

LGBT RIGHTS AS MEGA-POLITICS: LITIGATING BEFORE THE ECTHR

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I

INTRODUCTION

Contestations over lesbian, gay, bisexual, and transgender (LGBT) rights are now occurring worldwide at multiple levels of governance—local, national, regional, and global. These clashes are the most recent and contentious phase of a rapid evolution of international law and transnational advocacy for sexual minorities in which international courts are becoming key venues of contestation.

From the late 1980s until the early 2010s, LGBT rights were ascendant. Non-governmental organizations (NGOs) advocated for these rights by mobilizing across venues, leveraging litigation when efforts to achieve progressive legal reforms in domestic political arenas were blocked or delayed. This advocacy resulted in a string of decisions, including by international courts and treaty bodies, that anchored an expanding array of protections for LGBT persons in international law. To be sure, the lived experiences of sexual minorities in many places were often far more precarious—sometimes even life threatening—than the laws on the books or court decisions suggested. And in some parts of the world, governments imposed new restrictions or ramped up enforcement of existing laws. Nevertheless, the overall narrative was one of progress, albeit uneven, toward greater recognition and protection of LGBT rights.¹

Yet these trends also helped to set the stage for a retrenchment of LGBT rights over the last decade, a period that has coincided with the rise of nationalist populism and populist leaders, some of whom use opposition to LGBT rights as a tool to polarize domestic populations and push back against international laws and institutions.² Retrenchment is also increasingly prevalent in Europe, despite

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This Article is also available online at <http://lcp.law.duke.edu/>.

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** Harry S. Redmon, Jr. Assistant Professor of Law, LSU Paul M. Hebert Law Center. For helpful comments and suggestions, we thank Karen Alter, H el ene Ruiz Fabri, Veronika Fikfak, Paul Johnson, Christine Ryan, and participants in the conference on The Influence, Legacy and Future of the European Court of Human Rights in the International Legal Order. Nigel Copeland, Olivia Daniels, Jo Un Eom, Matthew Greene, and Matthew Sanders provided excellent research assistance.

1. See, e.g., Paul J. Angelo & Dominic Bocci, *The Changing Landscape of Global LGBTQ+ Rights*, COUNCIL ON FOREIGN REL. (Jan. 29, 2021), <https://www.cfr.org/article/changing-landscape-global-lgbtq-rights> [<https://perma.cc/C7VG-98EW>].

2. See, e.g., MARK GEVISSER, *THE PINK LINE: JOURNEYS ACROSS THE WORLD'S QUEER FRONTIERS* (2020).

the region's progressive reputation on sexual orientation issues. A 2020 report by a leading lesbian and gay rights organization, for example, describes "a complex picture that diverges from the widespread narrative that all is well for LGBTI people in large parts of Europe."³ In some countries, the rights of sexual minorities continue to advance; in others, populist parties, religious groups, and advocates of traditional values openly attack LGBT individuals.

Sexual minorities have responded to these developments by turning to the European Court of Human Rights (the ECtHR, the Court, or the Strasbourg Court), seeking to further expand the protection of LGBT persons in the European Convention on Human Rights (the Convention or the European Convention) and, separately, opposing the rollback of LGBT rights by some member states of the Council of Europe (CoE). Between 2010 and 2020, the ECtHR issued fifty-seven merits judgments involving a broad array of sexual orientation issues and asked for the government's views in fifty-five pending cases. As we explain below, these figures represent a sharp increase from the number of sexual orientation cases brought before the Strasbourg Court in earlier periods.⁴

Two divergent forces are pushing these cases to Strasbourg. First, the ECtHR has applied a dynamic and evolutive interpretation of the Convention as a "living instrument which . . . must be interpreted in the light of present-day conditions."⁵ By taking account of progressive trends in national law and policy, especially in Western Europe, the Court has not only expanded the scope of LGBT rights—including in the areas of privacy, nondiscrimination, and recognition of same-sex unions and nontraditional families—it has also increased the likelihood that lagging CoE members will protect those rights.⁶ A second explanation for the increase is that the ECtHR is receiving numerous complaints against post-Soviet countries alleging violations of the bodily integrity and political rights of gays and lesbians. These cases include violence and abuse by government and private actors, restrictions on freedom of expression, and the refusal to grant permits for pride rallies.⁷

3. *Annual Review of the Situation of LGBTI People Paints a Picture at Odds with a Widespread Notion that in Europe the Work is Done*, ILGA-EUROPE (Feb. 3, 2020), <https://www.ilga-europe.org/resources/news/latest-news/annual-review-2020-launched> [<https://perma.cc/8VAD-SGMT>].

