBT issues. Even though ABGLT helps to coordinate activity among the many SMO groups, the organizations themselves are still autonomous.

Although the variable of organizational strength seems very important, it doesn’t seem sufficient to explain when social movement will effectively pass a civil union bill.
The movements in both countries are organized in a similar fashion. Moreover, strong SMOs exist in many societies, yet they often are unsuccessful in passing their policy initiatives. An alternative explanation is that the structure in which SMOs operate may also influence their chances of success.

**Chapter Outline**

The rest of this work is organized as follows. Chapter two looks at how LGBT social movement organizations in Argentina and Brazil approach the topic of same-sex partnership recognition in their respective countries. Being the main agents that lobby the state for change, their understandings are especially important for setting the limits on the most progress one can expect. Although this chapter finds that Western ideas may catalyze SMOs in other countries to believe that SSPR from the state is possible, domestic considerations ultimately are more important for shaping exactly what the LGBT communities define as their grievance and their goal. More specifically, priorities and goals of social movement organizations will ultimately hinge on the ideologies of SMO leaders bounded by pragmatic considerations about what they believe is possible to achieve. In Brazil the dominant LGBT organizations and activists have consistently argued that their main concern is equal rights for same-sex couples, and civil unions could adequately provide for this. They have never advocated for marriage. As a result, this makes civil unions the highest bar that could be achieved in Brazil, while still leaving open the possibility for “smaller” forms of recognition. In Argentina, the FALGBT has begun pushing for marriage in recent years. Although this alone in no way guarantees
that the state will recognize same-sex marriages anytime soon, it does explain the boundaries of what is possible.

The third chapter discusses the legal foundations for same-sex partnership recognition in Argentina and Brazil to explain exactly what (if anything) their constitutions and the Civil Codes say about state-recognized unions. The positions they lay out—whether these documents include, exclude, or ignore homosexual unions—form the institutional basis from which LGBT groups must operate. In both countries, the Constitution and the Civil Code delineate exactly which agencies and branches within the state have the power to recognize same-sex unions and how to resolve conflict when different state actors come into conflict. Overall, openings are widely dispersed throughout the state among many branches of government in both countries, but the abundance of veto players in Brazil makes it much more difficult to effect widespread change than it does within Argentina legal system.

The next two chapters compare how LGBT individuals and organizations have petitioned for partnership recognition within the three branches of government. This allows us to clearly see the significant impact elite allies and institutional veto players have on the outcomes for these groups.

The long history of same-sex couples and LGBT SMOs advancing the case for partnership recognition in the courts is the topic of chapter four. Brazil has had a long history of jurisprudence on the issue with many lower and federal courts deciding in favor of same-sex couples since the mid-1990s. Here we also see two remarkably different time periods, pre-2004 and post-2004. Before 2004, LGBT individuals and
NGOs lacked strong allies with the power to bring a constitutional case to the country’s top Supreme Court. Moreover, even if a case were to reach this court, it has had very little power to make its decisions binding on the other branches of government or on lower courts. However, constitutional reform in the past several years along with new alliances made by the LGBT community have changed this dramatically. Within the past few years several government agencies with the power to bring a case to the Supreme Court have done just this. Also, a constitutional amendment passed in 2004 gave the Brazilian Supreme Court the power to make its decisions binding. Given that members of Supreme Court have openly expressed their support in favor of national same-sex civil unions, it probably will not be long before change happens here.

The court in Argentina also appears on the verge of deciding on the side of same-sex unions. Unlike Brazil, the high court in Argentina has for the most part had the power to make its decisions binding on lower courts (and then effectively to the population) for many years. In the 1990s and early 2000s, there was very little movement on behalf of the LGBT community to use the courts and no support from governmental entities to make a constitutional case. However, in recent years, LGBT activists and supportive government agencies have now brought cases to the highest court, and judging by the positions of many of the courts members, it will probably argue soon that not recognizing lesbian and gay unions is unconstitutional (barring that the Congress does not first pass same-sex marriage).

Chapter five compares attempts by lesbian and gay activists to pass SSPR bills through the legislative and/or executive branches of government. These two branches
warrant examination together because they are inexorably linked in the initiation, passage, and implementation of public policy. In both countries, LGBT organizations face strong opposition from religious legislators influenced by Christian ideologies. Their differences quickly become apparent though when we look their institutional structures and the absence or presences of elites allies.

LGBT Brazilians have a long history of allies in both the legislative and executive branches of government, who have attempted many times to pass bills recognizing same-sex couples. However, none of their proposals have ever received a full vote in the chamber even though the first civil union project of law was proposed over fifteen years ago. Because of the structural nature of the Brazilian Chamber of Deputies, there are an overwhelming number of veto players who can prevent any legislation from passing. Moreover, even though presidents in Brazil have the ability to move pieces of legislation to the top of the congressional agenda and emergency decree authority in some areas, the chief executive cannot use these powers when setting social policy. The result is that we have seen strong posturing by LGBT allies, accompanied with a slew of proposals recognizing same-sex unions, but no changes in the law.

In Argentina we have the opposite arrangement: fewer institutional veto players but also fewer allies to the LGBT community within the offices of the state. Congressional leaders in Argentina have much more power to shape the flow of legislation, giving fewer opportunities for minority interests to stop and/or slow legislation. However, this is only significant if you have allies within the state willing to propose legislation, and has not been the case in Argentina. In the early 1990s while the
first civil union bill was being drafted in Brazil, there was no activity or discussion of a similar proposal in the Argentine Congress: political parties from both major political parties were completely disinterested. Also, presidential power in Argentina vis-à-vis the legislature is much more centralized: the legislature has historically been a rubber stamp for most proposals from the chief executive. However, none of the Argentine presidents since the return to democracy in 1983 have been champions of lesbian and gay rights.

Chapter six closes this volume by drawing some conclusions and making some predictions about the future in Argentina and Brazil. Even though these two countries have been a hotbed of activity on this issue, significant battles have also been waged (and sometimes won) in other countries in the region. The work will conclude by examining developments (or the lack there of) in Chile, Colombia, Ecuador, to see how well the hypotheses in this volume travel to other cases in Latin America.
CHAPTER 2: LGBT MOVEMENTS AND ORGANIZATIONS

To begin to understand if or how a government will officially sanction same-sex relationships, we must first look at the LGBT movement and its organizations within a country. These groups play an incredibly important role in two ways.

First, because the LGBT movement organizations themselves are the main actors pushing same-sex partnership recognition, it is important to examine their political power vis-à-vis other actors and the state. This idea is in line with the resource mobilization (RM) approach of social movement theory. McAdam, McCarthy, and Zald define resource mobilization as “those collective vehicles, informal as well as formal, through which people mobilize and engage in collective action” (1996: 5; italics in original). Initially articulated by McCarthy and Zald (1977), this approach examines the internal dynamics and resources of movements to explain collective action. While variants of the approach have focused on the less-formal dynamics of social movements, such as the informal networks that bind various actors, the majority of work in this tradition focuses on formal organizations (McAdam et al. 1996: 3-4). The primary hypothesis of resource mobilization is that social movements should be more successful in influencing policy when they have strong organizations fighting for their interests. One would assume that policy change is more likely in places where the SMO organizations are powerful. Therefore it is important to consider the history of political organizing in each country, the current structure of the movement, and also their histories of successes and failures.

In the countries under study here, we find that the LGBT movements in Argentina and Brazil share similar patterns in their histories and structures. As military dictatorships
came to a close, movements in each country began to organize politically unified under a single organization. However, internal agreements soon caused these organizations to fracture into numerous groups where severe infighting and little coordination was the norm for many years. Recently, within the past decade, large umbrella organizations have formed within both countries, uniting the divergent groups under a common mission and helping to solve the collective action problem while at the same time respecting the autonomy of the individual organizations. Also, both movements have a visible presence, yet are fairly small compared to movements organized around other issues (e.g. labor, race, and gender movements). Sharing so many similarities, the variables of group strength and organization are held constant in this study.

LGBT movement organizations are important to study for a second reason. They not only influence if a government will pass a policy recognizing same-sex couples, but also the form that the recognition might take (domestic partnerships, civil unions, marriage). Advocacy groups generally help define grievances (“problem definition”) and propose policy solutions to fix the problem (Cobb and Elder 1983; Cobb et al. 1976). Issues do not become issues out of thin air; policies need someone or some group to first articulate an injustice in order an issue to ever appear on the governmental agenda. According to Cobb and Elder, “[t]he most common method is the manufacturing of an issue by one or more of the contending parties who perceive an unfavorable bias in the distribution of positions or resources” (1983: 82). After all, the state will not likely legally recognize same-sex partnerships unless members of the LGBT community actually believe that the state should recognize them. Without this push, it is a non-issue:
it’s not something the heterosexual mass will propose on its own. LGBT groups then play an essential role two ways in idea formation: 1) articulating whether or not there is a grievance, and 2) proposing policy solutions that would rectify the problem. We should not just take for granted that all LGBT movements and individuals throughout the world will articulate the same injustice and the same solution. We have to study how LGBT movements understand the idea of SSPR, how they articulate the injustice of not having a policy, and finally what they propose as a solution. This will ultimately determine not just if a government will pass a policy recognizing same-sex couples, but in what form the government might recognize same-sex relationships.

The extent to which a government could recognize same-sex couples can be understood on a one-dimensional continuum (see Figure 2.1). On one end, the government could completely ignore same-sex couples (the left), while on the other end the state could afford these couples all of the legal rights and responsibilities as those granted to opposite-sex couples by recognizes their union as a marriage (the right).\(^2\) In between these two extremes fall various configurations of legal rights and titles.

![Figure 2.1: Continuum of Same-Sex Partnership Recognition](image)

\(^2\) Some may argue (as does CHA in Argentina) that civil unions are more far-reaching and progressive than marriage because some civil union proposals give all the rights of marriage without all of the restrictions. However, from a religious perspective, allowing same-sex couples to marry is more radical change because it fundamentally alters the “traditional” notions of an institution in which they are more familiar, whereas civil unions do not have such a meaningful symbolic history. Since these are the groups against which LGBT groups will be fighting, we must take into consideration what they consider the most far reaching.
If a state is to recognize same-sex relationships, what determines which form of recognition it will grant? This cannot be stated with certainty because policy is often the product of compromise between competing interests. However, we can make one assertion about “what is possible” in each country. In other words, we can state how far reaching the recognition might be. The primary argument of this chapter is hypothesis one from the introduction:

\[ H_1: \text{The dominant LGBT organization’s policy proposal represents the maximum SSPR policy that can be adopted in a country at that time.} \]

In many ways, this hypothesis is intuitive. Governments will not give more rights and recognition than the LGBT groups demand, but they may give less as a result of compromise with other groups and interests. LGBT groups then can set the upper boundaries on how far reaching an SSPR law could go. Looking again at Figure 2.1, if an LGBT organization proposes same-sex marriage to rectify the problem, then marriage and anything to the left of it on that spectrum would be possible, either as a result of compromise or government inaction (no recognition). However, if a group were to propose civil unions, then civil unions and everything to the left of it would be possible, while anything to the right of that point, including marriage, would not be likely.

We see this exact difference in the two countries under examination in this work. Both diverge in how they define their grievance and what they propose as a possible solution. In Brazil, the movement is fairly united in believing that the primary problem with the lack of SSPR by the state is one of equal rights. Therefore, the movement is content with any legislation that will provide the exact same rights to same-sex couples as those afforded to opposite-sex couples—marriage, civil unions, stable unions, civil
partnership, etc.—regardless of the name. The movement in Argentina is different. The two main SMOs have different understandings in problem definition (legal inequality vs. social recognition AND legal inequality) and therefore are pushing for two different types of legislation: one is pushing for civil unions while the other wants full marriage rights (although they do fully support on another in their separate campaigns). However, recently they have both started to work together for marriage. As a result, the most that could be achieved in Brazil at this time is civil unions, while in Argentina full marriage is possible; however, less far-reaching arrangements are possible in both countries.

**Histories of Activism and Organizational Structures Today**

The LGBT movements in Argentina and Brazil share many similarities in both history and structure making them great cases for comparison. Both movements were born during periods of harsh military dictatorships, but did not flourish until after the return to democratic rule. Within just a few years after their formations, however, they faced severe problems of infighting and organizational fragmentation. Only in recent years have the movements become fairly unified under umbrella organizations that coordinate group activities and preserve organizational autonomy at the same time. Although these movements are not political heavyweights (compared to other social movements), neither have they been impotent.

**Activism in Brazil**

In the twentieth century, political power in Brazil has fluctuated many times between democratic and authoritarian rule. The armed forces have frequently exerted
their influence in politics by ousting democratically-elected civilian governments. The most recent bureaucratic authoritarian regime ruled from 1964 to 1985. Compared to the military juntas running Argentina (1976-1983) and Chile (1973-1990) during this same time era, Brazil’s was the least repressive to political dissidence, comparatively speaking, even allowing some political space in its later years for oppositional groups to organize (Skidmore 1988). In combination—and sometimes collaboration—with labor, women, and race-based movements in the late 1970s, the modern homosexual liberation movement began to organize during this period.

In 1978 a collection of academics, journalists, and artists in São Paulo founded Brazil’s first homosexual rights organization—Somos: Grupo de Afirmação Homossexual.3 Although it originally focused primarily on building a collective group consciousness for homosexuals in Brazilian society, the organization quickly gained great notoriety and became more activist-oriented in the face of a discriminatory social climate. In 1980, Somos organized the first Gathering of Organized Homosexuals, a nationwide conference of LGBT groups throughout the country, which set the stage for many future national meetings (Green 1999b). Also during this time its membership began to swell and diversify as more women and working-class individuals joined its ranks.

However, the movement itself quickly began to splinter. Disagreements began to surface within Somos over the role of women within its leadership and also whether it should be aligning itself so closely with other leftist causes. Due to its inability to satisfy the diverse demands of its membership, the organization fell apart as dissatisfied activists

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3 For a larger discussion of the formation of the modern homosexual rights movement in Brazil, see Facchini (2005), Green (1994), Green (1999a), Green (1999b), MacRae (1992), and Trevisan (1986).
left to form the own groups. In 1980 many lesbians left to start *Grupo Lésbico-Feminista* and others who were disgruntled with the Marxist direction of Somos formed *Grupa Outra Coisa: Ação Homossexualista* in São Paulo (MacRae 1992). Meanwhile, other organizations began to sprout up all over the country by activists not affiliated with *Somos* but still inspired by the idea of activism around sexuality. The nation’s oldest organization still in existence today, *Grupo Gay da Bahia* (GGB), was founded in the northeastern city of Salvador in 1980 by anthropologist and activist Luiz Mott.

Even with the formation of some new organizations, the early 1980s were a difficult period for the LGBT movement as many organizations began to wither away due to a lack of resources, poor organizational skills, and diminished spirit (Green 1999b). After a lull in activity lasting several years, there was a resurgence of activism in the mid-to-late 1980s. As the military dictatorship came to a close, more political space was available for groups in civil society to petition the government with less fear of repression. Also, many former militants from the earlier wave of activism once again began to get involved in politics as HIV began to devastate the LGBT community. During these years the number of organizations throughout the country skyrocketed.

In 1995, at the Seventh National Gathering of Homosexuals in the city of Curitiba, the 31 groups in attendance recognized a need to coordinate their activities, and they created the Brazilian Association of Gays, Lesbian, Bisexuals, Travestis and Transsexuals (ABGLT), a national network for the LGBT movement. Although ABGLT helps to coordinate activity among the many SMO groups, the organizations themselves
are still autonomous. Since its inception this organization has grown tremendously and as of 2010 it consists of a diverse network of 237 organizations.

However, not all organizations are a part of ABGLT. The wider LGBT movement in Brazil is composed of over 300 organizations from all parts of the country. These are the organizations that lead the political struggles throughout the country, information campaigns to reform society, as well providing resources and services to individuals the LGBT individuals. The exact numbers of the LGBT movement are difficult to measure, but the movement probably consists of probably a few thousand activists, many of whom have memberships in multiple organizations at the same time. The size of the LGBT movement pales in comparison to the size of Brazil’s (and Latin America’s) largest social movement, the Landless Worker’s Movement (*Movimento dos Trabalhadores Rurais Sem Terra*, MST), which counts more than 1.5 million members and has successfully mobilized more than 100,000 workers for demonstrations in Brasilia (Vanden and Prevost 2009: 261). This is a feat considering that the capitol of Brazil is located inland and has a relatively small population. The LGBT population, on the other hand, rarely mobilizes more than a few thousand activists for any political demonstrations. One important exception to this is the annual LGBT Pride Parade in São Paulo, which is the largest of the world with an estimated 3.2 million in attendance in 2009. However, this is more of a party in the style of Carnival than a real political demonstration, such as the LGBT pride march in Buenos Aires.

For better or worse, the overall movement is still prone to some disagreement as the many diverse organizations do not always agree; however, these differences can be
found within any social movement. The key question to ask is whether these disagreements have led to fracturing and infighting that prevent the overall movement from fighting as a united front. The answer is no: even when various SMOs disagree over goals and strategies, ABGLT has served as a forum for various LGBT organizations to discuss their differences and reach conclusions to satisfy the diverse membership base, preventing visible infighting and public disagreement (Golin 2008). The presence of ABGLT now allows many diverse segments of the LGBT community to coordinate their activities and fight on a united front. Moreover, ABGLT is today seen as the de-facto leader of the LGBT movement in Brazil. For example, when the press reports on any national issues related to the LGBT community, typically reporters of national publications quote members of ABGLT.

One way to judge the strength of the LGBT movement in Brazil is to examine how well it has fared advancing other policies of interest. Overall, its record is mixed: although it has as of yet failed to pass a national nondiscrimination law, it has secured impressive victories on other several fronts. Homosexuality per se was decriminalized in 1830 when all references to sodomy as a punishable offense were removed from the penal code. However, authorities have still had quite a bit of latitude to police gender and sexual deviance using indecency laws, such as those condemning “crimes against family” and crimes against custom,” to restrict individuals from displaying homoerotic or homosocial behavior in public (Green 1999b: 93). Although these laws are used less frequently today, some of these references still remain in the penal code (Vianna and Carrara 2007). Moreover, discrimination still remains a large problem for LGBT people.
Yet there is no nationwide anti-discrimination law, although some states and municipalities have moved ahead and introduced their own.

On the other hand, the LGBT movement has scored several very impressive wins in other areas. One of the greatest victories of the early movement came in 1985 when Grupo Gay da Bahia successfully led a campaign to remove homosexuality from the list of diseases recognized by the Brazilian Medical Association, a full three years before the World Health Organization did the same (Vianna and Carrara 2007). Brazil also has one of the most progressive HIV policies in all of Latin America (and the world), universally guaranteeing free anti-retroviral drugs and treatment since 1996 to anyone infected with the disease (Levi and Vitória 2002). Also, the movement has successfully lobbied the federal government to combat violence and discrimination against LGBT persons through its “Brazil without Homophobia” program launched in 2003. This campaign, run out of the Ministry of Health, essentially creates a federal government entity that acts as an advocate for the LGBT community.

Finally, Brazil has recently become a regional and world leader pushing for greater acceptance and protection for gender and sexual minorities. Because of steps taken by the executive branch at the behest of the LGBT community, Brazil proposed and successfully passed by consensus Resolution 2345 at the 38th General Assembly of the Organization of American States (OAS) in June 2008. This resolution “express[es] concern about acts of violence and related human rights violations committed against
individuals because of their sexual orientation and gender identity.”6 Although it falls short of adding actual or perceived sexual orientation and gender identity as protected categories, it marks an important first step for this regional organization protecting LGBT citizens.

In another important attempt, Brazil in 2003 tried to add sexual orientation to the list of protected categories at the United Nations; however, this resolution never received a full vote before the General Assembly. More recently, Brazil, along with France and the Netherlands, helped lead the way in sponsoring the UN General Assembly’s non-binding resolution “Global Decriminalization of Homosexuality” in December 2008. This resolution, which declares that “sexual orientation or identity should never be cause for any legal sanction such as execution, arrest or detention,” eventually passed, much to the chagrin of the Vatican, many Islamic states, and (initially) the United States (MacFarquhar 2008). This was an important step for international LGBT individuals globally as it marked the first time the UN had passed a resolution in support of lesbians and gays. More important for our interests, Brazil was at the forefront of the movement.

The LGBT movement in Brazil is more united now than it has ever been, yet compared to other social movements (such as those based on race, labor, gender, etc.) it is fairly small. Looking at its history of activism, it clearly has a mixed record in influencing public policy, making it difficult to predict based on their track record alone their ability to pass same-sex partnership recognition legislation. The movement in Argentina shares a similar history and structure.

6 The text of Resolution 2435 is available at http://www.oas.org/dil/AGRES_2435.doc.
Activism in Argentina

Organized political activism around homosexuality started nearly a decade earlier in Argentina than in Brazil. In 1967, two full years before the Stonewall Riots in New York City and under the context of the military dictatorship of Juan Carlos Onganía, the first openly gay rights organization in all of Latin America—*Grupo Nuestro Mundo*—came into existence in Buenos Aires. The group was founded by Héctor Anabitarte, a socialist activist who was pushed out of the Communist Party because of its strong homophobia (Bazán 2004: 336). *Nuestro Mundo* remained fairly small and its main political activities consisted of distributing pamphlets throughout the city about the political plight of homosexuals.

In 1971, members of *Nuestro Mundo* and several other sprouting gay rights groups met together and formed *Frente de Liberación Homosexual* (FLH). This organization was horizontally-run and consisted of many various sub-factions: *Nuestro Mundo* and *Eros*, which together continued to publish leaflets throughout the city; *El Grupo Profesionales*, an organization dedicated to the scientific study of homosexuality; *Safo*, dedicated to representing lesbians; and *Emanuel*, a Christian group. With such a democratic structure allowing many diverse factions to coexist under one umbrella, the organization aimed to build strong connections with other leftist originsations, notably Peronist, communist, and feminist groups. Many members, such the famous poet Néster Perlongher, questioned the patriarchal nature of marriage and society, while others pushed for more integration with heterosexuality society and civil rights (Bazán 2004: 353). It was able to overcome the internal disagreements among the divergent factions.
that tore apart *Somos* in Brazil by avoiding a hierarchy within its ranks and allowing the various factions to focus on their own concerns.

Even though *Nuestro Mundo* and the FLH were able to survive under the military dictatorship of *Revolución Argentina* (1966-73), being so closely allied with the left (and groups like the Montoneros urban guerrilla movement) eventually led to the destruction of the first wave of organized political activity around homosexuality. Violent leftist activism was a panacea for the many heads of state to run the country during the early 1970s and eventually was a contributing factor that led to the downfall of *Revolución Argentina*. After the country returned to electoral democracy in 1973, “leftist” Presidents Juan Perón (1973-4) and Isabel Perón (1974-6), steered very hard to the right and began to directly challenge left-wing extremist groups like the Montoneros and any groups associated with them (Brown 2002: 121). Isabel Perón took this campaign one step further and, although information is now just coming about her participation, it appears that she order broad killings of left-wing activists, including many homosexuals (Bazán 2004).

This campaign to round up and kill left-wing subversives accelerated ten-fold after the right-wing military coup in 1976 leading to the Process of National Reorganization (*El Proceso*) military dictatorship (1976-83). Unlike the bureaucratic-authoritarian regime running Brazil during this same time, *El Proceso* was much more ruthless and violent with the possibility of up to 30,000 “disappeared” (CONADEP 1986). Those remaining LGBT activists that had not already been killed or fled before the coup were eventually hunted down, and the FLH’s last recorded political activities were
recorded in 1976. The dictatorship was relentless during its tenure and continued to hunt subversives, including homosexuals, including taking part in the infamous multi-national killing ring known as Operation Condor (Bazán 2004: 389). Within this very violent atmosphere, political activism around homosexuality came to a halt and did not resume again until after the transition to democracy.

The ushering in of the new era of democracy in 1983 did not bring with it an immediately acceptance of homosexuality. With the return to civilian rule, gay bars were still frequently raided and patrons were still arrested (Brown 2002: 121). However, there was definitely more political space for organizing around sexuality. In April 1984, more than 150 activists met at the gay bar Contramano and laid the foundation to create Comunidad Homosexual Argentina (CHA), the oldest LGBT organization still in existence today (Comunidad Homosexual Argentina 2010b). Throughout the next decade 1980s, CHA set up several chapters throughout the country and was by far the most important LGBT group (Brown 2002: 121).

Just like Somos in Brazil began to lose influence after a couple of years, CHA too experienced an identity crisis in the early 1990s as many activists left to form their own organizations.7 Groups sprouted throughout the city and country representing different segments of the LGBT community. To name just a few, groups formed around a myriad of groups and approaches: lesbian-feminism (Las Lunas y las Otras and Convocatoria Lesibananana); academic groups (Grupo de Investigación en Sexualidad e Interacción

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7 Brown (2002) has argued that the splintering of the LGBT movement may have been the result of CHA’s own success in its battle to be an officially government-recognized organization (see section later in chapter on personería jurídica). Now that they had set precedence that LGBT organizations could be recognized by the government, any dissenting activists now had more of an incentive to form their own groups.
Social (Grupo ISIS); civil-rights groups (Sociedad de Integración Gay-Lésbica Argentina (SIGLA) and Gays and Lesbianas por los Derechos Civiles (Gays DC)); groups focused on trans issues (Transexuales por el Derecho a la Vida y la Identidad); and social groups (Desportistas Argentinos Gays (DAG)) (Brown 2002: 122). Since then dozens more associations have formed throughout the country. Under new leadership in 1997, CHA regained some of its energy and focus, ultimately leading to their victory fighting for civil unions for the city of Buenos Aires, but the movement remained fragmented nonetheless.

In 2006 several prominent LGBT organizations\(^8\) recognized the need to coordinate the many diverse factions of the movement, and they created a new umbrella organization, la Federación Argentina de Lesbianas, Gays, Bisexuales y Transexuales (FALGBT). Led by María Rachid, the President of La Fulana (a lesbian organization) and an advisor within Instituto Nacional Contra La Discriminación la Xenofobia y El Racismo (INADI-the governmental agency established to fight discrimination), FALGBT today has seven full member organizations and dozens of associate member organizations. One notable exception to this membership list is CHA, which prefers to maintain its independence (Cigliutti 2008). However, leaders of both groups argue that although they have different strategies, they do share a common purpose and do coordinate their activities at times (Waigandt 2008). While CHA still does carry

\(^8\) The five founding members were: Asociación de Travestis Transgéneros y Transexuales de Argentina (ATTTTA-trans issues); La Fulana (lesbian and bisexual women); Nexo Asociación Civil (health issues), VOX Asociación Civil (the first organization from the province of Santa Fè), and Fundación Buenos Aires SIDA (a group dedicated to HIV). Since then Area Queer (a student group from the University of Buenos Aires) and Club de Osos de Buenos Aires (a group representing the bear community) have become full members. Dozens of additional organizations are associate members.
considerable power, FALGBT appears today to be the most prominent LGBT organization in the country. Moreover, the movement has successfully resolved or swept under the rug any major disagreements among social movement organizations as there has been no publicity or rumors regarding intra-movement infighting. Throughout all of the interviews that I conducted and all of the newspaper articles that I read, I found nothing more than polite disagreement when there were differences in opinion between social movement organizations; and in these cases, SMO activists went out of their way to stress that they are fighting a united front against homophobia.

How does the size of the LGBT movement compare to other movements within the country? Strict statistics are hard to come by, but some estimate that the number of full-time activists lie somewhere in the hundreds.9 According to interviews with activists in the mid-1990s, LGBT groups were unable then to fill up the Plaza de Mayo when they protested government policies during that decade (Brown 2002: 122). However, in recent years these numbers have swelled tremendously as SMOs have done a better job of mobilizing the mass LGBT population. For example, organizers of the annual LGBT Pride March from the Plaza de Mayo to the National Congress estimate that attendance levels have averaged around 25,000 people for the past several years, but with the local newspaper Clarín putting that number at 50,000 in 2009.10 These numbers are by no means small, but they also do not match the numbers of other groups such as CGT (Confederación General del Trabajo de la República Argentina, CGT), Argentina’s

9 Although smaller in absolute numbers than the Brazilian movement, they probably are the same in relative size.
national trade union. The most we can say then is that they have the power to make some noise, but on the other hand they are not a major political force to be reckoned with compared to some other groups.

Like in Brazil, the Argentine LGBT movement has had a mixed record in winning its political battles. Although it has had some victories, their ability to influence policy has so far been fairly limited and has occurred mostly at the local level. The original penal code from 1886 (still for the most part in effect today) contained no direct references to consensual sodomy between adults so the decriminalization of homosexual behavior was never something around which the LGBT movement in Argentina had to organize (Bazán 2004: 91). However, the lack of a law criminalizing homosexuality did not keep the police from using other codes vague codes for harassing, arresting, beating, or killing LGBT people. In fact, during the last military government in Argentina, the dictatorship instituted Decree 3938 in 1977 that directed the government to “eliminate activities that promote birth control,” under which homosexuality or gender deviance might be included (Ramos et al. 2001). Also, because there were no direct laws criminalizing homosexual behavior, and most punishment of it was left to the discretion of individual police offers, fighting the stigma of homosexuality has been one of the main approaches taken by the LGBT movement.

One of the LGBT movement’s most interesting and significant victories occurred in the early 1990s in CHA’s struggle to be recognized by the government as a legal entity given the powers of legal personhood (personería jurídica). According to Article 33 of the Argentine Civil Code, these are organizations with the principle objective of
promoting the “common good.” Similar in the United States to corporate personhood (but in this case a non-profit organization), this legal designation gives an association many important legal rights and responsibilities (e.g. the ability to raise money, have tax-exempt status, legal non-liability for its members, powers to own property and make legal contracts, etc.) (Raznovich 2009). Clearly this is an important legal designation for social movement organization to have that can directly impact its ability to organize. It took nearly three years for the government to recognize CHA as a *personería jurídica*, and only eventually did so after a transnational advocacy network of LGBT organizations and labor groups in Argentina and the United States utilized what Keck and Sikkink (1998) call “the boomerang pattern.”

CHA began its campaign for *personería jurídica* in 1990 by sending its petition to the office charged with granting this designation, the *Inspección General de Justicia* (IGC). However, their request was denied on the grounds that homosexuality was a “deviation from natural sexual instinct” and therefore obviously not an organization that could promote the common good (Bazán 2004: 423). CHA appealed this decision several times, eventually reaching the Supreme Court, but it voted by a margin of seven to two that the IGC was well within its bounds to deny their request. The Menem administration stayed mum on this issue, so for all intents and purposes, it appeared that CHA was without any recourse.

CHA was able to utilize its connections with LGBT SMOs in other countries to eventually achieve success. In the autumn of 1991, President Carlos Menem was visiting New York City with the purpose of presenting Argentina as a first-world democracy that
had left its history of human rights violations in the past. However, activists in Argentina had communicated and organized with the NYC chapters of the International Lesbian and Gay Association (ILGA), the National Gay and Lesbian Task Force (NGLTF), the AIDS Coalition to Unleash Power (ACT UP), and the World Congress of Gay and Lesbian Jewish Organizations (Julian 1990). Their strategy was to repeatedly assult Menem with demonstrations and questions about the government’s recognition of CHA. To do so, they organized large protests outside both the local New York City Argentine Consulate and the hotel were Menem was staying (Raznovich 2009). Moreover, during any public appearance, they sought to ask him about this policy in front of the press. Eventually, during Menem’s visit to Columbia University, Alfredo González, an anthropology graduate student originally from San Juan, asked Menem in front of all of the press and rolling television cameras how Argentina could still persecute and discriminate against lesbian and gays. His very short response was that he would quickly order this subordinates to recognize LGBT groups upon his arrival back in Argentina. He followed through with his word and the IGJ granted personería jurídica to CHA in March 1992.

Other than this win, most of the LGBT movement’s victories have occurred at the local level. As will be discussed in chapter five, all laws recognizing same-sex couples have happened at the provincial or city level. Moreover, the only areas to pass non-discrimination ordinances are local governments: the city of Buenos Aires and the province of Rosario. Except for some funding for HIV medication and treatment, the LGBT movement has scored no other major wins at the federal level.
Goals and Priorities of the LGBT Movements

It’s not enough to just look at strength of the LGBT movement in Argentina and Brazil, but we must also consider how the social movement organizations think about SSPR and whether it is a priority for them. In the past several decades, the issue of same-sex marriage has enflamed fierce debate within lesbian and gay rights movements throughout the world. In the United States, progressive critiques have emerged from lesbian-feminists (Ettelbrick 1989), queer theorists (Warner 1999), and tactical arguments contending that marriage is too much of a “hot button” issue that inflames the opposition so the lesbian and gay movement should instead focus on piecemeal reform like civil unions. 11 Although this intra-movement debate has for the most part been settled in the United States (with the pro-marriage side winning), movements in other countries around the world are still forming their opinions of SSPR and whether or not it is a priority depends on local circumstances.

We cannot just assume that all sexuality-based movements around the world think about this topic the same way. Although many modern ideas of sexuality and SSPR have been exported around the world, they are not just accepted and assimilated in rote fashion (Murray 1995). What we see in both of these countries is that how these social movements think about these issues is really a result of domestic circumstances and the ideologies of social movement activist leaders. Both of these play a much larger role than just replication of the marriage framework from the United States or Europe.

11 For a critique of this position, see Merin (2002) and Wolfson (2004).
**Brazil: Civil Unions Are Enough, but Not Their Main Priority**

According to the leaders of several LGBT organizations in Brazil, the issue of partnership recognition for same-sex couples is one of relationship equality (Chamorro 2008b; Golin 2008; Reis 2008; Trinidade 2008). While there obviously are differences of opinion among individuals, the LGBT movement in Brazil is fairly united that civil unions are enough as long as it affords all of the rights and responsibilities of marriage.\(^\text{12}\)

According to the President of ABGLT, Toni Reis, “ABGLT is not advocating for same-sex marriage. Civil unions [are] seen as being a sufficiently large step forward towards equal rights in a country the legislative branch of which is essentially conservative/reactionary” (2008). Moreover, even literature published by ABGLT explains the rationale behind supporting civil unions only and not pushing for same-sex marriage. According to one of their pamphlets:

> “Although the expression as such is not incorrect in itself to describe legalized unions between homosexuals having identical rights to those guaranteed by civil heterosexual marriage, the word marriage, in Brazilian culture, has strong connotations with the institution of religious matrimony, and the term “gay marriage” is frequently used in an inappropriate, if not frivolous, manner, to designate the formalization of stable unions between same sex couples” (ABGLT 2010: 35).

Although some may disagree over whether same-sex partnership recognition should be a priority, the movement as a whole is fairly united in supporting for civil unions but not marriage.\(^\text{13}\) According to Reis, “ABGLT is not aware of an expressive movement in

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\(^{12}\) This is not to say that other issues do not create fissures in the movement.

\(^{13}\) I would be neglectful if I failed to note that Luis Mott, a national leader in the LGBT movement and the founder of Grupo Gay da Bahia (Brazil’s oldest surviving gay rights organization) strongly advocates for same-sex marriage. He believes that same-sex marriage could help homophobic prejudice in a number of ways that civil unions alone could not. However, his position has not brought about a broader push for same-sex marriage by any major organizations. For more information, see Mott (2006).
favour of same-sex marriage among Brazil’s LGBT community” (Reis 2008). Even
groups that are fairly radical in their political ideology, such as Nuances in Rio Grande do
Sul, while at the same time critical of marriage and the tactics of many other gay rights
organizations, support the idea that same-sex partners should have the same rights under
the law as opposite-sex couples (Golin 2008). In other words, they do not stand in the
way of ABGLT and even support them rhetorically in this battle.

However, SSPR is not the only priority of the Brazilian LGBT movement. The
first civil union bill was introduced in the Brazilian Chamber of Deputies in 1995, but
after many years of inaction it has fallen to the wayside as many activists believe it is
significantly outdated and instead have held out hopes that the courts are a more
promising route. The movement has recently focused its energy on combating the
violence directed at LGBT people in Brazil, and partnership recognition is currently a
second priority (Reis 2008). Most of the community, led by ABGLT, is focused on
passing Project of Law 122/2006, which would include sexual orientation and gender
identity as protected social classes, both making discrimination illegal and increasing
criminal penalties for those who commit hate-motivated violence.

Aggression against LGBT persons in the past several decades has reach epidemic
proportions making it clear why it is the most salient issue for the community (Ramos
and Carrara 2006). Although the federal government does not keep accurate count of
violence directed at sexual minorities, Grupo Gay da Bahia has compiled statistics on
such incidents since 1980. According to their findings, 2,998 people were killed between

14 More details of this project can be found at http://www.aliadas.org.br/site/arquivos/PLC122_2006.pdf.
1980 and 2008 on the basis of sexual orientation or gender identity (Grupo Gay da Bahia 2009). This means that someone is brutally murdered on average every three days in Brazil for stepping outside of gender or sexuality norms, and this number has stayed consistently high coming into the twenty-first century (Mott and Cerqueira 2003: 17). In fact, the problem only appears to be accelerating as 2008 witnessed a 55 percent increase over the previous year in murders of LGBT persons (Grupo Gay da Bahia 2009). It is important to keep in mind that these numbers only count cases were the person actually dies from the attack; it does not include all other forms of violence and discrimination directed toward LGBT individuals. According to a compilation of surveys conducted at gay pride parades throughout Brazil, “60 percent of those interviewed report having been victims of some discrimination or violence” (Vianna and Carrara 2007). The results is that Project of Law 122/2006 “is currently the Brazilian LGBT movement’s main battle flag” (ABGLT 2010: 26).

What does this say about how the Brazilian LGBT movement feels about SSPR? Overall, it is fairly united in its support for civil unions, but there is also fairly wide consensus that it is their second priority. Does this mean that neither marriage nor civil unions will ever become the main priority of the movement? Not likely. If the court system does not decide first that same-sex couples are entitled to equal protection under the law, it is likely that the LGBT movement will refocus their energies here after other battles such as the nondiscrimination/hate crimes bill are won (Trinidade 2008). If SSPR does make its way to the forefront of the movement, it’s unlikely that some element of the movement will be unsatisfied with the “separate, but equal” philosophy of civil
unions and push for full marriage rights. Finally, even though LGBT activists do not consider it their main priority, they are still taking very active steps to get the legislature or the courts to give same-sex couples equal rights (as will be discussed in-depth in chapters four and five).

**Argentina: Marriage or Civil Unions Are One of Many Competing Priorities**

Argentina differs from Brazil in that the main umbrella organization is pushing for marriage (not just civil unions) and the LGBT community here does not face the same epidemic of violence. Same-sex partnership recognition is very important to CHA and FALGBT, but it is one of many competing priorities (Cigliutti 2008; Rachid 2008). Violence and murder of LGBT people today in Argentina, though still a problem, is not as severe as it is in Brazil; therefore, it has not demanded the same amount of attention from the movement. Argentina though is still without a nationwide non-discrimination or hate crimes law. This is something that both groups are interested in seeing passed in the future, but they are not pursuing it with the same vigor as ABGLT in Brazil. Moreover, CHA and FALGBT both run media campaigns, social support networks, and other legislative goals, such as increasing funding for HIV/AIDS support and research. Consequently, we can say that passing an SSPR is an important goal of the Argentine movement, but it is not its only priority.

Another difference between the movements in Argentina and Brazil is in the form of partnership recognition that each is seeking from the state. In Argentina the two main LGBT organizations fighting for partnership recognition, CHA and FALGBT, disagree over whether civil unions or marriage should be the ultimate goal (Cigliutti 2008; Rachid
Whereas the Brazilian movement is united that civil unions should be the main goal (with the notable exception of GGB and Luiz Mott), the movement in Argentina is pushing for two separate initiatives; while most of the movement stands behind the FALGBT’s push for same-sex marriage, CHA would be satisfied with just civil unions (although they have waffled with this position). This current configuration has taken more than a decade to develop.

As chapter five of this volume will cover, the first major push for same-sex partnership recognition in Argentina took place in 2002 as CHA campaigned for civil unions in the city government of Buenos Aires (and concurrently in the province of Río Negro). It was CHA’s position at this time that civil unions were enough for same-sex couples, and marriage would never become their ultimate goal. To them, marriage represents an institution that belongs to the Catholic Church (Raznovich 2009) and they would be satisfied with civil unions as long as they provided all of the same rights (Cigliutti 2008). According to Marcelo Suntheim, Secretary of CHA, “civil unions will allow couples to enjoy all of the benefits of marriage without being subjected to all of its rules” (Valente 2005). In other words, they viewed their civil union as more progressive than marriage because it frees couples from excessive state regulation of their relationships.

Soon after the formation of FALGBT in 2006, it began drafting plans to petition the National Congress to pass a same-sex marriage law. Like CHA, FALGBT agreed that the marriage laws in Argentina were too burdensome, but they aimed to take on the institution of marriage itself rather than just creating a separate class of partnership
recognition. Based on the ideological roots of their feminist leaders, FALGBT was not just pushing to extend to same-sex couples the same marriage rights that heterosexuals enjoyed; rather, they were looking to reform the marriage code itself by removing all gender biases, including the components that dictated the sex of the people entering into the contract (Rachid 2008). It was also during this time that FALGBT began to eclipse CHA as the preeminent face of the LGBT movement in Argentina.

Right around this time, the position of CHA began to fluctuate. In January 2008, César Cigliutti and Marcelo Suntheim, a couple and the President and Secretary respectively of CHA, went to Spain to get legally married. Upon their return to Argentina, they petitioned the courts to recognize their marriage, in some ways changing their position. In 2005 they said they didn’t want all of the obligations of marriage, but now they wanted “their union to be legal tender throughout Argentina, ‘as it is in Spain,’ and match heterosexual marriages in all its rights and obligation” (Terra 2008: ; translation mine). For the most part, CHA was willing to take this step to marriage because they believed it posed the greatest opening for nationwide partnership recognition rights, even if it fell short of their ideal of civil unions (Cigliutti 2008). They feel that marriage could be a first step, but would still like to advocate for civil unions in the future.

Today CHA has returned to its original position advocating for civil unions while FALGBT continues to push for a same-sex marriage law. Leaders of both organizations admit that although they are pursuing somewhat different goals and strategies, they do

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15 They could because Suntheim still retains his German citizenship and can marry in any European Union country, including Spain, which recognizes same-sex marriages since 2005. See chapter 5 for more details.
support one another in their campaigns for partnership recognition and hope that one of them succeeds (Cigliutti 2008; Rachid 2008). Very recently, FALGBT’s same-sex marriage bill has been advancing through the Argentine Congress and CHA has announced its full support and even has engaged in lobbying efforts.