4. In Part II, we describe the data we collected on all lesbian and gay rights judgments and admissibility decisions by the ECtHR, as well as pending cases through 2020. We also explain our decision to focus on lesbian and gay rights cases as a subset of all LGBT rights issues that have been presented to the Strasbourg Court.

5. *Tyrer v. United Kingdom*, App. No. 5856/72, ¶ 31 (Apr. 25, 1978) <http://hudoc.echr.coe.int/eng?i=001-57587> [<https://perma.cc/M475-3KH3>].

6. See Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 80, 95–96 (2014) (finding that, on average, an ECtHR judgment is responsible for an additional five countries adopting pro-LGBT rights policies in the five years immediately following the ruling and an additional eight countries doing so over a decade).

7. Paul Johnson & Silvia Falcetta, *Sexual Orientation Equality in Central and Eastern Europe: The Role of the European Convention on Human Rights*, EUR. HUM. RTS. L. REV. 482, 493–494 (2019) ("[I]ll-treatment that sexual minorities encounter as a result of exercising, or attempting to exercise, the right to freedom of expression and freedom of assembly and association" is due to a "lack of adequate

This Article analyzes the evolution of lesbian and gay rights litigation before the ECtHR with a twofold objective. First, we provide an empirical foundation for the claim that LGBT rights in Europe have become increasingly contested in recent years, including in cases submitted to the Strasbourg Court. We explain the reasons for this trend and predict that recent ECtHR judgments concerning same-sex partnerships and asylum are poised to further exacerbate these contestations.

Second, we investigate whether LGBT rights litigation in Strasbourg falls within the definition of “mega-politics” offered by Karen J. Alter and Mikael Rask Madsen in the Introduction to this symposium. In particular, we consider whether these cases “involve substantive issues that deeply divide societies such that one can predict that at least one important social group will be upset by the outcome of international adjudication.”⁸ Our Article contributes to the mega-politics framework by showing how an issue that does not initially meet this definition can become mega-political over time as a supranational court responds to divergent national trends of rights expansion and rights retrenchment. It also explores how LGBT rights litigation in Europe is situated with regard to two different types of mega-politics identified by Alter and Madsen—“social cleavages,” in which mobilized social groups defend competing understandings of morals, traditions, religion, and societal values; and “sovereignty driven mega-politics,” in which groups oppose international court interventions as incursions on national autonomy by outsiders seeking to impose foreign values.⁹

The remainder of this Article proceeds as follows. Part II describes our research design. It begins with a brief overview of how cases are litigated before the ECtHR to provide context for the data collected and the subject matter focus of the study. Part III reviews three time periods during which the ECtHR evolved into a forum for two types of litigation over LGBT legal issues. The first are “rights-expanding cases,” which seek to expand lesbian and gay rights in new directions. The second are “rights-contracting cases,” which challenge violations of established rights by repressive governments in Eastern Europe. Part IV investigates the explosion of lesbian and gay rights litigation before the ECtHR by asking three questions: Why the increase? Why Strasbourg? And why LGBT rights? Part V considers the implications of our answers to these questions for the ECtHR’s future as a forum for mega-political contestations over LGBT rights. A brief conclusion follows.

legislative and other measures to deal with homophobic motivated crimes and the refusal of domestic authorities to combat anti-LGBT violence.”).

8. Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 *LAW & CONTEMP. PROBS.*, no. 4, 2021, at 8.

9. *Id.* at 11.

II

RESEARCH DESIGN

This Article's central research question is why the ECtHR has recently become a venue for mega-political disputes over LGBT rights. To answer that question, we explore the evolution of LGBT rights litigation in Strasbourg over the last seven decades. We focus on changes to the number of LGBT rights applications, the subject matter of the case law, and the states against which applications have been filed. Before discussing the data and research design, we first briefly summarize the procedures for litigating cases before the ECtHR.