Conclusion

Compared to many other countries in Latin America, Argentina and Brazil have had organized movements around sexuality for a number of decades now. Although well established, they have seen their ups and downs, and today they are both well organized around loosely-knit umbrella organizations. On some issues they have successfully influenced public policies to meet their interests. However, compared to other social movements in their countries, they are still relatively weak politically as they do not command the large membership bases as those movements organized around other issues, such as labor, race, and gender. The result is that they often lose. However, looking only at their history and structure, we can only predict that it is an uphill struggle for both movements to achieve partnership recognition.

One noticeable difference between these two countries lies in their objectives. The movement in Brazil would be satisfied with civil unions, while the main LGBT groups in Argentina are split between marriage and civil unions. The result is that marriage might be possible in Argentina, but, for the foreseeable future, civil unions are the most that could be possible in Brazil.

However, these organizations do not exist within a vacuum. Looking at LGBT organizational structures and how these groups conceptualize SSPR is not enough to
predict whether they will successfully convince the state to recognize their relationships. All of these ideas and organizational strength must ultimately confront the institutional structures of the state and the “rules of the game,” which is the topic of chapters three, four, and five.
CHAPTER 3: SAME-SEX UNIONS AND THE LAW

LGBT movements do not operate within a political vacuum so limiting our analysis to the groups themselves only presents a small piece of the puzzle: we must also look at the overall political opportunity structures (POS) in which they operate. According to McAdam, McCarthy, and Zald, “social movements and revolutions are shaped by the broader set of political constraints and opportunities unique to the national context in which they are embedded” (McAdam et al. 1996: 3). Whereas resource mobilization theory looks at the organizational characteristics of the SMOs within a social movement for explanatory power, POS focuses on the characteristics of the broader structural environment within which social movements operate (McAdam 1982; Tarrow 1983; Tilly 1978). Without an adequate understanding of what movements are up against and the “rules of the game,” it is difficult to predict when they can advance their public policies. According to this approach, social movements should be more successful in public policy campaigns when the political opportunity structures are favorable to their petitions.

The next three chapters will examine the political opportunity structures important for the battle for SSPR in Argentina and Brazil. Chapters four and five will look at how both elite actor preferences and specific institutional rules within all three branches of government (legislative, executive, and judicial) help or harm the ability for LGBT groups to pass SSPR laws. Before we consider possibilities for change, we have to look at the way things are right now. This chapter focuses on the policy status quo in each country today. In other words, it examines how their constitutions and Civil Codes define
the family (stable unions and marriage). If we are looking to change policy, we have to first look at the starting point. Upon close examination, we notice some differences in the constitutions and Civil Codes in Argentina and Brazil on the topics of the family, marriage, and civil unions, but none of these distinctions radically alter the basic strategies or avenues that lesbians and gays would have to pursue to change the law.

First, there are significant differences in the constitutional law on this subject. The Constitution of Argentina contains zero provisions on family law and/or marriage, effectively leaving the issue to the Civil Code. The Brazilian Constitution, on the other hand, has several sections that discuss marriage and civil unions (including passages mentioning the genders of its participants), but the passages mentioning gender are ambiguous and do not necessarily exclude same-sex couples. Because constitutions in both countries fail to establish clear policy on this matter, Argentine and Brazilian LGBT groups do not necessarily need a constitutional amendment to achieve legalized partnership recognition (although such a revision supporting their cause would definitely help).

Moreover, the existing Civil Code on this topic also varies between both countries. In Brazil, the gendered description of marriage and unions in the Constitution is repeated in the Civil Code, but again with language that is open to interpretation. Consequently, it is not clear that these passages in the civil law would need to be amended for relationship recognition. Instead, perhaps their legislatures or even local governments could pass laws recognizing same-sex couples without violating these statutes. In Argentina, the absence of any constitutional law on the subject is more than
made up for in the very specific gendered language of the Civil Code; here the sexes of both participants in a marriage are clearly laid out and there is no room for interpretation: it is between one man and one woman. Consequently, for there to be same-sex marriage in Argentina, these clauses of the Civil Code would need to be modified. Finally, although the Civil Code in Argentina does establish the rules for marriage, it fails to mention other forms of relationship recognition, such as civil unions or domestic partnership. These leaves open the door for other forms of partnership recognition at the local level.

Overall, we can clearly see several important differences in how the existing law dictates same-sex partnership recognition from the state. All of these detailed legal distinctions would be very important for legislators drafting the new legal code or lawyers arguing cases before a court. However, while legally these intricacies would be important to those well-versed in legal jargon, procedurally the distinctions between these two countries matter little to LGBT social movements organizations interested in change the law. Movements in neither of the countries would have to modify their national constitutional to achieve partnership recognition (although, it definitely would seal the deal in both cases). Moreover, the national Civil Code would have to be amended in both for there to be a clear nationwide policy on this subject. In the case of Argentina, the gender specific language of marriage would have to be rendered gender neutral or new code would have to be drawn that would recognize same-sex civil unions. Likewise, the Brazilian government could have to modify their Civil Code too in order to clarify the
ambiguous law on this matter. In both of these countries, these changes could happen by initiatives taken within any branch of government.

**Brazil**

**Constitution Law**

Following the end of the most recent military regime (1964-1985), a democratically-elected Constitutional Convention drafted the Constitution currently in use today in Brazil, the Citizens Constitution, which was finally promulgated in 1988 after two years of discussion, debate and voting. This is the seventh Constitution in the past 100 years of the republic. Most constitutions in Latin America are very long and detailed, and this document is no exception. Importantly, it contains a number of passages that are relevant to the struggle for same-sex partnership recognition.

As the supreme law of the land, it is relevant whether the Constitution actually mentions marriage or the legal recognition of homosexual relationships. Unlike the U.S. Constitution, Brazil’s Constitution references the role of the state in its recognition of marriage and the sexes of the parties involved. According to Article 226, Paragraph 3:

> For the purpose of protection by the state, the stable union between a man and a woman is recognized as a family entity, and the law should facilitate its conversion into marriage.\(^{16}\)

At first glance, it would seem that the Constitution takes a clear stand, leaving little room for ambiguity: one man and one woman form the basis of the family and a marriage. This

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\(^{16}\) Translated by author. Original text: “Para efeito da proteção do Estado, é reconhecida a união estável entre o homem e a mulher como entidade familiar, devendo a lei facilitar sua conversão em casamento.”
provision has been traditionally interpreted as such by the judiciary, the legislature, and society at large.

However, in recent years many have begun to question whether this clause actually prohibits state recognition of other types of relationships. Although the Constitution does explicitly mention that a stable union between one man and one woman shall be facilitated into marriage, it does not explicitly forbid the state from recognizing or encouraging other types of relationships into a family or marriage. As will be discussed later, several jurists have argued that while the Constitution does specifically mention one man and one woman as forming a family and marriage, it can be interpreted that this is merely an example instead of a restriction. In other words, perhaps a partnership between two men or a between two women could also be recognized as a family or a marriage; the omission of same-sex couples in the Constitution is not the same as a prohibition.

Second, because the civilian framers of the new Constitution were still weary from the human rights abuses committed by the military dictatorship, they included very clear principles about human rights, equality, non-discrimination, and the protection of traditionally marginalized groups. For example, the document cannot be any clearer about its stand on equality with articles such as Article 5:

All are equal before the law, without any distinction.\(^{17}\)

Additionally, Article 3, Paragraph 4, clearly states that it is the duty of the republic:

…to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination.\(^{18}\)

\(^{17}\) Translated by author. Original text: “Todos são iguais perante a lei, sem distinção.”

\(^{18}\)
During the drafting of the Constitution, several gay rights organizations pushed for sexual orientation to be added to this list, but it was voted down by a margin of 130 to 331 (Green 1999b).

Taking all of these articles together, it appears that the Brazilian Constitution establishes a loose position on this issue: while it does not explicitly recognize same-sex partnerships as either a family or a marriage as it does for heterosexual relationships, it also does not explicitly forbid their recognition. Moreover, it also includes such strong references to equality and non-discrimination that some might argue it is unconstitutional for the state to treat same-sex couples differently. Either way, supporters and opponents of SSPR both have strong constitutional arguments supporting their positions.

Finally, The Brazilian Constitution grants the federal government jurisdiction to define and regulate marriage (unlike the US where this is a state power). Moreover, civil and penal codes are also established at the federal level. Taken together, this means that state legislatures have little power to recognize same-sex relationships, making the National Congress an important battleground on this issue.

**Civil Code**

Clearly, there is ambiguity in how the Citizens Constitution can be interpreted on the issue of same-sex partnership recognition. In some countries this ambiguity has been cleared up by other codes or legislation. For example, Article 172 of the Argentine Civil

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18 Translated by author. Original text: “...promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação.”
Code and the Defense of Marriage Act (DOMA) in the United States both restrict marriage to a union between one man and one woman. DOMA reads:

[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.  

In the United States, there is little to no room for interpreting that other forms of unions could be recognized by the federal government as a marriage.

For Brazil the matter is not clarified so neatly. The current Civil Code in Brazil was passed in 2002 by Project of Law 10,406 and came into force in 2003. The fourth book of the Civil Code, *Family Law*, deals specifically with issues of family and marriage. Articles 1,511 through 1,590 delineate marriage law, and with Article 1,514 dealing with this issue the most directly:

The marriage takes place when a man and woman express before a judge, their willingness to establish conjugal ties, and the judge declares them married.

Although this provision uses gendered language like the Citizens Constitution, it also does not specify what exactly would happen when two men or two women express their willingness to marry before a judge. As such, this provision does not necessarily exclude same-sex couples from the institution of marriage. Moreover, Articles 1,521 through 1,525 specifically list a number of people that are ineligible to marry; importantly, same-

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19 Emphasis mine. In an early version, DOMA even went out of its way to mention that same-sex marriages would not be recognized: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”

20 Law 10,406 (along with all amendments to the code passed since) can be found at http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm (accessed May 5, 2009).

21 Translated by author. Original text: “O casamento se realiza no momento em que o homem e a mulher manifestam, perante o juiz, a sua vontade de estabelecer vínculo conjugal, e o juiz os declara casados.”
sex couples are not mentioned as one of these groups, further strengthening the argument of same-sex marriage advocates.

The new Brazilian Civil Code is very progressive in that it grants several rights formerly reserved only to married couples to those who can prove to the state that they are living in a “stable union” with another person. As a result, opposite couples need no longer get married to enjoy many of the benefits that come along with marriage. There is a large debate over whether same-sex couples can declare themselves as a stable union and receive the same rights and privileges. Articles 1,723 through 1,727 articulate the law regarding stable unions. According to Article 1,723 of the Civil Code:

A stable union between a man and a woman is recognized as a family entity, made in the public sphere, continuous and lasting, and established with the objective of building a family.  

The articles following this provision also spell out that people restricted from marriage according to Article 1,521 are also ineligible to form stable unions. In other words, there are no provisions explicitly excluding of same-sex couples from stable unions.

Like the Constitution, the Civil Code discusses unions and marriage with allusions to one man and woman, but it does not say this is the only possible configuration, nor does it specifically exclude same-sex couples. Because this exclusionary statement is missing, it is possible to argue that the constitutional principles of equality articulated in Articles 3 and 5 should guide the interpretation of the marriage and stable union clauses. Either way, there is a large gap in federal law on this issue.

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22 Translated by author. Original text: “É reconhecida como entidade familiar a união estável entre o homem e a mulher, configurada na convivência pública, contínua e duradoura e estabelecida com o objetivo de constituição de família.”
Argentina

Constitutional Law

The Constitution still in use in Argentina today, first drafted in 1853, is based on the principles and framework of the United States Constitution. Although it has been revised several times since its inception, the basic essence of the document and many of its major legal principles have remained the same. Whereas in Brazil a new Constitution often was drafted every time the government oscillated between democratic and autocratic rule, leaders in Argentina tended to just make changes to the preexisting text to suit their needs. The amendments made during the last major revision in 1994 establish the text in use today.

Unlike Brazil, there is no mention of marriage in the Argentine Constitution. As such, there is no clear-cut, established constitutional law on the topic of same-sex marriage. However, for our purposes a few provisions of the Constitution could be relevant for LGBT movements. First, like Brazil, strong references to equality are present in the Argentine Constitution. Part of Article 16 of the federal Constitution states: “…All inhabitants are equal before the law…” Similar to the equal protection clause of the U.S. Constitution, one could reasonable see a justice argue that any laws that treat same-sex couples differently than opposite-sex couples is unconstitutional. This is one of the arguments that has been used by several lower court justices in 2009-10 striking down laws preventing same-sex marriage. However, it’s questionable whether this reference in Article 16 has the same weight as the equality and non-discrimination principles of the Brazilian Constitution.
Moreover, Article 19 of the Argentine Constitution, which has been a part of the document since the original 1853 version, states: “The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges.” Although this provision would seem more relevant to laws prohibiting private sexual conduct, and not publicly-recognized relationships, it is possible that a judge could extend the rights of a conduct to a person. Of course, this would depend on the judge’s interpretation of “public order or morality.” Conversely, a judge might also rule that civil laws that prohibit same-sex marriage are constitutional because these relationships offend the public order and morality.

**Civil Law**

Although the Constitution stays quiet on issues marriage, unions, and family, this silence is made up for in the plethora of provisions in the Civil Code that address these topic. These stipulations in the code clarify the law in Argentina about same-sex partnership recognition, in many ways to the detriment of lesbian and gay couples.

Unlike in Brazil though, the Civil Code in Argentina takes a much less ambiguous position on same-sex marriage. Articles 159 to 494 of the Argentine Civil Code establish Family Law, and within those Articles, numbers 159 to 239 deal directly with marriage. Remarkably, only two of these previsions mention the sex of the people entering into the legal contract: Articles 172 and 188. According to Article 172:

The full and free expressed personal consent of a man and a woman before an authority competent to celebrate it is essential for the existence of marriage. An
act that is lacking in any of these requirements will not produce civil effects even though the parties have acted in good faith…

Because the Argentine Constitution has no mention of marriage, this addition to the Civil Code fills this void in the law and clarifies any ambiguity: it clearly states that a marriage cannot exist if it is not composed of both one man and one woman. In other words, it is a necessary condition for a marriage to be a marriage. Although the Civil Code in Brazil mentions “man” and “woman” in its description of a marriage, it leaves the door open for other possibility by not phrasing it as a requirement, just as an example. Article 172 of the Argentine Constitution does not leave open the possibility of this interpretation. Moreover, Article 188 of the Argentine Civil Code also uses gendered language:

…In the act of celebrating the marriage, the public officer will read Articles 198, 199 and 200 of this Code to the future spouses, receiving from each of them, one after the other, the statement that they want to take each other as husband and wife, and pronounce in the name of the law that they are joined in marriage…

This provision, dictating the specifics procedures that must be following during the marriage ceremony, clearly says that the two participants will be a husband and wife, not husband and husband, nor wife and wife, nor even spouse and spouse. Unlike in Brazil, the law is clear on this issue and not open to interpretation: marriage is a heterosexual institution.

Finally, the Constitution and Civil Code when read together effectively make marriage a federal issue. According to Article 75, Paragraph 12 of the Constitution, only

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23 Translated by author, emphasis mine. Original text: “Es indispensable para la existencia del matrimonio el pleno y libre consentimiento expresado personalmente por hombre y mujer ante la autoridad competente para celebrarlo. El acto que careciere de alguno de estos requisitos no producirá efectos civiles aunque las partes hubieran obrado de buena fe…”

24 Translated by author, emphasis mine. Original text: “…En el acto de la celebración del matrimonio, el oficial público leerá a los futuros esposos los artículos 198, 199 y 200 de este Código, recibiendo de cada uno de ellos, uno después del otro, la declaración de que quieren respectivamente tomarse por marido y mujer, y pronunciará en nombre de la ley que quedan unidos en matrimonio…”
the National Congress has the power to enact and amend the Civil Code, and this code legalistic superiority over laws passed at the state and municipal level. Obviously local governments have the power to draft their own laws, but cannot make laws that conflict with those passed by Congress. Because the national Civil Code is abundantly clear on the issue of marriage, there is effectively no way that a local government could grant marriage recognition to same-sex couples. However, other forms of recognition are not mentioned in the Civil Code, so this has been the opening that local governments such as the cities of Buenos Aires and Carlos Villa Paz, as well as the state of Rio Negro, have used to recognize civil unions (see chapter 4).

**Opportunities for Change?**

Clearly, in both countries there are some important differences in the established law on same-sex partnership recognition. Brazilian law is clearly much more ambiguous on the topic of marriage than Argentina, but both are equally vague on civil unions and other forms of relationship equality. In Brazil, the Constitution and Civil Code do not establish clear policy on this issue, leaving it open to many different interpretations. In Argentina, on the other hand, the Constitution is silent on this issue, but the Civil Code clearly defines marriage as an opposite-sex union only. Neither document mentions civil unions. The differences between the law in Argentina and Brazil will have important consequences (which will be drawn out in the next two chapters) for how LGBT movements and individuals can go about changing the law.

However, both countries also share an important similarity: neither of the constitutions emphatically outlaws same-sex marriage or civil unions, and this has
important tactical consequences for LGBT groups. First, neither movement necessarily needs to pass a constitutional amendment in order to get the state to recognize lesbian and gay couples. Whether the Civil Code is ambiguous (as it is in Brazil) or it contains clear prohibitions (as it does in Argentina), the place to establish clear policy on this issue is in national Civil Code, which usually is much easier to change than a Constitution. Consequently, it is possible that legislative and/or executive branch support may be all that is needed to change the law.

Second, because discrimination of same-sex couples is not clearly enshrined in their Constitution, it could mean that the judicial branch might have the power to step in on behalf of same-sex couples. If the constitutional law on this subject were clearly prohibitory in either country, it would prevent the courts from taking any action because they would have to use this document as their guiding principle. However, without a clear constitutional ban on SSPR or barring any other cultural or legal restraint, the courts could potentially also play an important role advancing this issue for same-sex couples.

The result is that multiple openings exist both of these countries through which LGBT groups would attempt to bring relationship equality. According to Theda Skocpol, the “degrees of success in achieving political goals—including the enactment of social legislation—depend on the relative opportunities that existing political institutions offer to the group of movement in question (and simultaneously deny to its opponents and competitors)” (Skocpol 1992: 54). Lesbians and gays in both countries could, and have, pursued legal recognition from all three branches of the government (legislature, judiciary, and executive) at the federal level, but there are even some opportunities for
less far-reaching reforms at the local or state level. Only through a close examination of how both lesbian and gay individuals and movements have operated within the political opportunity structure of the state—and all three of these branches—can we understand why progress has been made in some areas and not in others. This is the focus of chapters four and five.
CHAPTER 4: THE COURTS

The judiciary represents one possible avenue through which lesbian and gay couples could achieve a nationwide policy recognizing same-sex unions. As LGBT movements run into roadblocks using the legislative and executive branches to advance same-sex partnership recognition (see chapter five), one might expect that they would turn their attention to the judicial branch as another route to possible success (Wasby 1993). Historically speaking, as social movements grow, they typically expand their petitioning to all three branches of government, both at the state and the national level, to advance their cause (Salokar 2001). Moreover, the judiciary also represents a system accessible to apolitical same-sex couples not affiliated with LGBT SMOs who may consider petitioning the courts to recognize their same-sex union to win the practical benefits that come along with it, but who maybe are not interested or concerned with the larger cultural and legal battle.

As discussed in the preceding chapter, the juridical question on this topic is of an essentially different nature in each country of this dissertation. In Brazil the primary task is to rule on the ambiguous law (and practice) already in existence. For a judge to recognize a same-sex partnership would not require him/her to strike down an existing part of the law as unconstitutional; rather, he/she would simply have to specify how to interpret the existing statutes. However, in Argentina, the Civil Code is much clearer in articulating that marriage is only between one man and one woman. Therefore, a case brought before the courts in Argentina would have to challenge the existing Civil Code (specifically Articles 172 and 188) on the grounds that they violate some provision(s) in
the Constitution or adherence to any international treaties. While the jurisprudence would be different in each country (a clarification vs. a void of the existing statutes), LGBT people would essentially need the courts to do the same thing: give a ruling that would have the power to effectively change how the state treats same-sex couples nationwide.

This chapter begins with a discussion of the institutional powers of the judiciary in each country compared to the other two branches of government. Would it even be possible for the courts to change the status quo for same-sex couples? The remainder of the chapter is then composed of a detailed examination of how LGBT couples and activists organizations have engaged with the courts over the past two decades. Overall, it finds that same-sex pairs have thus far only made limited progress in both the Brazilian and Argentine judiciaries, but their lack of success is for very different reasons: Argentina has had the judicial institutions amenable to change, Brazil has had outspoken allies, but neither country had both until just very recently.

In Brazil, judges throughout many levels in the judiciary have spoken out forcefully for same-sex partnership recognition since 1996, both in books they have written and in judicial opinions that they have handed down. Clearly, the LGBT community has had many allies throughout the courts for more than a decade. The problem for gay and lesbian couples is that the Brazilian Supreme Federal Court has

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25 It is not completely unheard of for Argentine Supreme Court Justices to heavily weigh international treaties in their decisions. According to Article 75, Paragraph 24, of the Argentine Constitution, “…The rules derived from [international treaties] have a higher hierarchy than [domestic] laws.” Justices regularly cite in their opinions passages from international treaties that Argentina has signed.
lacked strong *institutional* powers, essentially preventing it from making a decision that would affect couples nationwide.

Argentina, on the other hand, has faced the opposite problem. *Institutionally*, although its top court cannot change the statutory law through a ruling, it still has a great deal of power because its decisions are binding on lower courts. Under this framework, a decision by the Supreme Court declaring of unconstitutionality of Articles 172 and 188 of the Civil Code would force all inferior courts throughout the country to follow their interpretation, effectively granting same-sex marriage rights to any couple who simply petitioned a court. Unfortunately, the Supreme Court historically has been very conservative about using its powers of constitutional review, especially overturning laws supported by the Presidents who appointed them to the high bench. Moreover, gays and lesbians have been without sitting judges who have produced scholarship or made rulings supporting a constitutional foundation for same-sex partnership rights. The result is that the LGBT movement in Argentina has had a difficult time finding *allies* in the courts.

However, some recent developments have made it so that the two countries have both of the necessary ingredients (allies and institutions) for the courts to play an active role in granting legal recognition to same-sex unions. Constitutional reform in Brazil has empowered their already supportive highest Supreme Federal Court with the institutional powers necessary to bind both lower courts and the other branches of government to a favorable decision. In many ways, the court has gone from being less powerful than the Argentina Supreme Court to now being more powerful. Moreover, the Argentine court system now has enough allies in place both at the inferior level and in the Supreme Court.
for the body to exercise its preexisting institutional powers to grant same-sex pairs full equality with marriage rights. Overall, the judiciary today could potentially bring about a major change in the status quo for LGBT couples in both countries.

**Legal Systems Compared**

Unlike the system of common law used in the United States, most legal systems in Latin America are rooted in the civil law tradition. An important difference between these two is the source of law: in civil law systems only the legislative and executive branches can make the law, but in common law systems the statutory law can be changed by the judiciary as well. Moreover, verdicts in civil law systems usually only affect the parties involved in the case at hand (inter partes), whereas under common law they can have broader impacts on others in the society as a whole (erga omnes). Justices in civil law systems as a result do not have to worry about the broad implications of their rulings beyond the individual case at hand (Taylor 2006).

Another difference between these two legal models is the sources of judicial interpretations. Judges in civil law are supposed to base their rulings only on a strict reading of the law, while in common law they rely on a combination of the codified law and the body of preceding legal opinions. Stated another way, common law systems are governed by the principle of *stare decisis* where decisions made by high court justices should be considering a binding interpretation of an issue, and lower court justices should conform their reading of the law to what higher courts have decided in analogous cases. Obviously these systems are not complete dichotomies as judges in common law systems are pressured to use restraint and not commit “judicial activism” in setting the law.
Likewise justices in civil law systems, while they might not technically cite other cases in their opinions, are obviously influenced the current body of legal scholarship and may consider the wider societal implications of their ruling.

The United States is a strong example of a common law system. In 1803, the U.S. Supreme Court gave itself the power of constitutional review in *Marbury v. Madison*, and later reinforced its power to make its rulings binding on lower courts and other branches of government in *Cooper v. Aaron* (1959) (Sagüés 2006: 18). When the high court delivers a ruling of unconstitutionality, its effects have *erga omnes* effects meaning that the ruling impacts other parties in identical (or nearly identical) situation. The court has the power to do this because its decisions are binding on the statutory law, the other branches government, and lower courts within the judiciary. The result is that the U.S. Supreme Court is today is seen as one of the most independent judiciaries in the world, and it places a strong check on the power of the legislative and executive branches.

Both Argentina and Brazil are founded in the civil law tradition but in various ways have adopted some forms and customs of common law during throughout history. These differences have a significant impact on how the courts would effectively be used to change the law for same-sex couples seeking state recognition of their partnerships.

**Brazilian Legal System**

Brazil’s legal system differs from Argentina’s in a number of significant ways. The Brazilian judiciary consists of a dual system of federal and state courts with two tribunals sitting on the top: the Superior Court of Justice (*Superior Tribunal de Justiça*, or STJ) and the Federal Supreme Court (*Supremo Tribunal Federal*, or STF). The key
difference between the two courts is that the former is the nation’s top court of appeals for non-constitutional matters, while the latter has original jurisdiction over constitutional questions. While all courts in Brazil have the power to rule on the constitutionality of a specific law, their verdicts are only *inter partes*; only the STF has the ability to give its decisions *erga omnes* effects.

However, we cannot just talk about a single Brazilian judiciary. Same-sex partnership recognition has been an issue for nearly fifteen years, and constitutional reform in 2004 changed the power of the STF dramatically. Therefore, we really need to talk about the power of the judiciary under two different legal systems: 1) 1988-2004 and 2) 2004-present. Each of these systems presents different legal opportunity structures for LGBT movements.

*Weak STF: 1988 Constitution to 2004 Constitutional Reform*

The Brazilian legal system from 1988-2004 really resembled a civil law system in that the power of the judiciary was very limited: the high court could not bind its decisions on lower courts nor on other branches of government.

Those who wished to see the judiciary rule on the issue of SSPR could do so by presenting either an *incidental* or an *abstract* case. Legal systems like the United States only allow incidental cases: you need to demonstrate that an actual law or act harms you in order to have legal standing to question its constitutionality. However, in Brazil constitutional questions could also be brought to the judiciary on abstract grounds meaning that one need not prove that he/she was actually harmed by a law (or a gap in the law) (Zimmerman 2008). Each of these types of cases presents a different legal
opportunity structure for both the LGBT movement as a whole and individual same-sex couples not involved with political organizing.

**Incidental Cases.** Incidental cases refer to those lawsuits based on a specific instance where a party is directly injured and seeking justice. For example, this would be a case where a person sues their employer arguing that the lack of health coverage for their same-sex partner is in violation of the constitutional principle of equality (Article 5). At any level within the courts, a judge has the authority to judge the constitutionality. However, prior to the constitutional reform, the effects of these cases were limited. Individual judges could “question the constitutionality of laws but [could not] aspire to produce *erga omnes* effects” (Navia and Rios-Figueroa 2005: 210). “Any determinations of unconstitutionality, according to this procedure, [resulted] in *inter partes* effects, which [meant] that it [bound] only the litigating parties” (Zimmerman 2008: 190). In other words, if the plaintiff won the case, it would not translate into a win for all homosexual couples, nor would it establish a clear national policy on same-sex partnership recognition. It would only force that one employer to provide health insurance to that one partner (and not even all same-sex couples at the business).

If the aggrieved party were to question a law on constitutional grounds and have the court decide in their favor, the court would then inform the proper legislative body or administrative agency that it had 30 days to bring the law or code into compliance. However, this advisory power was without any real teeth. “Although injunctions were created for the purpose of reducing situations of non-enforcement of constitutional rights, judges [had] no authority under the constitutional principle of separation of powers to
oblige legislators to produce legislation” (191). In other words, the legislative body could just ignore the court completely and nothing would change in the statutory law.

The only way for this type of case to have broader effects would be for the aggrieved party to appeal the decisions all the way to the STF. However, if this were the case, they would need the STF to not only decide in their favor, but also have the request that the Senate pass a resolution in agreement. But, again, this would just be a request. Only after all these steps have been followed would an incidental case have *erga omnes* effects. Consequently, prior to the 2004 reform, it was not likely that an incidental case could establish a clear law on the issue of same-sex partnership recognition.

**Abstract Cases.** Constitutional cases in Brazil can also be presented on abstract grounds (Rios-Figueroa and Taylor 2006). Here the litigant does not need to prove that they are *actually* harmed by a law or administrative act—they only need to demonstrate that somebody’s constitutional rights *could be* violated. In these cases the STF has original jurisdiction and, because there is no specific aggrieved party, the decisions naturally have *erga omnes* effects.

However, not just anyone can file an abstract case of judicial review. Article 103 of the Constitution only grants this authority to a handful of actors: the President, the Senate, the Chamber of Deputies, a state legislature or governor, the Public Prosecution (Ministério Público), the Brazilian Bar Association, a political party represented in the National Congress, or an organization representing an entire class, such as a labor union or professional association. LGBT organizations do not need to search for a real life case

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26 However, as argued by many scholars of the Brazilian judiciary, it is easy to make a constitutional case out of just about anything in a country with such a long Constitution.
in order to make a constitutional case, but they must convince one of these actors to do it on their behalf as they do not qualify themselves.

One of these entities, the Public Prosecution has acted on behalf of the LGBT community many times. According to Article 127 of the Constitution, the purpose of the Public Prosecution (Ministério Público) is “to defend the juridical order, the democratic regime and inalienable social and individual interests.”

Over the past twenty years it has taken a very proactive role defending diffuse rights and minority rights in the Brazilian judicial system (Sadek and Cavalcanti 2003: 205). As such, it has made it a natural fit for LGBT organizations to petition the Federal Public Prosecution to file constitutional cases on their behalf.

However, other significant barriers have prevented Brazilian LGBT organizations from using abstract cases to push their cause. The 1988 Constitution only granted the STF limited power to make its decisions binding for the other branches of government (Zimmerman 2008). As a result, there remained significant limitations on the ability of abstract cases to clarify the law for same-sex couples. Because judicial decisions historically in Brazil did not establish binding precedent, litigation campaigns were not a rational use of resources for social movement organizations looking to affect larger political and social change. One or two favorable (or unfavorable) judicial opinions for same-sex partnership recognition neither establish precedent for future cases nor have far-reaching implications of changing the law for all same-sex couples. Instead, LGBT

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27 Translated by author. Original Text: “a defesa da ordem jurídica, do regime democrático e dos interesses sociais e individuais indisponíveis.”
organizations’ money and time seem better spent on legislative tactics than on advocating incidental or abstract cases.

**Strong STF: 2004 Constitutional Reform to the Present**

Although Brazil has traditionally been a civil law system, the 2004 reform granted the highest bench the power to make its decisions binding. While the 1988 Constitution already gave the STF the power of judicial review, its effects were limited: it only had declaratory power. However, in an attempt to strengthen the judiciary and bring uniformity within the judiciary branch, Amendment 45 to the Brazilian Constitution was ratified in 2004. One key piece of this reform was the addition of Article 103-A, which codifies the principle of *súmula vinculante* in the powers of the judiciary. Similar to *stare decisis* in common law systems, *súmula vinculante* institutionalizes that if the STF declares one of its decisions binding, then lower all court judges must follow it (Bruno 2007). The main difference between *stare decisis* and *súmula vinculante* is that in latter only the STF opinions are considered binding (again, if it makes this assertion as it decides the case and has the support of at least 2/3 of the justices), while in former a judge should follow past decisions produced by courts of the same or higher levels (Bruno 2007). Further, *súmula vinculante* gives the decisions the force of law: they are not just declarations, they legally binding over lower courts, the other branches of government, and governments at all levels—federal, state, and local.

The significance of this change cannot be understated as it fundamentally strengthens the power of the courts and gives them powers that historically have only existed in pure common law systems: the STF can now make its decisions binding on
lower courts and other branches of government by issuing a *súmula*, effectively giving its judgments *erga omnes* effects.

**Argentine Legal System**

The structure of the Argentine judiciary was established in the 1853 Constitution, granting it many of the same constitutional powers as the U.S. Supreme Court. The Argentine Supreme Court (*Corte Suprema de Justicia de la Nación*) sits at the top of the judicial system and has original jurisdiction over a number of areas. It also functions as the top appellate court in the country for both constitutional and non-constitutional questions (Helmke 2005a: 15).

Although the U.S. and Argentine judiciaries were established nearly identically in their constitutions, their court systems have otherwise taken different trajectories. The Argentine Supreme Court followed the *Marbury* example by granting itself the power of judicial review in its 1887 *Sojo* decision. However, a ruling of unconstitutionality is far more limited in Argentina because the courts do not have the power to change the statutory law. When the Argentina Supreme Court declares that a law is unconstitutional, it only has *inter partes* effects. In other words, the law is only thrown out for the specific party at hand, but it does nothing to change the statutory law in the books as it applies to other parties (Sagüés 2006: 25).

Although the Supreme Court of Argentina cannot change the law *de jure* when it makes a ruling of unconstitutionality, it can have a *de facto* impact on how the state enforces a specific law. One area in which Argentina diverges from the pure civil law tradition is that its decisions on analogous cases are binding on all lower courts. This
power of the Supreme Court has developed out of a steady line of jurisprudence.\textsuperscript{28} The consequences of this is that when the Supreme Court rules that a certain piece of the law violates the constitutional, all lower courts must in the future follow this ruling unless they can specifically state how the case before them is significantly different.

Through transitivity then, once the high court declares that a law is unconstitutional in a specific case (with limited \textit{inter partes} effects), this ruling would then apply in the future \textit{erga omnes} to any person brought before any court in the country in the future. For a same-sex pair to marry, they would not need for the statutory law to change; all they would have to do is address any court in the country to secure an analogous ruling. Theoretically this would then put pressure on the legislature to amend the law to bring it in line with the Supreme Court’s ruling, or perhaps push the executive branch to stop enforcing the law since they know any court could just throw it out. Such a scenario did play out, for example, in the 2009 \textit{Arriola} case when the high court ruled that the criminalization of the possession and consumption of small amount of marijuana was unconstitutional—it effectively legalized small drug use for the entire country. The legislature is currently redrafting their drug laws, and the executive branched stopped prosecuting such offenses.

Finally, in Argentina, like in the United States, if an individual or a group wants the court to rule on the constitutionality of law, the only way to do so historically is to present an \textit{incidental} case: the plaintiff needs to demonstrate that an actual law or act harms him or her in order to have legal standing to question its constitutionality. In other

\textsuperscript{28} For an in-depth examination of this evolution of this right, see Sagüés (2006: 26-8).
words, a court could not exercise *abstract* judicial review arising from a suit questioning the constitutionality of a law by a third party who is not a directly injured by that law (Helmke 2005a: 176).

However, there is some legal disagreement about this issue. Other legal scholars today argue that constitutional reform in 1994 now allows abstract cases to be presented before the court, through which their decisions would then naturally have *erga omnes* effects. According to the Article 43 of the new Argentine Constitution:

> Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule…

Oddly, although this ability clearly exists in the Constitution since 1994, it is not a common avenue for groups to utilize. In fact, no individuals or groups have yet filed an abstract case challenging prohibitions against same-sex marriage; all litigation thus far has come from incidental cases.

**Legal Opportunity Structures**

Looking at all of these institutional features of the Brazilian and Argentine legal systems, we can make some general statements. The differences between the Argentina and Brazilian legal systems are described in Table 4.1.

Even though Argentina’s legal system is founded and based primarily in civil law, it really a hybrid between the two legal systems: although the high court cannot bind the other branches of government, it can force inferior courts to follow their precedent (a
feature normally found on common law). Comparatively, the judicial branch in Argentina was designed to be much more independent and powerful than the pre-2004 Brazilian judiciary as it had the institutional capacity to check and balance the legislative and executive branches of governments as well as inferior courts.

Table 4.1: Comparative Legal Systems

<table>
<thead>
<tr>
<th>Court Decisions Are ...</th>
<th>Ideal Common Law System Characteristics</th>
<th>Ideal Civil Law System Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>...binding on lower courts <em>(stare decisis).</em></td>
<td>Yes (Argentina, Brazil Post-2004)</td>
<td>No (Brazil, Pre-2004)</td>
</tr>
<tr>
<td>...binding on other branches, giving <em>erga omnes</em> effects.</td>
<td>Yes (Brazil Post-2004)</td>
<td>No (Argentina and Brazil, Pre-2004)</td>
</tr>
</tbody>
</table>

Brazil, on the other hand, has transformed from being heavily rooted in civil law to more firmly resemble a common law system today. The pre-2004 judiciary had very weak powers: the decisions of the judiciary, including the Supreme Federal Court, were neither binding on lower tribunals nor on other branches of government. However, the constitutional changes introduced in 2004 changed this picture significantly as it gave the Supreme Federal Court in Brazil the power to make its decisions binding on both lower courts and the other branches of government. In this respect, the post-2004 judiciary in Brazil might be considered more powerful today as an institution than the high court in Argentina.

Just looking at institutional factors, it appears that the Argentine judiciary would present a possible route for same-sex couples to pursue partnership recognition. A lesbian or gay couple could secure a favorable ruling from the Supreme Court and it would force
all lower courts to then decide the same way. This decision would not directly change the statutory law, but it would give any same-sex couples in similar circumstances the ability to challenge a denial of a marriage license in the courts and nearly guarantee them a favorable opinion. This would effectively put pressure on the legislature to change the law, but even if they didn’t same-sex couples could still seek the courts for legal remedy.

In Brazil, this opportunity did not exist prior to the 2004 constitutional reform, and therefore did not present a credible path for LGBT movements to following in their pursuit of partnership recognition. If the Supreme Federal Tribunal were to rule in favor of a same-sex partnership petition, it would neither force inferior courts to follow suit nor would it change the statutory law. As a result, there would little pressure on the legislature to change the law either, so LGBT organizations would better spend their time seeking change through another avenue in state. However, all of this radically changes after the constitutional reform in 2004 as there now is an incentive for LGBT movement activists to petition the court in the form of abstract court cases. The judiciary then in Brazil now could potentially lead to widespread policy changes recognizing same-sex couples.

However, institutions that have the power for reform are useless unless there are they are friends to LGBT groups within them. Therefore, we must also consider the role that elite allies played in advancing same-sex partnership recognition. Even though the institutions in Argentina are powerful, little progress has been made for lesbian and gay couples early on because few public cases were brought into the courts and no judges ruled in their favor. In Brazil, we saw a large number of cases brought into the courts
right way, but the rulings from favorable justices only had a very limited impact. It was not until allies came aboard in Argentina or the institutional framework changed in Brazil that progress seemed possible in both countries.

History of SSPR Cases in the Courts

Litigation in Brazil

As discussed in chapter three, the Brazilian Federal Constitution and Civil Code are void of any mention of same-sex relationships: they neither outright accept nor prohibit them. As such, justices in Brazil when presented with cases seeking recognition have had to look at wider constitutional principles in order to determine their validity. Article 4 of the Law of Introduction to the Brazilian Civil Code (Decree 4657 passed in 1942) lays out what judges are supposed to do when they encounter such gaps in the law:

When there is an omission in the law, the judge will decide the case according to analogy, custom, or general principles of rights.29

However, the situation is still far from clear as justices’ opinions will vary based on which analogies, customs, or principles of rights they use.

Over the past fifteen years, a combination of incidental and abstract cases for legal recognition for same-sex couples have been presented in Brazilian courts. Overall, the results have been fairly positive for LGBT individuals as a steady body of jurisprudence, although not without setbacks, has been building in favor of same-sex partnership rights. According to Vianna and Carrara, “although jurisprudence does not have the power of law in Brazil like in countries ruled by common law, it is noteworthy

29 Translated by author. Original Text: “Quando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito.” For a larger discussion of the application of this article to judicial interpretation, see Diniz (2005).
that countless judges, as they seek to interpret constitutional principles, have granted
rights that are not explicitly included in the laws” (2007: 29). A number of cases here are
noteworthy as the courts have tried to fill the legal hole that exists regarding the legal
recognition of same-sex couples. What we find is that the lack of stare decisis from 1988-
2004 created a political space that allowed lower court justices to develop the
jurisprudence that could later be used after the constitutional reform by higher court
justices to create legally binding opinions with *erga omnes* effects.

*Jurisprudence: 1988 Constitution to 2004 Constitutional Reform*

A number of pre-2004 incidental cases established a large body of legal theory
justifying same-sex partnership recognition in Brazil. Because lower court judges had
quite a bit of independence, they had been able to make their rulings without fear of
reprisal from higher courts (Rios 2008). Moreover, precedence is not supposed to carry
any weight when judges decide a case (they are only supposed to do a strict reading of
the Constitution and statutory law) so opinions have been all over the map on this issue.

The first time that the courts ordered the legal recognition of a same-sex union
occurred in 1996. A man (name undisclosed because of privacy) sued the Brazilian
Federal Bank (Caixa Econômica Federal) to include his same-sex partner on his health
and pension plan. Federal Judge Roger Raupp Rios ordered that the principles of equality
and human dignity in the Constitution, in conjunction with prohibition against
discrimination of sex, required the bank to extend the same benefits to his partner of
seven years that it would of an opposite-sex partner (Rios 2008). This decision was
upheld upon appeal in 1998 by Federal Judge Marga Barth Tessler.
Because Brazil was a pure civil law system, this ruling was limited to *inter partes* effects. However, it did create a legal foundation based on commercial law (not yet in the family law as discussed in chapter three) that justices have used ever since to grant partnership benefits to same-sex couples. According to Article 981 of the Civil Code:

> Persons participating in societal contracts are mutually bound to help each other with goods or services for the exercise of economic activity and sharing the results together.\(^{30}\)

Judges since then have used this section of the Civil Code to argue that even if same-sex couples cannot be recognized as a family entity (a stable union or a marriage), one can still justify giving them certain benefits under the law by treating them as if they were economic dependents (as if they were business partners) under commercial law. The justification here was that these partnerships are a fact of society (*sociedade de fato*), and the state does not have a right to discriminate against them. While this obviously is not ideal for many couples, because it does not acknowledge that theirs is a homo-affectionate relationship (*relación homoafetiva*) with all the same rights, it still has allowed same-sex couples to get many important practical legal benefits.