A. Procedural Overview of European Human Rights Litigation

The Convention, adopted in 1950, created a novel system of human rights monitoring and enforcement that enabled individuals to file applications against governments alleging violations of civil and political liberties.¹⁰ As originally designed, this system included two international bodies—the quasi-judicial European Commission on Human Rights (the Commission) and the ECtHR. The Commission screened applications to ensure that they satisfied the Convention's admissibility requirements and, if they did, issued reports determining whether the respondent state had violated the Convention. The state or the Commission could then appeal the case to the ECtHR, which issued a legally binding final judgment.¹¹

With entry into force of Protocol No. 11 to the Convention in 1998, this human rights system underwent a major overhaul. That protocol abolished the Commission and restructured the ECtHR as a permanent, full-time, judicial body with the authority to review complaints from any individual subject to the jurisdiction of now all member states (currently 47).¹² As in the earlier period, most applications are dismissed on admissibility grounds without a reasoned decision. The Court rarely publishes these decisions and, as a result, it is not possible to obtain information about them.

Cases not dismissed at this preliminary stage are assigned to a panel of three or seven judges (a Committee or Chamber, respectively), which notifies the respondent state and publishes the application number, the filing date, and a summary of the allegations in a procedure known as “communicating” the case.¹³

10. Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMP. PROBS. 141, 145 (2016), <https://scholarship.law.duke.edu/lcp/vol79/iss1/6> [<https://perma.cc/SY3P-GC6V>].

11. This description oversimplifies a complex, multistep process. For additional details, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 294–95 (1997) (explaining the procedures for litigating before the Commission and the ECtHR).

12. Our historical narrative of LGBT rights litigation in Strasbourg in Part III refers to the Commission's major lesbian and gay rights decisions prior to its abolition in 1998. We do not, however, include those decisions in our data.

13. *Rules of the Court*, EUR. CT. OF HUM. RTS. (Aug. 1, 2021), https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf [<https://perma.cc/PMW9-7EDC>].

The Court also invites the parties to submit additional arguments and to answer written questions. Many communicated cases result in a judgment on the merits, which is often issued four or five years—sometimes longer—after an application is filed in Strasbourg. However, the Court declares some communicated cases inadmissible and strikes others off the list of cases, for example if the parties reach a settlement. For issues that the Court deems exceptionally important, a seventeen-member Grand Chamber is convened to review the case.

B. Data Collection

We collected all published LGBT rights decisions issued by the ECtHR through the end of 2020. We identified these decisions by reviewing three primary sources published by the Court—the HUDOC database,¹⁴ the Factsheet on Sexual Orientation,¹⁵ and press releases¹⁶—as well as numerous secondary sources.¹⁷ For each case, we collected the name(s) of the applicant(s) and the respondent state(s), the application number(s), and the main legal issues. We also recorded the date the application was filed, the date that the Court communicated the case to the government (for pending cases), the date of the final decision, and the disposition of the case, including whether or not a Committee, a Chamber, or the Grand Chamber found a violation of the Convention, dismissed the case as inadmissible, or struck it from the list.¹⁸

C. Subject Matter Focus

This Article’s primary argument is that contestations over lesbian and gay rights in Strasbourg are being driven by two types of cases—those in which litigants urge the ECtHR to narrow the margin of appreciation (a doctrine of deference to national governments) and expand the Convention’s protection of gays and lesbians in light of progressive national-level trends, and those that seek to uphold the established rights of sexual minorities who are targeted by regressive laws and policies in some member states. As discussed in greater detail below, the first type of cases—which we label rights-expanding—focuses on privacy, nondiscrimination, and recognition of same-sex couples and families. In contrast, the second type—rights-contracting cases—alleges violence and abuse

14. HUDOC, EUR. CT. OF HUM. RTS., <https://hudoc.echr.coe.int/eng> [<https://perma.cc/ZYW5-P2KB>].

15. *Factsheet – Sexual Orientation Issues*, EUR. CT. OF HUM. RTS. (Sept. 2021), https://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf [<https://perma.cc/3QUV-8WAE>].

16. *Press Service*, EUR. CT. OF HUM. RTS., <https://www.echr.coe.int/Pages/home.aspx?p=press&c=> [<https://perma.cc/5K35-T8VP>].

17. See, e.g., DAMIAN A. GONZALEZ-SALZBERG, *SEXUALITY AND TRANSSEXUALITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A QUEER READING OF HUMAN RIGHTS LAW 8–10* (2019); PAUL JOHNSON, *GOING TO STRASBOURG: AN ORAL HISTORY OF SEXUAL ORIENTATION DISCRIMINATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 201–12* (2016) [hereinafter *GOING TO STRASBOURG*]; Paul Johnson, *ECHR SEXUAL ORIENTATION BLOG*, <http://echrso.blogspot.com/> [<https://perma.cc/MW5J-X7RW>].

18. See *infra* Part II.

by government or private actors and infringement of bodily integrity and political rights, such as freedom of association and assembly.