Some years later, courts began to apply family law to argue that homosexual couples can be treated as family units. In 1999 Judge Breno Moreira Mussi, from the 8th Circuit Civil Court of Justice of Rio Grande do Sul, decided in a case that Article 226, Paragraph 3, of the Federal Constitution, while explicitly mentioning men and women as making up a stable union, did not preclude state recognition of homo-affectionate relationships also as stable unions. As a result, the judiciary was not violating the Federal

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\(^{30}\) Translated by author. Original text: “Celebram contrato de sociedade as pessoas que reciprocamente se obrigam a contribuir, com bens ou serviços, para o exercício de atividade econômica e a partilha, entre si, dos resultados.”
Constitution by examining cases of partnership recognition. Afterwards two other justices within the Superior Court of Justice, in 2004 and 2005, argued the opposite position: because the Constitution does not explicitly mention same-sex unions, the court has no authority deciding in these areas (Dias 2006: 136). Again, because Brazil had a civil law system without *stare decisis*, these cases did not overturn the earlier decisions. Over the past fifteen years, thousands of cases like these have appeared all over the country; whether or not a couple is successful really depended on the political leanings of the judge the couple drew in the judicial lottery system (Rios 2008).

Interestingly, a small number of incidental cases have produced some *erga omnes* effects to parties outside the suit, but for reasons that are not typical. In one case, the defendant was a government agency that *voluntarily* decided to change its general policies toward same-sex couples after the court’s decision. In a second case, the judge really made an internal administrative ruling on how one of the agencies within the court system should recognize same-sex couples; therefore, the judge and the head of the agency were really one in the same as he had the power to issue new administrative regulations that would change how the agency interacted with all same-sex couples.

In 2000 the Public Prosecution, at the behest of the local queer group Nuances and a gay couple, filed a Public Civil Action (*Ação Civil Pública*, or ACP) in Federal Court arguing that the National Social Security Institute (*Instituto Nacional do Seguro Social*) must extend pension and social security benefits to homosexual couples (Vianna and Carrara 2007). Federal Judge Simone Barbasin Fortes of the Third Circuit Welfare Court of Porto Alegre (Rio Grande do Sul) agreed and *pressured* the INSS to draft new
rules allowing same-sex couples to be beneficiaries. However, the INSS shortly thereafter *voluntarily* drafted Normative Instruction (*Instrução Normativa*) 25/2000 allowing any homosexual partners who can prove that they are in a stable relationship to be included as dependents. This case is remarkable because it represents the first time that the judicial system initiated a decision extending some type of partnership recognition with *erga omnes* effects to all same-sex couples in Brazil. However, in reality it eventually applied to all couples at the behest of the INSS and not the courts.

The first judicial decision with broad *erga omnes* effects recognizing same-sex couples as stable unions within an entire geographic region took place in Rio Grande do Sul in 2004. Although this judgement took place within the judiciary, it probably is more accurate to think of it as an administrative decision. As of this writing it is still the only state in the country that has a broad policy of recognizing same-sex partnerships as stable unions.

In order for a Brazilian couple to get many of the benefits that come with being in a stable union, they need a notarized declaration from the office of notary (*Cartórios de Registros de Notas*) that their partnership is indeed a stable union. However, because of the ambiguities in the law, notaries were without a clear directive to follow when same-sex couples petitioned their offices to notarize of their relationships—some would approve it while others would deny it (Rios 2008).

Because of these inconsistencies throughout the state, groups began to petition the Judicial Administrative Department (*Corregedoria-Geral da Justiça*), the department

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31 Again, the INSS was not legally required to draw up new rules because the courts only have the power to make their decisions binding with *inter partes* effects.
with authority over the notary offices, to declare a consistence policy on the matter. In early 2004, Judge Aristides Pedroso de Albuquerque Neto decreed Resolution 6/2004, which added Article 215 of the Consolidated Normative Rules of the Notary and Registry (Consolidação Normativa Notarial e Registral), the bureaucratic rules that all notaries within the state must follow:

> Fully capable people, regardless of identity or opposite sex, who live in a lasting de facto relationship, in affectionate communion, with or without commitment papers, may register documents relating to this relationship. Persons wishing to be an affective union as above may also register the documents that relate to it.\(^{32}\)

As a result of this ruling, *de facto* same-sex couples within the state of Rio Grande do Sul can today go to any public notary office to have their relationships recognized. They can then use this certificate as proof that they are in a stable union to petition for partnership rights in places such as private health insurers or the national immigration department.

Together all of these incidental cases have helped the struggle for SSPR in a number of ways. First, each garnered great media attention in Brazil forcing society to begin to discuss this issue publicly. Moreover, a small body of jurisprudence began to develop that justified the sanctioning of same-sex unions. Two sitting federal judges, Roger Raupp Rio and Maria Bernice Diaz, are especially outspoken on this issue and have written several juridical books on this topic. If Brazil were a common law system, it is unlikely that this jurisprudence would have developed as higher court justices would

\(^{32}\) Translated by author. Original text: “As pessoas plenamente capazes, independente da identidade ou oposição de sexo, que vivam uma relação de fato duradoura, em comunhão afetiva, com ou sem compromisso patrimonial, poderão registrar documentos que digam respeito a tal relação. As pessoas que pretendam constituir uma união afetiva na forma anteriormente referida também poderão registrar os documentos que a isso digam respeito.”
have quickly squashed lower court rulings. Finally, in some of these cases, the rulings have convinced various agencies within the bureaucracies to grant real, tangible rights and benefits to same-sex couples. Unfortunately, the many limitations of the Brazilian judiciary had thus far prevented it from establishing a clear national policy on same-sex partnership recognition.

*Jurisprudence: 2004 Constitutional Reform to the Present*

Since the 2004 constitutional reform, one case has made its way to the Superior Court of Justice (STJ), the highest appeals court in the country, making it the highest incidental court decision ruling in favor of same-sex couples. In 2008, a bi-national couple, Brazilian Antônio Carlos Silva and Canadian Brent James, sought legal recognition of their relationship for immigration purposes. The STJ eventually ruled that the absence of provisions discussing same-sex partnerships in the Constitution or Civil Code does not prevent the state from recognizing them as family entities. This ruling was especially significant because it marked the first time that the STJ decided in favor of same-sex couples according to family law and not just commercial law. While the results of this case only affected the parties at hand, it does demonstrate that the higher courts are slowly moving if favor of granting benefits and rights to lesbian and gay pairs.

The 2004 constitutional change, however, significantly altered the political opportunity structure for how LGBT movement could utilize the Supreme Federal Court. Whereas pre-2004 the judiciary had many with many allies of LGBT people, but lacked institutional powers to affect change for LGBT people, today we see that the courts now are a branch of government that has the *allies* and *institutions* that could lead to a
nationwide policy recognizing same-sex couples. Because of the constitutional change, LGBT movement organizations now have an incentive to be more directly involved in litigation campaigns since a *súmula* from STF could potentially clarify that gaps in both the Constitution and the Civil Code do not preclude same-sex partnership recognition.

Notably, we have seen a recent rise in activism on behalf of the LGBT organizations as a result of this constitutional (and institutional change). In the past few years, attempts have been made to get the Supreme Court (STF) to take up the case of same-sex unions and make a decision with *erga omnes* effects. To date the court has not ruled in favor of civil unions for homosexual couples, but it appears that LGBT people are on the verge of winning these rights through the judicial system.

In 2006 the São Paulo Gay, Lesbian, Bisexual, and Transgender Pride Parade (*Associação da Parada do Orgulho dos Gays, Lésbicas, Bissexuais e Transgêneros de São Paulo*) and the São Paulo Association for Education and Health Incentive (*Associação de Incentivo à Educação e Saúde de São Paulo*) filed ADI 3300 in the Supreme Court (STF), challenging the constitutionality of a provision of Law 9278/1996, which stated the stable union is composed of a man and a woman (much in the same way the Civil Code today does). They argued that the law violated the constitutional principles of nondiscrimination and human dignity. The motion was originally filed as a Direct Unconstitutionality Action (*Ação Direta de Inconstitucionalidade* or ADI). However, the Court dismissed the case without prejudice on the grounds that an ADI can only be used to challenge the constitutionality of laws introduced AFTER the Civil Code took effect. Since Law 9278/1996 was passed several
years BEFORE the Civil Code went into effect, the proper way to challenge this was through Allegation of Breach of Fundamental Precept (ADPF).

Although the case was dismissed on a technicality, it marked a significant advancement for same-sex partnership rights in the Supreme Court. In his opinion, then-Chief Justice Celso de Mello argued thoroughly and passionately that homosexual couples should be recognized as family units, not just de facto unions, and that they deserved the same legal rights as opposite-sex stable unions. Moreover, he explicitly told them in the opinion to resubmit the same arguments as an ADPF. Because the rest of the court also signed off on this opinion, it is a clear indication that most of the STF support Mello’s reading of the law.

Various groups have learned the lesson from 2006 and introduced ADPF cases to the Supreme Federal Court. In early 2007, three organizations (including ABGLT) and several public attorneys made a petition to the Public Prosecutor of the Republic (Procurador-Geral da República) requesting them to forward to the Supreme Court an ADPF requesting a decision with *erga omnes* efficiency and binding effect, “compulsory recognition of unions of persons of one sex, that there are public, continuous and lasting having been established with the objective of creation of family with all the legal effects arising” (Reis 2008). This essentially would have creating a binding interpretation of the Constitution and Civil Code recognizing same-sex unions as stable union. Unfortunately the Public Prosecutor did not take any action.

Soon afterwards in 2008 Governor Sérgio Cabral (the same person who in 2003 as a National Deputy proposed the constitutional amendment recognizing same-sex
unions) forwarded a nearly identical case, ADPF 132, to Supreme Court. He requested that the Supreme Court clarify that Article 1723 of the Civil Code permits the recognition of homosexual couples as stable unions. The Court, now under the leadership of Justice Cezar Peluzo (appointed by Lula), has yet to make its decision on this matter, but many believe that the best potential for a universal policy supporting same-sex partnership recognition lies here.

Today, it is very likely that the court would rule in favor of stable unions for same-sex couples. It is generally believed that more than 2/3 of the court (the number required to issue a *súmula*) are in support of recognizing same-sex couples in the form of a stable union (Rios 2008). According to a 2009 poll conducted by the newspaper *O Globo*, more than 66 percent of judges in the Brazil believe that the Constitution allows the state to recognize same-sex couples in the form of civil unions (*O Globo* 2009). Also, seven of the current eleven court judges were appointed by current President Lula de la Silva, who is a strong supporter of civil unions for same-sex couples. While this may only anecdotally point to their leanings, Lula’s last appointment to the court in 2009 publically stated during his confirmation hearings that he favored state recognition of civil unions (Bresciani 2009).

**Litigation in Argentina**

Unlike in Brazil, challenging the constitutionality of prohibitions on marriage for same-sex couples is a nascent phenomenon in Argentina so it does not have the long history of case law. The first two major cases in Buenos Aires were part of a carefully orchestrated litigation campaign organized by FALGBT, with the support of INADI (the
federal anti-discrimination institute) that began in 2007. All legal actions to date have been filed as incidental cases with no such actor yet making a case on abstract constitutional grounds. We see in Argentina the opposite of what we saw in Brazil: the judiciary as an institution has long had the power to effect meaningful change for partnership recognition, but LGBT couples have historically not had too many allies. Only within the past year have judges begun to rule in favor of same-sex marriage, and because the judicial institutions are already fairly powerful, the courts will likely rule in favor of same-sex marriage and/or force the legislature to pass an equivalent bill.

The very first well-known case petitioning for same-sex marriage rights involved María Rachid (President of FALGBT and an advisor to INADI) and her partner Claudia Castro. In February 2007, the couple requested a marriage license from the Civil Registry office in Buenos Aires. When they were turned away, they immediately filed a *writ of amparo*, which argues that a severe infringement on a constitutional right has occurred (Helmke 2005a: 178). In June of that year, their claim was denied by Civil Court Judge Mary Bacigalupo, who argued that “allowing marriage between two homosexuals ‘completely undermines the concept of the institution’ that ‘is intended for the continuity of the species and to educate the children’” (Bacigalupo 2009). When the appeal to this decision was denied, their petition finally arrived at the docket of the Argentine Supreme Court in 2009. It still awaits a decision, but their case now has received *amicus curiae* briefs from a number of important people including a long list of international human rights lawyers and organizations, INADI, and the Attorney General of the Republic, Esteban Righi (Osojnik 2009; Raznovich 2009).
Just four months after the Rachíd/Castro tried to tie the knot, Alejandro Vanelli and Ernesto Larrese tried the same tactic in June 2007. Represented by Gustavo López, the same FALGBT attorney as Rachíd and Castro, Vanelli and Larrese also applied for and were denied a marriage license by the office of the Civil Registry. Likewise, they turned to the courts for remedy, and after several appeals, also have their case pending before the high court. Over the new few years, other couples followed the same strategy, but none were successful within the inferior courts.

As discussed in chapter two, the couple that leads CHA, President César Cigliutti and Secretary Marcelo Suntheim, also have petitioned the courts to recognize their marriage. This pair, which was the first to be united in a civil union ceremony in Buenos Aires in 2002, traveled to Spain (where same-sex marriage is legal) in 2008 to marry. They could do this because Suntheim still retains his German citizenship and can officially marry in any European Union country. However, the litigation strategy rests on different legal grounds than the prior cases: Argentina must recognize their marriage because it recognizes all marriages sanctioned in other countries, even those performed under rules that differ from Argentine law. Hence, upon their return to Argentina, they petitioned the office of the Civil Registry in Buenos Aires to recognize their marriage. When they were denied, they filed a lawsuit in federal court. In March 2010, Federal Civil Court Judge María Rosa Bosio, for the first time ever in Argentine history, denied the recognition of a marriage performed abroad. They are currently appealing their case to the Federal Court of Appeals.
Unfortunately, the Argentine Supreme Court is overloaded with casework and it can take years for the court to reach a decision on a case. Annually the court decides on more than 36,000 cases and typically has over 50,000 cases “en tramite,” or pending (Helmke 2005a: 177-8). The reasons for this are many. Until 1990 the Court did not have a functional equivalent of a *writ of certiorari*, meaning that it has no effective control over its docket. However, as a custom the high bench has not really used this power effectively. Moreover, the 1994 constitutional reform introduced the *acción de amparo*, which gives lawyers a legal maneuver to quickly bypass other appellate courts and advance their case on the docket of the Supreme Court (ibid). The result is that the Rachid/Castro and Vanelli/Larrese cases have been sitting on the docket of the high court, along with thousands of other cases, for a number of years.

Meanwhile, the LGBT movement has not stayed idle: in the past two years it has continued with its litigation campaign hoping to inundate the lower courts with lawsuits also challenging the constitutionality of articles 172 and 188 of the Constitution. Near the end of 2009, FALGBT and CHA together organized a campaign for more than 60 couples to follow the steps of Rachid/Castro by petition the Civil Registry office for a marriage license, and pursuing their cases in the courts if unsuccessful. Their hope was that a single favorable opinion at the inferior court level would fast-track this issue to the Supreme Court, or that the flood of cases would pressure the high bench to move the same-sex marriage cases to the top of their calendar in order to stop all of these analogous cases from wasting the court’s time. The result is that we have seen a flurry of activity on
this issue with tribunals ruling all over the place on this issue, leading to a great deal of legal uncertainty about the direction of same-sex marriage in the courts.

Just recently, the LGBT movement has had a number of allies within the judiciary come forward. On November 10, 2009, in the first landmark ruling, Gabriela Seijas, an Administrative Judge of first instance for the city of Buenos Aires, declared that Articles 172 and 188 of the Civil Code were unconstitutionally preventing Alejandro Freyre and Jose Maria Di Bello (both members of FALGBT) from marrying on the basis that LGBT people constitute a suspect class for the purposes of equal protection by the state. Further, the Constitution for the city of Buenos Aires prohibits discrimination on the basis of sexual orientation. She ordered the office of the Civil Registry in Buenos Aires to issue a marriage license, making it the first court in the country to rule that in favor of same-sex marriage. Interestingly, the conservative mayor of the city, Mauricio Macri (PRO), very publicly stated in video made for YouTube that he would not appeal the ruling as this was the natural order in which societies were evolving on this issue. 33 As a result, the couple made an appointment to marry on December 1.

In the meantime, attorney Francisco Roggero, a lawyer from the Corporation of Catholic Lawyers, filed an injunction in federal court to overturn the verdict. Hours before their wedding ceremony, Federal Court Judge Marta Gómez Alsina ordered the Civil Registry to temporarily refrain from issuing a marriage certificate to Freyre and Di Bello on the grounds that an administrative judge cannot make a ruling on the Civil Code. Further, she argued that a higher court would need to decide on the issue before the office

33 Video available at: http://www.youtube.com/watch?v=T7fp0ecfQ3s.
could proceed. Mayor Macri did a complete reversal from his earlier stance and complied with Alsina’s request, preventing the couple from wedding that day. However, this did not completely stop the couple from marrying because Alsina’s judgment only narrowly applied to the Civil Registry office in Buenos Aires. On December 28, the couple legally married (the first in all of Latin America) in Ushuaia, Tierra del Fuego, after ally and Governor Fabiana Rios instructed the Civil Registry office there to issue a marriage license. In yet another twist of events, a city judge in Ushuaia ruled on April 13, 2010, that their marriage was indeed “null and void” because they did not have all of the essential prerequisites to marry (one man and one woman according to Article 172 of the Civil Code nor were they residents of the province).

Meanwhile, during this entire dramatic scene, courts have ruled affirmatively in four other cases, nullifying Article 172 and 188 of the Civil Code, and granting these couples the right to marry. But in many cases judges have overruled other judges, sometimes shifting verdicts back and forth several times in the same case. On March 3, Damian Bernath and Jorge Esteban Salazar Capon became the second couple in the court to have a judge rule successful in their favor. Interestingly, this case also happened in Buenos Aires, but this time the Civil Registry office went through granted them a marriage license. However, on March 11, Civil Court Judge Felix Gustavo de Igarzabal, at the behest of a different lawyer from the Corporation of Catholic Lawyers (this time Ricardo Ernesto Lamuedra), declared their marriage “nonexistent,” and ordered the couple to surrender their marriage license. They are appealing this verdict and are considered technically married until an appellate court reaches a decision.
Moreover, a third couple, Carlos Alvarez and Martin Canavaro received a favorable verdict from a judge on April 5, and the first lesbian couple, Norma Castillo and Ramona Arevalo (well known for opening the first LGBT retirement home in Buenos Aires, *Puerta Abierta a la Diversidad*, in 2009), received the fourth green light on April 9. Currently, the Alvarez/Canavaro marriage has not received any further treatment in the courts, but the Castillo/Arevalo marriage has shifted back and forth several times. Federal Court Judge Marta Gómez Alsina, again after a suit filed by Lamuedra, declared the Castillo/Arevalo marriage null and void on April 16; but just one day later, Elena Liberatori, Administrative Judge for the city of Buenos Aires at the same rank of Judge Seijas, ordered the Civil Registry office to again produce the marriage license and put it into judiciary custody. Her argument was that this was a municipal matter and a federal court judge is beyond her jurisdiction to overrule a provincial court on a provincial matter. Moreover, she verbally threatened Judge Alsina that she will ask the Supreme Court to intervene if Alsina continues to annul these same-sex marriages.

Meanwhile, judges also permitted two more marriages: Martin Canevaro (President of the LGBT group *100% Diversidad y Direchos*) to Carlos Alvarez and Alejandro Luna to Gilles Grall. The second wedding is interesting because Grall is a French citizen so this marriage is especially important as it provides a pathway for him to gain Argentine citizenship. The Luna/Grall marriage was also annulled by Alsina, but it was done before Justice Liberatori told her to stop annulling all of the marriages.

Jurists in Argentina are currently debating who is in the right on all of these legal questions. First, did Administrative Judge Seijas have the authority to declare a portion of
the federal Civil Code unconstitutional? According to Constitution, only federal court judges are supposed to rule on Constitutional questions. However, she Seijas based her judgment on the Buenos Aires Constitution so maybe she was not out of bounds. Second, was Federal Judge Alsina within her jurisdiction to overrule a provincial judge? After Constitutional Reform in 1994, the city of Buenos Aires received a great deal of autonomy from the federal government so it is unclear whether a federal court judge can overall a decision that was made within a provincial court even if that municipal judge perhaps was out of order herself (Raznovich 2010). Finally, even if Alsina was out of line, could just another Administrative Judge (Liberatori) simply overturn a Federal Judge’s decision? If Alsina was stepping out of her jurisdiction ruling on a provincial matter, it would seem that Liberatori also could not overturn a decision made within another jurisdiction at the federal level. It could be that all or even none of these judges are within their authority or jurisdiction. The final word is still out but the Civil Registry office in Buenos Aires has simply been following whichever judge rules last.

Interestingly, even though the law on same-sex marriage seemed much clearer in Argentina than in Brazil, we have ended up with the exact same phenomenon in both countries: inferior court judges have ruled on both sides of this question allowing some couples to marry while turning others away. In Argentina this is a relatively new phenomenon as neither social movement organizations nor same-sex couples pursued litigation as a tactic until recently. Moreover, there seems to be a lot of social pressure on the high court to consider the earlier cases now.
This brings us to our final question with regards to Argentina: now that we see inferior courts producing inconsistent opinions on this issue, could the Supreme Court effectively settle this question? In other words, does it have the institutional means to either settle this question within the judiciary or to pressure the either legislative or executive branches to take action? Finally, has the high court given any clues about how it will decide on this issue?

For the Supreme Court to make an affirmative decision for same-sex couples, it would currently need an affirmative vote by at least five of the seven justices (Zaffaroni 2008). The reasons for this are rooted in changes in the structure of the court over the past two decades. In the 1990s, Carlos Menem increased the number of Supreme Court members from five to nine as a means to increase his influence on the court. After all, he was able to appoint these additional four justices once the change was approved in the Congress. With this change, the majority necessary to make a decision increased from three to five.