A common thread connects these two groups of cases. The ECtHR's expansion of legal protections for gays and lesbians—mainly in cases originating from countries in Western Europe—is viewed by governments in Eastern Europe as undermining traditional families or, more broadly, as a threat to the nation as a whole. The result is a backlash against LGBT rights, leading to the adoption of repressive laws and policies that are later challenged in Strasbourg.

The ECtHR has also adjudicated two other types of LGBT legal issues: applications from sexual minorities who seek asylum in Europe, and cases involving gender identity. Because the litigation of these disputes raises distinctive issues, they are excluded from this study.

We exclude asylum cases because they focus on the likelihood of persecution on grounds of sexual orientation in the applicants' home countries. The ECtHR has interpreted the Convention to prevent member states from deporting individuals who face a credible risk of torture or ill-treatment in the country of destination. Until very recently, however, the Court repeatedly “refus[ed] to uphold complaints about [CoE] states who seek to deport gays and lesbians.”¹⁹ Asylum applications thus cannot easily be categorized either as rights-expanding or as rights-contracting cases because they do not involve the domestic protection of sexual minorities by the member states. Asylum cases are likely, however, to be a focus of rights-expanding litigation before the Strasbourg Court in the future, as discussed in Part V.

Gender-identity litigation in Strasbourg also has a somewhat distinct trajectory. Compared to lesbian and gay issues not involving asylum, there are far fewer decided and pending cases involving transgender rights, both in total (193 vs. 45) and during the decade ending in 2020 (120 vs. 30). In addition, human rights issues relating to gender identity are rapidly evolving,²⁰ and scholars have criticized the ECtHR for pathologizing and medicalizing transgender persons—critiques that have not been applied to the Court's treatment of gays and lesbians.²¹ Gender-identity litigation is also the focus of transgender-specific advocacy organizations, suggesting another reason to bifurcate studies of sexual orientation and gender identity.²²

19. Paul Johnson, *The European Court of Human Rights and Gay Asylum Seekers: A Shameful History?*, ECHR SEXUAL ORIENTATION BLOG (Oct. 22, 2015), <http://echrso.blogspot.com/2015/10/the-european-court-of-human-rights-and.html> [<https://perma.cc/72XJ-VPVY>].

20. See, e.g., MARJOLEIN VAN DEN BRINK & PETER DUNNE, *TRANS AND INTERSEX EQUALITY RIGHTS IN EUROPE – A COMPARATIVE ANALYSIS* (2018), https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf [<https://perma.cc/T5CA-CJCW>].

21. See, e.g., Pieter Cannoot, *The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition*, 37 NETH. Q. HUM. RTS. 14, 14 (2019) (criticizing the Strasbourg Court for “pathologising requirements such as a diagnosis of gender dysphoria and compulsory sex reassignment surgery”).

22. See, e.g., TGEU, <https://tgeu.org/>.

III

THE EVOLVING TRAJECTORY OF LESBIAN AND GAY HUMAN RIGHTS IN EUROPE

The rights and freedoms in the European human rights system have expanded dramatically over the last several decades. Lesbian and gay rights are a paradigmatic example. The European Convention—like all other post-World War II human rights instruments—nowhere mentions sexual orientation or gender identity²³, and its drafters conceived of marriage and the family “as unproblematically heterosexual.”²⁴ In the mid-1970s, however, the ECtHR endorsed a dynamic, evolutive approach to interpretation that enabled it “to adapt, over time, the text of the Convention to legal, social, ethical or scientific developments” in Europe.²⁵ As the laws and policies of most CoE member states slowly converged towards greater protection of sexual minorities, the ECtHR began to find fault with countries that had not kept pace with these trends. The Court’s reliance on evolving European standards, in turn, shaped domestic advocacy strategies by LGBT rights groups and attracted a growing number of lesbian and gay rights cases to Strasbourg.

We explore these issues by dividing the discussion into three time periods that reveal the ECtHR’s evolving approach to lesbian and gay rights. These periods reflect three eras of Strasbourg jurisprudence concerning sexual orientation issues, each of which is separated by key judgments that marked a significant shift in the Court’s approach to lesbian and gay rights. Only in the most recent era, however, did these cases rise to the level of mega-political contestation as defined by Alter and Madsen.