However, in the past decade there has been general agreement that the court is too big with nine members and that it should return to its original size of five. Upon taking office in 2003, one of the first things Néstor Kirchner did was clean out the Menem wing of the court using impeachment (or the threat of impeachment) and was able to remove five of sitting justices for corruption (Helmke 2005b: 161-2). However, he has not reappointed all of these positions, leaving the current size of the court at seven. But because the rules have not formally lowered the number of the court to five, the majority to make a decision remains at five instead of three. Current President Christina Fernandez
de Kirchner has introduced a bill lowering the number of justices from nine to five (and the number to reach a decision a simple majority of sitting court justices), but this legislation is still pending in Congress.

Whereas a year ago the courts were very silent on the issue of same-sex partnership recognition, many visible allies throughout all levels of the Argentine judiciary are stepping forward today, including some on the Supreme Court. Well-known within Argentina but not often discussed publicly in the news, the Supreme Court has an openly gay justice, Eugenio Raúl Zaffaroni. Appointed by President Néstor Kirchner in 2003, Zaffaroni has a reputation as a firm supporting for the individual rights guaranteed in the Constitution. One cannot help but think that his appointment to the court would not only bring an affirmative vote for gay marriage, but working with him as a colleague would also influence the votes of other justices on the high bench.

Moreover, in February 2010, when the gay marriage bill was still being debated in committee and the first same-sex couple had already received their marriage license as a result of a judicial decision, an unidentified member of the Supreme Court gave an interview with Página/12, one of Buenos Aires’ main newspapers. In the article, which was featured on the front page, this member of the high court clearly stated both the opinion of the court on this issue and how he/she thought that it should pay out politically (in the courts vs. the legislature). First, when asked for an opinion, he/she stated “It is a clear case of supervening unconstitutionality, the same as the divorce law,” which was declared unconstitutional years earlier (Wainfeld 2010). Moreover, this justice added that at least a majority of the court felt the same way. Finally, the judge said that the only real
debate within the court was over “whether we should promptly make a ruling on the cases before us or wait for Congress to decide on this issue” (Wainfeld 2010).  

This information was confirmed to me through electronic correspondence that took place in May 2010. My source went further than the Página/12 article however and stated that the court is unanimous in its opinion (i.e. it is not just a majority) that the Civil Code as currently written is unconstitutional. Moreover, three of the judges believe the court should rule one of its current cases now, two believe they should wait for the Congress to vote on the issue, and two are undecided. This being the case, the court today appears to have a functional majority (five out of seven) necessary to change the law.  

To scholars of Latin American political institutions, this represents an interesting development because it appears that the Supreme Court is essentially threatening the two branches: if they do not quickly pass a same-sex marriage bill, the high court will rule in one of its many incidental cases that Articles 172 and 188 of the Civil Code are unconstitutional, effectively legalizing same-sex marriage throughout the country with its power to make this decision binding on all of the inferior courts in the country.  

The Future in the Courts?  

It appears that the judicial branch represents a possible path for same-sex partnership rights in both countries today as both institutional powers and allies in high places favor change. In Brazil, the court all but said that it will rule in favor of stable unions for same-sex couples through an abstract lawsuit, and now they have the

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34 The source insisted on anonymity because of the sensitivity of assessing the outcome of a case still in litigation.
institutional means to give this ruling immediate *erga omnes* effects for LGBT families throughout the country. However, it is still not clear for us why this will probably happen in the courts first instead of legislation from the Congress or through some type of executive decree. In Argentina, the Supreme Court also appears on the verge of granting marriage rights to gay and lesbian couples if the other two branches do not quickly act first; therefore, it is also worth looking at the history for action (or lack thereof) within these bodies as well. The next chapter takes on this task: it closely examines how LGBT individuals and social movement organizations have interacted within both the legislative and executive branches of the state in their battle to secure partnership rights.
CHAPTER 5: LEGISLATURES AND PRESIDENTS

Although LGBT couples and social movement organizations have used litigation strategies to fight for partnership recognition rights, they have not confined their activities to the courts; groups in both countries have petitioned both the legislative and executive branches to pass laws recognizing same-sex couples. According to basic democratic theory, the legislature is the branch charged with writing the law so it naturally seems fit that here is where social movements could start to fight for changes in the code. Also, Latin American presidents are notorious for having an overwhelming amount authority to implement their agendas (for example, see O'Donnell 1994) so perhaps an ally in the executive branch could also either change the law by decree or push a bill through the legislature.

Because so much of policymaking is the result of some interaction between these two branches, naturally they should be studied together. Upon close examination of the history of SSPR legislation within each these institutions, we see the same general phenomenon in the legislative and executive branches for both countries that also exists in the judiciary: Brazil has had the allies for many years, Argentina has had institutional structures with few veto players, but neither has had both of these at the same time (until recently).

Brazil has long had elite allies but the institutional structures are so dismissive of changes to the status quo that SSPR legislation seems impossible now and anytime in the near future. The first piece of legislation pushing for civil unions in Brazil was introduced in the Chamber of Deputies in 1995. Since then it has had the continued support of a
nonpartisan legislative coalition specifically organized around issues of sexuality in addition to having a place within the official platform of the Workers’ Party (PT), the party usually with the largest number of seats in the Congress. However, the institutional rules of the Chamber of Deputies make it nearly impossible for any divisive pieces of social legislation to get through the body. Therefore, any bills recognizing same-sex couples have easily been defeated by parliamentary tactics for almost two decades and the issue has never even come up for a full vote.

The executive branch in Brazil exposes similar story. Since 2003, LGBT groups found an ally in the presidency when Lula de la Silva took office. In recent years, he has spoken out very forcefully about the need to pass civil union legislation. One would think that going through the executive branch in Brazil would be an easy route for same-sex couples because Brazilian presidents are notoriously known for having strong decree powers. However, this power only covers certain types of laws (e.g. those of national emergency or related to the budget), and it has weakened over time as constitutional reform in 2004 limited when it would be used. Moreover, Brazilian presidents have often governed from a position of “minority presidentialism” making it very costly for any president to use his/her political capital to push through controversial or decisive pieces of legislation in a chamber with weak party discipline.

Argentina has faced the opposite dilemma: both the formal rules and the informal practices are conducive to change as its system has fewer veto players; however, few elite allies (until just very recently) have expressed a desire to change the status quo. Although LGBT movements in both countries began calling for some type of partnership
recognition around the same time in the early 1990s, legislation was not introduced into
the Argentina Chamber of Deputies until several years after Brazil. Same-sex union
advocates in Argentina simply could not find anyone to submit a bill. Once they were
able to secure a sponsor, other allies were hard to come by and no bills were even
discussed in committee for years after the first introduction.

The executive branch in Argentina is similar. Historically, the presidency has had
an enormous amount of sway with members of the legislature, and Congress has more-or-
less functioned as a rubber stamp on his/her initiatives. Unfortunately, all of Argentina’s
presidents for the past two decades have been (at best) indifferent to LGBT issues or (at
worst) openly hostile. Therefore, the executive branch in Argentina has never introduced
a single partnership recognition initiative.

However, in the past few years, support for same-sex marriage has been growing
in Argentina both within the Chamber of Deputies and the Senate as more representatives
from across all political parties have cosponsored and announced their support for the
legislation. As a result of this new development (now the Congress has both allies and
institutions conducive to change), pressure of the Supreme Court (as discussed in the last
chapter), and even a nod of support from the Presidency, Argentina appears to be on the
verge of approving legislation granting full marriage rights to same-sex couples.

In Brazil, things do not look so promising in the near future. The legislative and
executive branches do not have the institutional means to overcome the opposition, even
as the number of allies has grown. Unless there are some changes to these institutions (as
there were with the judiciary in 2004), laws recognizing same-sex couples in the form of
stable or civil unions will probably not come from the legislative or executive branches in Brazil.

This chapter will begin with a look at the history of SSPR initiatives in both countries, and then explain why these pieces of legislation have seen similar fates. Next, it will explore the allies and institutions within the executive branches in both countries, and explicate why neither has changed the law to recognize same-sex unions. It will conclude with a look at future possibilities within both of these branches.

**The Legislative Branch**

The national congress represents the first—and possibly the most obvious—avenue for LGBT activists to secure partnership recognition. For an LGBT movement to be successful in the legislative branch, they will need elite allies in positions of authority that can move an initiative along, as well as not have opponents occupying offices with veto power. For each legislature, these positions will vary as each body has its own rules about who can advance legislation and who can stop it.

For example, in some bodies, committee chairpersons serve as the gatekeepers of all initiatives that fall within their jurisdiction, while in others party leaders or the assembly heads can introduce a bill directly to the floor bypassing the committee. If an LGBT movement does not have an ally filling one or both of these positions, progress will not happen. Moreover, other bodies may require the approval of numerous actors for a bill to come up for a full vote. If any one of these veto players is firmly opposed to the legislation—and is willing to use that power—it will be stopped in its tracks. Passage will be more likely in legislative systems where there are many allies with few veto points.
For many years, SSPR bills have stalled in both congresses but for very different reasons. Brazil had had many allies, but also many veto players. Even though many supporters have been pushing for action for years, the religious conservative opposition has been able to repeatedly thwart their attempts because of chamber rule require the consent of all major party blocs for a bill to be introduced on the floor. Argentina, on the other hand, has had very few allies and very few veto points. It has not had elite allies in positions that could advance same-sex union making it easy for veto players to turn down any proposal. Only recently has legislation progressed in Argentina as more allies have come aboard and occupied key leadership positions.

**SSPR Legislation in Brazil**

Brazil is the first country in Latin America to see a partnership recognition bill introduced at the national level. In 1995, Deputy Marta Suplicy of the Workers’ Party (PT-São Paulo) submitted Project of Law 1151/1995 to the Chamber of Deputies, calling for the recognition of civil unions for same-sex couples. This bill would have created a national civil union registry, open only to same-sex couples, modeled after the national registry for married couples. Soon after the bill was introduced into Congress, it was modified by Deputy Roberto Jefferson (PTB-Rio de Janeiro) and the commission in charge of it in a very important way. Because Suplicy’s original bill contained no references to whether a couple in a civil union could adopt children, the title of the recognition was changed from civil union to civil partnership in order to clarify that this

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35 For a lengthy discussion of this bill’s history in the Congress, see Mello (2005a) and Mello (2005b). You can find the full legislative history for this and other projects submitted to the chamber of deputies at http://www.camara.gov.br/internet/sileg.
would not give the partners the ability to adopt (Mello 2005b). It was believed that this modification was necessary in order to convince some legislators on the fence to support the bill. However, it was not enough, and the bill sat in the legislature for many years never coming up for a full vote.

In 2001, Deputy Jefferson reworked the original 1995 proposal into Project of Law 5252/2001, which would recognize same-sex couples as Solidarity Pacts (*Pactos de Solidariedades*). Much in the same way that he amended Project 1151 to make it more amicable to opposition, this new legislation removed all references to same-sex couples to alleviate fear among conservatives that the legislation would also create new “special rights” for homosexual couples. As such, this new institution would be open to same-sex and opposite-sex couples alike. However, it also never received an up-or-down vote in the Chamber.

One of the major sticking points that kept both of these bills from coming up for a full vote was the belief by some that these pieces of legislation were unconstitutional because the Constitution does not give the National Congress the power to sanction new types of family entities. As a result, two bills were considered in 2003 to revise the Constitution. In the first attempt, Deputy Maria do Rosário (PT-Rio Grande do Sul) submitted Project of Law 66/2003, which would have modified Articles 3 and 7 of the Citizens Constitution. The amendment to Article 3 would have specifically added sexual orientation as a class against which the federal government has a duty to protect. To Article 7 it would have added sexual orientation, as well as a number of groups, against
which people could not discriminate.\textsuperscript{36} Although these bills would not have directly granted same-sex couples the right to marry or form stable unions, they would have strengthened judicial arguments that denying partnership rights is unconstitutional. However, they never received a vote.

The second attempt in 2003 to amend the Constitution for SSPR rights was submitted in the National Congress by Senator Sérgio Cabral (PMDB-Rio de Janeiro). Project of Law 70/2003 was much more clearly a bill for the LGBT community as it specifically aimed to amend Article 226, Paragraph 3, to say that the state must recognize both heterosexual and homosexual relationships as a stable union. To win over the conservative opposition, this amendment also included language affirming that marriage was only between a man and a woman. Even though it would have codified stable unions for same-sex couples in the Constitution, it would have specifically excluded the possibility for state recognition of same-sex marriage, closing the door in the future for a possible court ruling granting marriage rights to lesbian and gay couples. However, this compromise was not enough and, like every other bill discussed so far, this constitutional amendment also did not make it to the floor of the Chamber of Deputies for a vote.

Most recently, in March 2009, Deputy José Genoino (PT- São Paulo) and Roberto Gonçale from the Brazilian Bar Association (\textit{Ordem dos Advogados do Brasil, OAB}), in coordination with ABGLT and the Parliamentary Front on LGBT Citizenship, presented

\textsuperscript{36} One would expect that this bill would have had a better chance of passage because it did not just give include sexual orientation, but many other characteristics as well, which could have helped to build a broader political coalition. The original text of Article 3, for example, only included “origin, race, sex, color, and age” as protected category. Bill 66/2003 would have added to this list ethnicity, religious creed, political leanings, socio-economic condition, physical condition, and mental state, in addition to sexual orientation.
a new partnership recognition bill to the National Congress, Project of Law 4914/2009. This marks a renewed effort on behalf of the LGBT movement to see progress on this issue. According to the first draft of this bill, it would amend the Civil Code to include the following language after Article 1727:

The previous articles of this title apply, with the exception of Article 1,726 to relationships between persons of the same sex, guaranteeing all rights and obligations.37

Essentially this bill replaces Project 1151 and would modify the Civil Code to make same-sex couples eligible to form stable unions. Unlike 1151, however, it would not create a separate institution of civil unions as other countries and localities have done (e.g. France, Buenos Aires)—it would just include same-sex couples in an existing legal category. Moreover, the explicit language that this provision does not apply to Article 1726 of the Civil Code—which states that anyone eligible to form a stable union is also eligible for marriage—demonstrates that the movement is not looking for marriage in the foreseeable future (whether this is political or ideological reasons). However, it is not likely that this bill will have any more success than any of its predecessors.

During every step in the legislative process for the past fifteen years, the LGBT community has compromised on the issue of same-sex partnership recognition, but nothing seems to be enough to satisfy the conservative opposition in the chamber. The original Project 1151 submitted by Deputy Suplicy called for civil unions, which would have granted the same-sex partners all of the legal rights of marriage without the name, was modified by Deputy Jefferson to become civil partnerships, clarifying that marriage

37 Translated by author. Original text: “São aplicáveis os artigos anteriores do presente Título, com exceção do artigo 1.726, às relações entre pessoas do mesmo sexo, garantidos os direitos e deveres decorrentes.”
adoption rights would not be granted. When this was not enough, Project 5252 was watered down further to pacts of solidarity, granting couples even fewer rights, to make it more satisfying to opposition lawmakers. Moreover, neither of the constitutional amendments could muster up enough support to make it to the floor for a vote. This being the case, it is not clear that even the latest reiteration will have much success. After an examination of Argentina, we will consider why these initiatives have run into so many difficulties.

**SSPR Legislation in Argentina**

Like in Brazil, the first calls for legislation in Argentina recognizing same-sex couples happened in the early 1990s. Carlos Jáuregui, President of *Gays por los Derechos Civiles* (Gays DC), pushed for the Congress to amend the Civil Code to allow same-sex couples full marriage rights; however, no action was taken due to a lack of any legislative allies at the time (Comunidad Homosexual Argentina 2010a).

A few years later the LGBT community began to see some progress in the Congress on this issue. At the behest of group *Sociedad de Integración Gay Lésbica Argentina* (SIGLA), the first bill calling for the recognition of same-sex couples in the form of a civil union was introduced by Deputy Laura Christina Musa (UCR-Federal Capital) on December 11, 1998, in the form of Project of Law 7816-D-98.\(^{38}\) Because this bill was introduced at the very end of the legislative calendar (the session ended just one

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\(^{38}\) To read the specifics of this first bill presented by Deputy Musa, see: [link to the specific bill](http://www3.hcdn.gov.ar/folio-cgi-bin/om_isapi.dll?clientID=1285737044&E1=&E11=&E12=Laura%20Musa&E13=&E14=&E15=&E16=&E17=&E18=&E2=diputados&E3=116&E5=ley&E6=&E7=&E9=&headingswithhits=on&hitperheading=on&infobase=proy.nfo&querytemplate=Consulta%20de%20Proyectos%20Parlamentarios&querytemplate=Consulta%20de%20Proyectos%20Parlamentarios&record={10ED5}&recordswithhits=on&softpage=Document42&submit=ejecutar.)
week later), and the general lack of interest among the rest of the deputies in the chamber, this bill did not receive a hearing in any of the three relevant committees: General Legislation; Family, Women, and Minorities; or Human Rights and Guarantees. In 2000, the exact same bill was reintroduced on March 24 as Project of Law 1158-D-00 by Deputy Margarita Stolbizer (UCR-Buenos Aires Province). However, in both cases there was not a single cosponsor.

Deputy Laura Christina Musa returned to the chamber in 2002, but this time as a member of the political bloc Afirmación para una República Igualitaria (ARI). Over the next two legislative sessions in 2002 and 2004, she again reintroduced the exact same legislation as Projects of Law 4424-D-02 and 5194-D-04, respectively. This time she was able to secure a small number of cosponsors: nine in 2002 and seven in 2004, nearly all of which were members of ARI. However, in a body with 257 members, this still represented very few proponents; moreover, ARI as a party controlled less than 10 percent of the seats in the Chamber of Deputies (and just zero or one out of 72 in the Senate), making them a very small political coalition at this time. Clearly, this initiative did not have many allies.

Meanwhile, same-sex partnership recognition became a much more pressing issue at the local level. In 2001, CHA focused its attention on passing a bill recognizing civil unions in the autonomous city of Buenos Aires. Finally, on December 13, 2002, they

39 Her change is party was less the result of her “jumping ship,” but really coincided with the meltdown of the UCR as a viable political party.
were able to win passage of Law 1004 ultimately by a lopsided vote of 29-10, making it the first territory in Latin America to recognize the relationships of same-sex partners as civil unions. The civil effects of this bill are rather limited though because marriage is regulated at the federal level and only the national government can confer many of the benefits and rights that come along with marriage. However, couples who enter into a local civil union are able to receive health insurance and pension rights for their spouse if their employer is the city government, but it does not grant them the inheritance or adoption rights (Cigliutti 2008). To enter into a civil union, a couple just needs to apply for a license at the Civil Registry office in the Federal Capitol. César Cigliutti and Marcelo Suntheim of CHA were the first couple to be united on the same day the law went into effect on July 18, 2003.

A number of other local jurisdictions have followed the lead of Buenos Aires. Southern province Rio Negro has a reputation for being a national leader in policy innovation having passed years ago very progressive laws on mental health and reproductive rights (IGLHRC 2002). Just four days after Buenos Aires passed Law 1004, Rio Negro legislature passed Law 3736 in its general terms on December 17, 2002, and completely March 22, 2003. Remarkably, the bill only received one vote against it, and the Catholic Church remained silent on the issue (IGLHRC 2002). This bill, spearheaded by Regina Kluz (Alianza), works slightly differently than the bill passed in the capitol: couples can simply go to the public registry office and receive a notarized certificate of their union, but the local office does not maintain a registry. Moreover, Buenos Aires allows same-sex and opposite-sex couples to form civil unions, but in Rio Negro it is
only open to same-sex pairs. Not many in Argentina know about the law here: five years after it went into effect, only ten same-sex couples had taken advantage of this new opportunity and registered their unions (Rio Negro Online 2008).

Several years later, two more localities adopted same-sex civil union laws: the city of Villa Carlos Paz in 2007 and the province of Rio Cuarto in 2009. Finally, civil union legislation has also been introduced in the provinces of Chaco, Santa Fe, Córdoba, Corrientes, and Mendoza, but no action has yet been taken (Piatti-Crocker 2010: 62).

Meanwhile, back at the federal level, CHA made plans to present a civil union bill to the National Congress and drafted a bill with the help of Judge Graciela Medina. The bill carried over many of themes from the civil union legislation at the city level, but it also included many important federal rights such as immigration, inheritance, and adoption (Cigliutti 2008). In December 2005, Senator Diana Conti (FREPASO) submitted this bill to the Senate, but it was never even taken up in committee. Although CHA had some allies within FREPASO, general support throughout the chamber and across parties was lacking.

The year 2007 saw a dramatic change. FALGBT, with the support of INADI, submitted two pieces of legislation calling for the recognition of same-sex marriage: Deputy Eduardo Di Pollina (Partido Socialista-Santa Fe) submitted 1907-D-07 on April 30 in the Chamber of Deputies and Senator Vilma Ibarra (FPV-Buenos Aires) introduced 3218-S-07 in the Senate on October 17. Something had changed dramatically from the earlier pieces of legislation as the bills found 21 cosponsors from all of the major parties in the Chamber of Deputies but still just one supporter in the Senate. However, this time
around too, both proposals lagged in committee and never came up for a full vote. The year 2007 was also a presidential and parliamentary election year. Ibarra was the only Senate sponsor and left the chamber a month later after being elected to the Chamber of Deputies. Moreover, both President Néstor Kirchner and President-elect Christina Fernandez de Kirchner remained silent and showed neither their support nor their opposition.

In the next two years, CHA and FALGBT separately submitted two distinct projects of law both aimed at securing a nationwide policy on same-sex partnership recognition. At the behest of CHA, Deputy Silvia Augsburger (Partido Socialista-Santa Fe) introduced Project of Law 1737-D-09, which would create a civil union registry at the national level, functioning as an alternative institutional arrangement to marriage for both heterosexual and homosexual couples. Keeping in line with the political philosophy of CHA, couples who take part in a national civil union under this bill would have all of the rights as married couples, but not have all of the responsibilities and regulations of marriage (e.g. adultery would not be illegal and it would be much easier to dissolve this union). This piece of legislation had four cosponsors. The second piece of legislation, 0574-D-10, was submitted by Senator-turned-Deputy Vilma Ibarra (Nuevo Encuentro Popular y Solidario-Federal Capitol) along with ten other cosponsors on behalf of FALGBT. This bill included many modifications to the marriage section of the Civil Code, but its most notable change would be to transform all references of “husband and

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42 Information on all of the pieces of legislation in Argentina can be found at: http://www.hcdn.gov.ar.
wife” (hombre y mujer) to “contracting parties” (contrayentes), essentially making marriage completely gender-neutral.

Both of these bills were referred to two committees in the Chamber of Deputies: 1) the General Legislation Committee and 2) the Committee on Family, Women, Children, and Adolescence. On April 15, 2010, a joint meeting of the two committees merged together both of these pieces of legislation into Order of the Day 197/2010 and approved the bill by overwhelming margins to send it to the full chamber.43 This combined piece of legislation is more or less the FALGBT bill as it would grant full marriage and adoption rights to same-sex couples. However, both CHA and FALGBT united and together lobbied very hard for its passage.

The project was originally scheduled to come up for a vote on April 28, but it was tabled for another week because a separate bill on taxes ran over its allotted time. The legislation finally did come up for a discussion in the full chamber on May 5. The leaders of three political blocs announced their support for the legislation, and all blocs released their members to “vote their conscience” meaning that there would be no punishment for voting against their party leadership.44 After 12 hours of debate, the bill was finally approved by a vote of 127-111.

This bill is now scheduled for a vote in the full Senate on July 14. At the time of this writing, 29 senators have announced their support, 28 have announced their


44 The five largest political blocs in Argentina today are: PJ-FPV (Frente para la Victoria), PJ (Peronismo Federal), UCR (Unión Cívica Radical), CC (Coalición Cívica), PRO (Propuesta Republicana). The two dissident party leaders were from the PJ and the PRO. Moreover, according to Bleta (2010), nearly all political parties in Argentina have suggested that they do not want this issue to become a partisan issue and divide the society.
opposition, 14 are undecided, and one will abstain (Ybarra 2010). However, these numbers could change before the final vote as legislators often shift their votes at the last minute in Argentina. Right now, things look like they could go well for same-sex marriage advocates as the heads of four major political blocs (FPV, UCR, CC, and Partido Socialista) have announced their support, although all party members have been released to vote their conscience in this body as well (Llama 2010).

Explanation of Differences

Why do we see such different outcomes in these cases? The answer lies in the absence or presence of both elite allies and institutions with few veto players. The bills were not even introduced into the chambers if there were not elite allies willing to bring them forward. However, they do not make their way through these chambers unless allies occupy important positions and few veto players can stand in the way.

The difficulties that the LGBT movement has faced in the Brazilian legislature are not unique to the issue of SSPR as numerous roadblocks are imbedded within the institutional structure of the Brazilian Congress. Over the past two decades a large number of studies have examined the workings of its Congress (Ames 2001, 2002; Ames and Power 2007; Figueiredo and Limongi 2000; Mainwaring 1997, 1999; Pereira et al. 2005). Almost all are in agreement that Brazil faces a constant and reoccurring crisis of governability: various institutional features create an excessive number of veto players, which prevent it from adopting innovated policies that deviate from the status quo (Ames 2001: 267-8). According to Barry Ames, this happens even on issues where there is wide consensus among policymakers from diverse political parties. If even large political
coalitions cannot pass policy of great national significance, what is the likelihood that a small, niche movement like the LGBT community will have better luck? Many of the same features that hinder the passage of general legislation has also stood in the way of the LGBT movement.

First, political parties in Brazil are in a constant state of disarray, hindering their potential to be conduits of large-scale change. According to Ames and Power, “contemporary Brazil’s party system can be described as highly fragmented, highly competitive, highly volatile…weakly institutionalized… [and] extremely uneven in terms of parties’ commitments to ideology and organization” (Ames and Power 2007: 180). Electoral rules within the Chamber of Deputies produce a large number of parties. The result is that Presidents are always constantly living in a situation of minority presidentialism, meaning there are rarely strong legislative coalitions completely in line with the President’s agenda (Mainwaring 1997). Moreover, because of the incentives built into the electoral system, legislators owe more to their local district than they do to their political party (Ames 2002: 193). Consequently, “Parties in Brazil rarely organize around national-level questions; the Congress, as a result, seldom grapples with serious social and economic issues” (Ames 2001: 6).

A second institutional constraint on the Congress is that bills proposed by individual legislators often take a backseat to those proposed by the executive. As I will discuss more in the next session, the President has the ability to introduce legislation and also move it to the top of the Congressional agenda. As a result, very little legislation that originates in the Congress actually gets passed. According to a study done by Figueiredo
and Limongi (2000), only 176 of the 1,259 laws approved in the Chamber of Deputies between 1987 and 1994 originated in the legislature; the rest came from elsewhere—997 from the President and 86 from the judiciary. While this feature does not necessarily single out LGBT legislation specifically, it does signify that very little agenda space is available to bills born in the Congress, and lesbians and gays have to compete with a wide range of other interests to get attention.

Finally, even though individual legislators have little to no allegiance to their parties, power within the Brazilian Congress is highly centralized within the leadership of each party preventing individual legislators from getting their bills on the agenda. In this environment it is nearly impossible for a bill to come up vote without the permission of the president of the chamber and the major party leaders (Figueiredo and Limongi 2000: 164). If a piece of legislation faces any opposition, it can easily remain stalled in committee. In the fourteen years since the first civil unions project was first submitted to Congress, this legislation has never made it out of committee or received a full up-or-down vote.

Currently, more than 30 political parties are represented in the National Congress, with each chamber run by coalitions because no single party has a majority in either body. Even though the LGBT movement has had strong allies for years within the Chamber of Deputies, it has not been able to overcome many of the institutional hurdles as outlines above.

Even though movement for civil unions in Brazil has allies in the Chamber of Deputies, they have thus far been thwarted by the institutional features outlined above.
The Brazilian Democratic Movement Party (Partido do Movimento Democrático Brasileiro, PMDB) has the plurality of seats in the Chamber of Deputies—89 out of 513 seats (17 percent). This party is considered a “big tent” with no clear political bent as its members come from all over the ideological spectrum. Together, representatives from the PMDB and the PT (part of the ruling coalition) have introduced the most proposals to recognize same-sex unions. However, these leaders have not been able to use the leadership of the chamber nor their party alliances to advance their legislation.

As discussed above, other deputies from within the PMDB and the PT have no incentive to consider the same-sex union bills and would rather focus on their own initiatives. For this reason, the chairpersons who govern the relevant committees have never brought any of the initiatives up for a vote in committee. Moreover, the current President of the Chamber, Michel Temer (PMDB-SP), has never made this position on these bills clear, making it unlikely that he would use his clout to bring it to the floor. However, even if he did push for a floor vote, an opposition leader would probably use a procedural tactic to stop it. Again, as stated earlier, any bill that comes to the floor of the chamber needs at least the consent of all of the main ruling parties. Just threat of shooting it down has kept it from being introduced before the whole body. There are just too many veto players here that are against the legislation.

The situation is even more precarious in the Senate. This body does contain allies who in the past have public stated their support for same-sex civil unions. However, opposition parties are in control of both the committee leadership position and the chamber itself. The Democrats (Democratas) have a plurality—18 out of 81 seats (22
percent)—and they are closely allied internationally with Christian Democrats, a frequently opponent of LGBT rights based on religious beliefs. Moreover, they currently consider themselves the opposition to the PT, making them less likely to support anything proposed by the executive branch. For these two reasons, one ideological and the other political, any legislation in the Senate to recognize same-sex couples is not likely to pass soon.

All of these structural constraints do not mean that LGBT movements are without hope in the Congress. In order to combat the many institutional hurdles within the legislative branch, ALGB helped form the Mixed Parliamentary Front for Free Sexual Expression (Frente Parlamentar Mista pela Livre Expressão Sexual) in 2003 to advance the interests of the LGBT community in the National Congress. In 2007, the name of the front changed to Parliamentary Front for LGBT Citizenship (Frente Parlamentar pela Cidadania GLBT) and the number of members associated with it has increased significantly. As of today, at least 220 members from both houses of the National Congress consider themselves members of this front, representing all political parties with the exception of one (Reis 2008). However, because the National Congress is made up for 513 Deputies and 81 Senators (for a total of 594), clearly the vast majority of representatives are still not a part of the front. Moreover, it will still be difficult to overcome conservative and religious opposition groups who also have created powerful fronts (Serbin 2000: 156). Catholic and Evangelical groups also have their own

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45 For more information on the Front, see http://www.aliadas.org.br/site/congresso/frente.php.
46 This brings the name of the parliamentary front in line with the master frame that social movements in Brazil have been using post-1985. For more information, see Hochstetler (2000: 166).
Evangelical Parliamentary Front (e.g. Frente Parlamentar Evangélica) standing in opposition to almost any pro-LGBT legislation. Usually one of the leaders of the major political parties is a member of the Evangelical Parliamentary Front and would definitely shoot down any legislation that might make it to the floor.

The legislature in Argentina works very differently: parties are much more disciplined and the majority party controls the agenda. We saw very little progress on civil unions or same-sex marriage in its Congress for many years until allies from many political parties came around; once the initiative gained the support of the governing party, it quickly passed the Chamber of Deputies and is poised to be accepted in the Senate as well.

Unlike Brazil, party loyalty is very strong in the Argentine Congress. In a study of roll call data in the Argentine Chamber of Deputies, Mark Jones (2002) finds that party discipline is relatively high for a number of reasons. Most saliently, the Chamber of Deputies elects its members from closed party lists in a proportional representative electoral system, and local party bosses set the order on these lists. It would appear on the surface then that individual legislators, like in Brazil, would be beholden to provincial interests rather than the centralized party leadership. However, because of the unique federalist nature of fiscal policy is made in Argentina, centralized party leaders can use the power of the purse to keep local party bosses in line (Jones 2002: 160). So the party leadership typically controls their congressional members through the local party bosses. This is especially true for the party in control of the presidency as he/she can more easily
direct resources (Jones 1997: 279). The result is that political parties tend to be rather disciplined even in cases where representatives are freed to “vote their conscience.”

Argentina historically has been a two-party system for the past fifty years as power has alternated between the Peronists (Partido Justicialista, PJ) and Radicals (Unión Cívica Radical, UCR). However, in the 1990s, the country experienced a partial collapse of its party system as the UCR disintegrated but the PJ stayed powerful and adaptable to the change (Levitsky and Murillo 2005). Other political blocs also rose and fell during this time with the two big names being FREPASO and la Alianza. The current party structure is organized around a few major blocs. The PJ party has split into two different factions but are technically still the same party: 1) FPV-PJ (Frente para la Victoria) under the leadership of the Kirchners and the PJ (Peronismo Federal). The major opposition groups are the UCR, CC (Coalición Cívica), and PRO (Propuesta Republicana).

In the latest same-sex marriage vote in the Chamber of Deputies, almost all parties technically freed their candidates to vote their conscience so one might think that party discipline does not matter for this issue. However, it also is clear that the FPV stayed more cohesive than the other major parties. The FPV vote was 46 for and 29 against whereas all of the rest of the parties combined voted much more in parity at 81 to 82. Clearly many members in the FPV were convinced to following the party leadership even when they were told that they did not have to. Many legislators waited until the last minute to decide their vote until they knew how Néstor Kirchner was going to cast his vote (On Top Magazine 2010). Being the de facto head of the FPV and potential future
President, he could control their political fate. Moreover, according to Jones, when party members strongly oppose a position taken by a party, they frequently leave the floor of the chamber at the time of the vote so as not to go on record opposing their party. In this case, ten of the 85 FPV members were not present for this vote out, while only six out of 169 of the members from all of the remaining parties were absent. Clearly many members of the party did not support same-sex marriage, but they were unwilling to defy their party over it.

Moreover, the FPV in Argentina has much more power to set and control the legislative process than the PT in Brazil, and its support is crucial for any law to pass. More than 47 percent of all bills passed originate from members of Congress, not the executive branch, suggesting that representatives can draft their own legislation and not just be a rubberstamp on the executive branch (Jones and Hwang 2005). The majority party also tends to control the agenda of the chamber from start to finish (Jones and Hwang 2005: 134-6). The result is that their bills usually receive full consideration. Finally, according to Jones and Hwang, not a single piece of legislation was approved in the Argentine Congress from 1989-1999 without at least a majority of PJ members voting in the affirmative (2005: 136).

When the earlier civil union and same-sex marriage bills were introduced in Argentina, they never had much support among the major parties. However, this story has changed in the past few years. The Kirchner-led faction of the Peronist party—the Justicialist Party-Front for Victory Party (Partido Justicialista-Frenta para la Victoria, FPV-PJ)—is currently in control of both houses of Congress, with a plurality of the seats
in the Chamber of Deputies (85 out of 257) and in the Senate (35 out of 72). Party mechanisms have played an important role in garnering support for the current legislation as FPV members or their very close allies have occupied the positions that could have potentially stopped this legislation from receiving a full vote.

Vilma Ibarra, the author of the legislation, is very closely connected with the FPV and has played a crucial role carrying the legislation forward. Although today she is a member of Nuevo Encuentro Popular y Solidario, this party is very closely aligned with the FPV and votes with them on most major issues. Back in 2007 Ibarra was a member of the FPV and listed as the second candidate on the closed-list ballot for the Chamber of Deputies. Her connections with the ruling party are strong. Beyond just being the author of the legislation, she also was the chairperson of the General Legislation Committee, serving as an important gatekeeper for the bill. Using her power in this position, she was able to steer the 2010 same-sex marriage bill to a vote before the whole chamber.

The same-sex marriage bill even had support at the top of the FPV. President Christina Fernandez de Kirchner announced that she would not veto the legislation, giving the green light to members of her party that she at least tacitly supports the bill. Moreover, her husband, Néstor Kirchner, is currently a deputy and de facto head of the Front for Victory also announced his support and cast his vote for the bill. Finally, Agustin Rossi, the FPV party head in the Chamber of Deputies announced his strong support for same-sex marriage arguing that civil unions were not enough (On Top Magazine 2010). In Argentina then, every single veto player in the process supported the same-sex marriage bill, however, any piece of legislation that is passed by a congress in
either of these countries, that does not already have a supermajority of support, still
requires the approval of the executive branch or it may be vetoed (Jones and Hwang

The Executive Branch

The executive branch represents another possible avenue to advance SSPR ideas
in both nations. Countries in Latin America are often called “delegative democracies”
because their chief executives have so much power and influence (O'Donnell 1994).
Perhaps with this authority, a supportive president could enact a SSPR law and set a clear
national policy for same-sex couples. What we see is the LGBT movement in Brazil has
had a staunch ally in the presidency for many years, but in Argentina gay and lesbian
couples could at the most get a confirmation that the president would “not veto” a same-
sex marriage bill. However, Presidents in Argentina today have more tools at their
disposal to implement such change by decree.

Presidents in Brazil

Since the transition to democracy in 1985, Brazilian Presidents José Sarney,
Fernando Collor de Mello, Itamar Franco, and Fernando Henrique Cardoso were all, at
best, apathetic or, at worst, against LGBT rights. Either way, very little progress was
made under their administrations (with the exception of AIDS policy). Of this group
Cardoso was probably the most supportive, announcing his support for various gay rights
measures, including civil unions for same-sex couples, ahead of the 2002 presidential
elections. However, none of these polices ever made their way into law.
Recently, the executive branch under President Luiz Inácio da Silva (Lula) has very visibly demonstrated support for the LGBT movement. In June 2008, Lula convened the first National Conference of Lesbians, Gays, Bisexuals, Transvestites and Transsexuals (Conferência Nacional de Lésbicas, Gays, Bissexuais, Travestis e Transexuais). This conference allowed the many diverse LGBT organizations throughout Brazil to meet with the heads of numerous government ministries to discuss their ideas and concerns. For many it was seen a giant step forward for the LGBT movement, giving them unprecedented access to all of the federal government agencies within the executive branch (Chamorro 2008a).

Moreover, Lula has spoken out very forcefully in support of the LGBT community. He even went so far as to say homophobia is perhaps “the most perverse disease impregnated in the human head,” and that he was “going to do all that is possible so that the criminalization of homophobia and the civil union may be approved” (Pink News 2008b). Such strong comments have thrilled many activists, excited to finally have a President be such a strong advocate for their side. In terms of same-sex partnership recognition, he has stated his clear and unequivocal support for civil unions (Pink News 2008a).

While presidential support is a very encouraging sign, it may not be enough to bring tangible results to same-sex couples. In order to see how presidential support might matter, we have to examine the powers of the presidency to bring results. Scott Mainwaring argues that while the President has quite a bit of power compared to the Congress, this authority is tempered by significant constraints (1997). Overall, these
limitations have so far prevented the President from successfully granting partnership recognition rights to same-sex couples and will probably continue to do so in the future.

The original 1988 Constitution granted the President extraordinary decree power. According to Article 62, the presidency has the ability to issue provisional decrees that take effect immediately for 30 days without congressional approval. Although originally intended for emergencies, this power has been widely used by all Presidents on a wide variety of issues, social and economic, since the Constitution came into force. Moreover, the executive could completely circumvent the legislature (unless it directly rejected the decree) by reissuing it after its 30 day expiration.

This power perhaps could have been used by past Presidents, but none of them ever did. However, because of general agreement that this power had been significantly abused by Presidents in the past, Congress in 2001 passed Constitutional Amendment 32 significantly curtailing this power (Pereira et al. 2005). This important revision now limits the issues areas over which the president can make decrees, specifically delineating that issues of citizenship and rights are excluded from this power. This presidential power was curtailed just before supportive Lula took office, essentially preventing him from potentially using it to pass SSPR through decree.

Although executive decree power cannot help LGBT groups today, the President’s power to write submit legislation to Congress and set its agenda might still prove useful. Article 64 of the Constitution grants the President the power to submit a piece of *urgent* legislation, requiring the body to vote on the bill within 45 days or it moves to the top of their agenda, displacing all other pieces of legislation (except for
those that have specific constitutional deadlines). The President has full discretion to declare what is urgent.

While this power does seem to be significant, its effects for LGBT groups are likely to be limited. Even though the President can move items to the top of the legislative agenda of the legislature, he/she still faces some of the problems discussed in the previous section about minority (or coalition) presidentialism. In order for an executive bill to pass, it still needs the support of a majority of legislators. Lula’s party (PT) controls only 83 of the 513 seats in the Chamber of Deputies and 11 of 81 seats in the Senate as of the 2006 election. To the advantage of Lula, of all the parties in the Brazilian Congress, the PT has most discipline (Figueiredo and Limongi 2000: 158-9). However, the PT is only one party in the governing coalition of the Chamber of Deputies, and Lula must still form coalitions with deputies from other parties in to pass legislation.

This is where the potential for the President to initiate a SSPR bill runs into problems. He could probably count on the support of 220 members of the Mixed Parliamentary Front for Free Sexual Expression, but it is not clear how many other members of the ruling coalition would vote for the initiative with such weak party allegiances. In order to win the support of representatives from his coalition and even opposition party members, presidents usually have to engage in costly patronage to representatives who are mainly concerned with delivering pork to their local districts (Mainwaring 1997: 84-5). Members who might even be supportive of the idea of same-sex unions many only trade their votes if the President delivers something for them in return. This type of bartering can be costly for a President, and s/he may want to reserve
it only for those issues that are at the top of the agenda. S/He may be able to do it in the Chamber of Deputies, but it would cost real, tangible resources. However, the Senate might be a really expensive (if not impossible) proposition because it is composed of a much larger proportion of conservative members.

Lula has yet to introduce a bill in to the Congress recognizing same-sex unions, even though he does have the constitutional means to put it at the top of their agenda. In this case, we need qualify how strong of an ally he really is to the LGBT community: he may be a firm rhetorical advocate of SSPR but at the same time not be willing to use all of his resources to make it a reality. So far even though he has made very favorable public statements in favor of SSPR, he still has not expended any political capital to make it so. It would be encouraging to have someone like Lula on your side if a legislature was more proactive, but he might not bring any more practical benefits than the current President of Argentina.

**Presidents in Argentina**

Throughout the 1990s, relations between LGBT movements and the executive branch were essentially the same in Argentina as they were in Brazil: not good. Carlos Menem of the Peronist Party (PJ) was the president of the country throughout this entire decade from 1989 to 1999. As discussed in chapter two, Menem firmly stood behind his government’s decision to not recognize CHA as an official organization for many years and only relented after the international spotlight was cast upon this issue. When the first civil union bill was introduced in the late 1990s, he never took a public position on the issue.
As we moved into the 2000s, staunch executive branch support never really materialized. During the short-lived presidencies of Fernando de la Rúa (1999-2001) and Eduardo Duhalde (2001-2003), most of the nation and national government were attentive to the severe economic problems facing the country and the LGBT SMOs were focusing their attention on passing the civil union bill at the local level in the federal capitol of Buenos Aires.

The issue did not return again at the national level until the presidency of Néstor Kirchner (2003-2007) when CHA’s civil union bill was proposed in the Congress in 2005. However, Kirchner never spoke publicly about this issue, even after the first same-sex marriage bills were introduced near the end of his term in 2007.

The LGBT movement in Argentina has finally received some support from the executive branch, but this support has been very tempered. Unlike Lula in Brazil, President Christina Fernandez de Kirchner (2007-11) has not been a visible advocate for the LGBT community. Whereas Lula has strongly condemned homophobia, organized a national conference on LGBT people, and publicly announced his support for civil union legislation, Fernandez de Kirchner did not state anything publicly (either for or against) the national civil union and marriage bills that began to arrive at Congress’s doorstep in 2007. In her 2007 campaign for President, she declared that she was undecided and it was an issue for the legislation to consider. Only recently has she stated that she will not veto a same-sex marriage bill if it lands on her desk. This is hardly the position of a fierce advocate, but it also sends a signal to the Congress that they are free to pass the current legislation without it being overturned.
Moreover, since leaving office and being elected to the Chamber of Deputies, Néstor Kirchner has announced his support for same sex marriage. When the Chamber voted on the same-sex marriage bill in May 2010, he publicly stated his support and voted for the legislation. Being the de facto head of the FPV, and their likely candidate for the presidency in 2011, his stance was an important signal for other undecided members of the party and probably secured important votes for legislation (Bleta 2010). Although technically today he is a member of the legislature today, this further demonstrates the connections between these two branches of government as others may have followed him because his wife is the sitting president and he might return to that office next year.

Although both of the Kirchners have had a fairly hands off approach when dealing with the same-sex marriage, one agency within the executive branch has played an especially proactive role supporting the LGBT community, working alongside FALGBT and CHA in their quests for partnership recognition.

Argentina's National Institute against Discrimination, Xenophobia, and Racism (*Instituto Nacional contra la Discriminación, la Xenofobia, y el Racismo* (INADI), located within the Ministry of Justice, Security, and Human Rights, has actively supported same-marriage rights and coordinated activities with LGBT groups, even producing advocacy television spots on the issue. According to their website, the purpose of INADI is to assist “all persons whose rights are affected by discrimination because of their ethnicity or nationality, political opinions or religious beliefs, gender or sexual identity, having a disability or illness, their age or physical appearance. Its functions are
to ensure for these people the same rights and guarantees enjoyed by the whole society.”

Within this agency, the Forum of Sexual Diversity (Foro de Diversidad Sexual) specifically deals with issues of sexual orientation, but same-sex couples have received support right from the top as their leadership has been physically present at nearly every step in the same-sex marriage battle. For example, INADI’s former president María José Lubertino accompanied Rachid and Castro in 2007 when they first applied for their marriage license at the Civil Registry office in Buenos Aires. Later in 2009, INADI President Claudio Morgado helped to arrange the wedding of Freye and di Bello in Tierra del Fuego later that year and even traveled to attend.

Finally, the President of FALGBT, María Rachid, is an employee and “advisor” within the INADI, leading to organizing happening within the government offices themselves. My interview with Rachid for this work took place within the INADI offices. Even though the Kirchners were never strong same-sex marriage advocates, it is hard to believe that the movement did not at least have their tacit support by allowing this agency to partake such an active role.

So what we see overall is that Argentina’s Presidents have not been all that supportive of civil unions or same-sex marriage. Only within the past year has the sitting president announced that she would not oppose a same-sex marriage bill, which admittedly is not the same as supporting it. The most support within the executive branch has come from INADI, but its powers here are limited. The result is that presidency will not like expend any of its political capital in the near future to approve same-sex marriage. This brings up the following question though: what powers would the
presidency in Argentina possess to change the laws to approve same-sex partnerships if an advocate were to occupy the office?

Like in Brazil, the office of the presidency in Argentina has historically had a great deal of political power, both institutionally and through custom, leading some to call it the *Decretazo*. The three main tools of the presidency that are relevant for same-sex partnership recognition are: 1) the power to veto acts of Congress, 2) the freedom to draft and submit legislation to the Congress, and 3) the ability to issue “Necessary and Urgent Decrees” (*Decreto de Necesidad y Urgencia*, DNU). These powers make the presidency in Argentina stronger than it is in Brazil (Morgenstern 2002: 438).

Veto power is a reactionary power that is only relevant if the Congress has already taken the initiative on an issue. Therefore, it really isn’t a power that can be used to initiate legislation with the possible exception that Congress may be more likely to take up an issue if they know the President will no veto it. The other two powers are what Mainwaring and Shugart (1997) call *proactive powers*: the ability of the president to introduce his or her laws for congressional consideration or simply bypassing the legislature entirely by making law through decree.

The executive branch can submit its own legislation for the Congress to consider. For a bill recognizing same-sex marriage to be successful going this route, much will depend on what kind of support a President has within the legislature. For the past two decades with the exception of de la Rúa (1999-2001), all presidents have enjoyed having a Congress where their party controls at least a plurality (and many times a majority) of seats in both chambers. This is important because Argentine presidents are often the head
of their political party, and therefore, can directly influence the political fate of members of Congress in a number of significant and important as discussed in the legislative section. There was talk in 2007 that the executive branch with the help of INADI was going to propose its own gay marriage bill, but this effort never materialized. Once cannot help but think this bill would have been given great consideration by the Congress.

Finally, Argentine presidents have significant powers of decree. Before the 1994 reform, presidents often made law by fiat as a matter of custom, but this power and its restrictions were eventually codified into the Constitution under Article 99, Paragraph 3:

Only when due to exceptional circumstances and the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed... [the president] shall issue decrees on grounds of necessity and urgency (emphasis mine).

Like Brazil, there is a lot of ambiguity over how far reaching this power as because it does not clearly define “necessity and urgency.” A president could potentially argue that denying same-sex marriage rights is such a grave injustice that s/he had to change the law immediately be decree. It is not uncommon for presidents in Argentina to abuse this power. For example, in 1991 President Carlos Menem issued an NUD “to give asphalt to the Bolivian government to be used to pave and airport runway and a road” (Ferreira Rubio and Goretti 1998: 50). Moreover, Article 99, Section 3, lays out four areas in which NUDs cannot be issued: penal, fiscal, electoral, or political matters.

The court has upheld cases questioning the constitutionality of various NUDs. For example, in 1990 Menem issued a decree regarding long-term deposits in the banks, and the Supreme Court in the Peralta decision ruled that it was constitutional so long as the
Congress did not pass a law stating otherwise, or what Ferreira Rubio and Goretti call “implicit congressional consent through silence” (1998: 55). Between 1994 and 200, Congress remained silent on 92 percent of all NUDs, ratified 3 percent, and repealed 5 percent (Ferreira Rubio and Goretti 2000: 8). However, unlike in Brazil where the ability to issue decrees were curtailed, presidents in Argentina still retain this power today and could potentially use it to change the law to recognize same-sex couples. As of yet though no president has seen fit to take such action.

**Conclusion**

Like we saw in the judiciary last chapter, this chapter explains why both strong allies and powerful institutions within the legislative and executive branches are crucial making state recognition of same-sex partnerships a reality. Without strong allies, SSPR legislation does not make its way off the ground. Moreover, unless these allies occupy strong institutional positions that have the power to change the law, not much progress will be made.

In Brazil, institutional features of the legislative and executive branches of government—the bodies charged with making the law—have thus far been incapable of clarify the law and filling the policy gap that exists regarding same-sex partnership recognition. Strong allies have existed within both branches of government. However, all legislative efforts have been halted by the ability for oppositional groups to stop unfavorable legislation from coming up for a vote. All past presidents, while they do have the power to put legislation up for a full congressional vote, have not been willing to spend their political capital to do so.
Argentina has a clear policy on same-sex marriage: it is not legal. It took many more years for any movement to happen in the Argentine legislature because LGBT groups here did not have many allies. Today, as many more allies have jumped aboard, they are able to navigate through their institutions of government much more easily than groups in Brazil. For that reason, Argentina is soon likely to go from one law (no recognition of same-sex couples) to another (full marriage rights), while Brazil will probably remain with the status quo of ambiguity.
CHAPTER 6: CONCLUSIONS

Argentina and Brazil have so far had little success changing the law to recognize same-sex marriage or civil union, but have fallen short for very different reasons. Due to recent developments, however, they both seem poised for change, but Argentina really looks hopeful.

LGBT groups in Brazil would be satisfied if they had all of the rights of married couples in the form of a stable union, but they are less concerned about what it is called (stable union, domestic partnership, civil union, marriage, etc.). Right now they are living within a policy vacuum: neither the Constitution nor the Civil Code establish clear law on the legal recognition of same-sex unions. Moreover, the political system has been unable to resolve this dilemma. Although lesbians and gays have found many vigorous elite allies, numerous institutional constraints have prevented the national government from establishing a clear policy. As a result, various functionaries of the state and society have come up with their own interpretations of the law to determine how to treat lesbian and gay homo-affectionate relationships, and we have seen a proliferation of policies all across the country at the local level.

However, this institutional structure is not completely bad news for lesbians and gays. As Juan Marsiaj points out, even though it has been difficult for the GLBT movement to get the Congress to pass their proposals, it also has been equally as hard for the opposition to do the same (Marsiaj 2006). In no single case did any major piece of legislation—either for or against LGBT issues—even make it to the full body for a vote.
Although these institutional constraints have prevented the recognition of same-sex unions, LGBT couples are not without hope as some developments within all three branches of government show some promise. ABGLT’s creation of the Parliamentary Front for LGBT Citizenship can potentially help the movement overcome the institutional hurdles of the Congress. This in combination with the recent strong and vocal support from Lula may help a bill recognizing same-sex unions finally make it to the top of the legislative calendar. However, they would somehow have to convince the religious opposition to allow the full chamber to vote on a measure. The best hope in Brazil today rests with the judiciary. The new binding powers granted to the Supreme Federal Court may allow it to issue a ruling clarifying that the existing laws do not prohibit legal recognition of same-sex partnerships and that the general constitutional principles of equality and nondiscrimination actually require it. Change could happen.

In Argentina, although there was disagreement initially between CHA and FALGBT over their ultimate goal, both groups have converged and are now fighting side-by-side for same-sex marriage. Together united, their slogan has been “The Same Love, the Same Rights with the Same Names” (*El Mismo Amor, los Mismos Derechos con los Mismos Nombres*).

However, they have confronted a more difficult obstacle here than in Brazil: the statutory law is very clear in stating that marriage is only between one man and one woman. Luckily, the institutions in Argentina allow for change much more easily than in Brazil. The Congress has fewer veto players, the President has more power to change the law by decree, and the Supreme Court has *de facto* powers to make its rulings have ergo
omnes effects because their rulings are binding on lower courts. The institutions here have the power to change the status quo much more easily.

It has taken the Argentine LGBT movement longer to secure allies, but today they have friends in three branches of government in powerful positions. Very recently, many elite allies have joined the same-sex marriage cause creating a kind of “perfect storm” making change. The legislature has gotten clear signals from the other two branches of government that it should approve the pending same-sex marriage bill. Current President Fernandez de Kirchner has said she will not veto the bill, gesturing that they would not be wasting their time or FPV party leaders would not anger their party leader if they passed the legislation. Moreover, the courts have threatened give same-sex couples marriage rights if the legislature fails to act. The result is that elite congressional allies have taken the ball and appear poised to legalize same-sex marriage very shortly.

Other Cases

Argentina and Brazil are not the only countries that have seen efforts to change the laws to recognize same-sex couples. Uruguay was the first country to pass a civil union bill covering the entire population, Colombia saw similar change through a court decision, Ecuador legalized civil unions nationwide when it approved a new Constitution, Mexico recognizes civil unions and marriage in some areas, and Chile has had many bills waiting in committee for years. Upon taking a cursory look at just a handful of these cases (Colombia, Chile, and Ecuador), we see how elite allies and powerful institutions were instrumental in bringing change. The policies were only when changed when these two variables coexisted within the same branch of government at the same time.
Colombia

Colombia represents a country where same-sex couples have won all of the rights and responsibilities of marriage, but without the formal name of marriage or civil unions. For more than ten years, the LGBT movement has been pushing for formal relationship recognition for same-sex couples. Since 2001, a number of bill have been introduced in the National Congress, all of which would have given lesbian and gay couples many of the rights of marriage, but without the formal name. This campaign has been spearheaded by Diversa Colombia, the country’s leading LGBT social movement organization. While they have not had much luck in the legislature, the courts have been much kinder by recognizing same-sex couples in the form of uniónes de hecho (de facto unions), with all of the legal rights and responsibilities of marriage. However, Diversa Colombia today wants quality in name too and is pushing for legalized marriage for LGBT couples.

A bill recognizing same-sex couples in the form of civil unions was nearly approved in June 2007. The bill was passed separately by the Senate and the Deputies and had the verbal approval of conservative President Alvaro Uribe. However, in a procedural reconciliation vote that was being taken right after many Senators left town (because the thought it was a done deal), the bill was defeated by a vote of 34-to-29, in a chamber that has 102 full voting members. Clearly some members of the Senate did not mind using a procedural tactic to stop a bill that was passed by most of their colleagues.

To explain how this bill was killed, we need to look at the allies and institutions of the executive and legislative branches. Uribe’s support is more akin to Fernandez de Kirchner’s “I will not veto it” than Lula’s “Homophobia is a perverse disease.” In other
words, he was hardly the outspoken ally to the LGBT community so we should not have expected him to initiate legislation. It is not too relevant then that the President has had great institutional powers since the 1991 Constitution (Archer and Shugart 1997) since he wouldn’t be willing to use them.

The Colombian Congress has very few veto players, but also weak party discipline. According to Archer and Shugart, “when members perceived a particular policy prescription to be in their best interest, they are capable of moving as fast as the basic institutional rules allow” (Archer and Shugart 1997: 145). This is especially true for the majority party that a lot of control over the agenda. The result is that the Liberal Party was able to see this bill go quickly from committee to a full vote in both chambers. However, like in Brazil, Colombian political parties are undisciplined and there is very little party unity. So, even though this bill was able to pass through the normal political channels, a small number of religious Senators from multiple political parties had no fear derailing it with a parliamentary tactic.

The LGBT movement has seen much more success in the courts. The judiciary in Colombia has many high courts, but the Constitutional Court is the arm that hears all cases that deal with acciones de tutelas, or writs claiming that a fundamental constitutional right has been violated. Compared to other judiciaries in Latin America, the Colombia judiciary has a long history of powerful independence. Since 1910, the supreme courts in the country have had the power of judicial review and the power to make their decisions binding to both lower courts (stare decisis) and to other branches of government (ergo omnes effects) (Uprimny 2003: 61). In other words, when they make a
decision, they can actually change the statutory law. Moreover, the progressive political orientation of the Constitutional Court has taken many people by surprise as it has taken on a role as a vigorous defender of the rights of individuals and disadvantaged groups (Uprimny 2003: 60).

In February 2007, the Constitutional Court ruled that LGBT couples should be eligible to receive the same inheritance and property rights that heterosexual couples in common law marriages receive. Later in October of that year, in a separate decision they decided that same-sex couples should also be able to receive their partner’s social security and health insurance benefits. Finally, in January 2009, the Court went much further and argued that same-sex partnership should be eligible for all of the benefits that same-sex common law couples receive. All of these decisions have fundamentally changed partnership rights throughout the country.

Chile

Lesbians and gays in Chile have been pushing for same-sex partnership legislation for nearly a decade. The main LGBT organization in the country, Movimiento de Integración y Liberación Homosexual (MOVILH), first proposed a bill to the Congress in 2003 with the support of 19 legislators from a variety of political parties that would have legally recognized same-sex couples in the form of civil unions. More recently, they have changed their strategy and now advocate for a change in the law that would give all of the legal rights from associated with marriage to those in common law marriages, whether they be heterosexual or homosexual couples. In other words, they would not be a registered couple, but could enjoy many of the benefits. However, they
have thus far been unsuccessful because of the tepid support from some of their allies but more importantly because the Constitution left in place after the end of the Augusto Pinochet dictatorship.

When the military regime left power, it engineered the democratic electoral laws in such a way that would guarantee that parties on the right received at least 40 percent of the seats in national elections (Siavelis 1997: 344). The result is conservative parties that are traditionally opposed to LGBT rights make up a disproportionate share of the legislature. Moreover, even political parties that have been part of the ruling center-left governing *Concertación* political bloc have stood in the way of equal partnership rights. Since 2006 this bill has been proposed annual in the Chilean Chamber of Deputies. However, so far none have made it out of the Family Committee in the because of opposition from the Christian Democratic Party (Estrada 2009). No progress has been made in the Congress then because opponents to reform have the ability to halt the legislation.

Like in Argentina and Brazil, the Chilean presidency is embodied with the power to declare pieces of legislation “urgent” for the Congress to immediately consider. However, historically presidents in Chile have rarely used this tool because a number of institutional and political features of the Chilean democracy “have provided incentives for presidents to avoid resorting to the use of extreme presidential power” (Siavelis 2002: 81). Moreover, support from the executive branch has been lukewarm. During the 2005 presidential and congressional election cycle, the idea of civil unions had the expressed public support of both center-left candidate (and eventual victor) Michelle Bachelet and
center-right candidate Sebastian Piñera (Estrada 2006). However, Bachelet never introduced a civil union bill into the Congress. Piñera became President in early 2010. Although he again expressed his support for civil unions in his 2009 election campaign, he so far has not introduced a bill and it doesn’t seem to be a legislative priority (Estrada 2009).

Finally, compared to Argentina and Brazil, the Chilean judiciary does not have widespread powers of judicial review, making them too political weak to change the law. Even if they did have this power, the high court has been especially hostile and homophobic in its rulings when dealing with LGBT issues over the past decade. In 2003, the Supreme Court removed sitting Judge Daniel Calvo from a pedophilia case because a news television program caught him on tape visiting a local gay bathhouse. They argued that he might have conflict of interest, essentially equating homosexuality with pedophilia. In a separate case on May 31, 2004, the Supreme Court took away custody rights from lesbian Judge Karen Atala. They argued that she was an unfit parent and that exposing her children to a second mother (her partner) might be psychologically damaging. With such anti-gay rulings and really weak powers, it would be hard to imagine the Chilean courts changing the law. The result is Chile will likely remain without SSPR laws anytime soon.

**Ecuador**

Ecuador represents a unique case compared to the other countries analyzed in this work, but the general model still functions well. Ecuador is the second country in Latin America to accept nationwide legal recognition for same-sex couples (following
Uruguay), but it did so through a very unique institutional path. Just three months after Rafael Correa ascended to the Presidency in January 2007, he secured victory in a nationwide referendum to hold elections for a constituent assembly to rewrite the nation’s Constitution. The new document, which came into effect in September 2008, included nondiscrimination clauses for LGBT persons and also states that same-sex couples can form “stable unions.” Two constitutional clauses are especially relevant. According to Article 67:

The family is recognized in its diverse forms.” …. “Marriage is a union between man and woman…

Moreover, according to Article 68:

The stable and monogamous union between two persons, free of a matrimonial bond, who form a de facto couple, for a duration and under the conditions and circumstances that the law provides, will generate the same rights and obligations that families, built through the marriage, are holding. Adoption will only correspond to couples of different sexes.

Whether this represents a “victory” for lesbian and gay couples is debatable: while it does enshrine in the Constitution their right to form civil unions and enjoy nearly all of the rights and protections of a married couple, it also clearly stipulates that marriage is solely between opposite-sex couples, and that same-sex couples are prohibited from adoption. However, it clearly does represent a change from the status quo that does give some tangible rights to lesbian and gay couples.

How well does the model in this project fit this case? First, the LGBT movement within Ecuador was seeking civil unions (but not marriage) for same-sex couples and this is exactly what they got, although they also would have preferred adoption rights (Pérez
They probably would not have achieved marriage rights if that was their desire, but they also could not achieve it without first asking for it.

Moreover, the right combination of allies and institutions came together to make this change happen. Lesbians and gays definitely had an important elite ally in Correa who ran on a platform of constitutional reform and unequivocally stated during his campaign that he supported making stable unions available to same-sex couples in this document (Pérez 2007). However, as a Catholic humanist he could not envision extending marriage and adoption rights as well. The institutions also uniquely aligned in that the constituent constitutional assembly provided for him an avenue through with oppositional forces could not stop his plans. Members of Correa’s political party won more than 60 percent of the vote in the assembly, allowing for easy passage of this proposal. Moreover, when the finalized Constitution went back before the people for a confirmation vote, it would have been unlike for them to reject the entire document just for this one provision, and they did not.

Final Thoughts

This dissertation has hopefully demonstrated that both elite allies and powerful institutions capable of change are necessary to pass same-sex partnership recognition laws. Brazil had the allies long before the Argentina, but Argentina had the institutional structures capable of making change. However, these two variables are not created equally. It is a lot easier to find allies than to change institutions; therefore, Argentina will probably see change much sooner than Brazil. Clearly we saw that having the elite allies enabled the first civil union bill to see the light of day in the Brazilian Congress
much sooner than in Argentina, perhaps giving hope to many same-sex couples in the country that change was near. However, that legislation has moved essentially nowhere. In Argentina, on the other hand, the partnership recognition bills did not see any action in its Congress until many years later, but these pieces of legislation have moved much more quickly than the same bills in Brazil. Finding elite allies involves tireless campaigning and a relentless public relations campaign, but changing the democratic institutions themselves though is a much more daunting task. For these reasons, the LGBT movement in Argentina is poised to see change sooner.
BIBLIOGRAPHY