A. Period One: 1950 to 1998

The earliest sexual orientation cases were filed between the mid-1950s and mid-1970s by gay men prosecuted for engaging in consensual homosexual activity. Their complaints alleging violations of the rights to privacy and nondiscrimination were summarily dismissed by the European Commission on public health and morals grounds.²⁶ As Paul Johnson’s detailed study of these early cases succinctly concludes, “the Commission did not regard the criminalization of homosexual sex to be an issue worthy of consideration in

23. Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural “Sensitivity”*, 22 MICH. J. INT’L L. 283, 286–87 (2001), <https://repository.law.umich.edu/mjil/vol22/iss2/2> [<https://perma.cc/FV7Z-KJUA>].

24. Jonathan Symons & Dennis Altman, *International Norm Polarization: Sexuality as a Subject of Human Rights Protection*, 7 INT’L THEORY 61, 75 (2015).

25. Magyar Helsinki Bizottság v. Hungary, App. No. 18030/11, ¶ 3 (Nov. 8, 2016), (Sicilianos & Raimondi JJ., concurring), <http://hudoc.echr.coe.int/eng?i=001-167828> [<https://perma.cc/RUX3-KDFV>].

26. Prior to its abolition in 1998 with the adoption of Protocol No. 11, the European Commission reviewed the admissibility of all individual applications and, in cases declared admissible, issued nonbinding decisions as to whether the respondent state had violated the Convention. The Commission or the state (but not the applicant) could appeal these decisions to the ECtHR.

respect of human rights.”²⁷

Over time, however, as growing number of states repealed these laws, the European human rights system shifted course. In the landmark 1981 case of *Dudgeon v. United Kingdom*, the ECtHR became the first international tribunal to find that laws criminalizing consensual same-sex conduct violated human rights.²⁸ In concluding that a sodomy statute in Northern Ireland violated the right to privacy, the Court referred to the widespread changes in European laws and social attitudes, reasoning that “there is now a better understanding and . . . an increased tolerance of homosexual behavior to the extent that in the great majority of the member-states of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices [as] a matter to which the sanctions of the criminal law should be applied.”²⁹

The *Dudgeon* case received widespread public attention.³⁰ It also galvanized lesbian and gay rights groups to expand their advocacy efforts at the national and regional levels. The ECtHR’s reliance on progressive trends in law and policy suggested that those groups should pursue a two-prong strategy to achieve legal and social change. First, they should lobby national parliaments and litigate before national courts on a country-by-country basis. Second, they should file cases with the ECtHR against states that fail to follow an emerging European consensus on LGBT rights.

At the national level, lesbian and gay rights made substantial progress in the 1980s and 1990s. A growing number of jurisdictions adopted anti-discrimination statutes including sexual orientation and outlawed incitement to hatred against homosexuals.³¹ Several countries permitted gays and lesbians to serve in the armed forces, and a handful—beginning with Denmark in 1989—allowed same-sex couples to enter into domestic partnerships or civil unions. To be sure, progress was uneven, especially for laws restricting public advocacy of homosexuality³² and laws regulating custody, adoption, and other family law issues.³³ Yet by the mid-1990s, scholars had identified a “more or less standard sequence of steps” in the legal recognition of lesbian and gay rights: countries “tend to first decriminalise homosexuality, then include sexual orientation in their anti-discrimination legislation, before finally giving (some) legal recognition

27. GOING TO STRASBOURG, *supra* note 17, at 12.

28. *Dudgeon v. United Kingdom*, App. No. 7525/76, ¶ 63 (Oct. 22, 1981), <http://hudoc.echr.coe.int/eng?i=001-57473> [<https://perma.cc/9WJY-9FUL>].

29. *Id.* ¶ 60.

30. GOING TO STRASBOURG, *supra* note 17, at 77–87.

31. COUNCIL OF EUROPE, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE (2d ed., 2013).

32. In the United Kingdom, for example, the notorious section 28 of the Local Government Act prohibited local authorities from promoting homosexuality or “teaching in any . . . school of the accept[ability] of homosexuality as a pretended family relationship.” Local Government Act 1986, c. 10 (UK), <https://www.legislation.gov.uk/ukpga/1986/10/enacted/data.xht?wrap=true> [<https://perma.cc/2492-8U5X>].

33. See, e.g., Roberta Messina & Salvatore D’Amore, *Adoption by Lesbians and Gay Men in Europe: Challenges and Barriers on the Journey to Adoption*, 21 ADOPTION Q. 59 (2018).

to same-sex partnership and family.”³⁴

Advocates for LGBT equality had less success with the second prong of the strategy—turning to the European human rights system to challenge states that did not keep pace with progressive regional trends. The most prominent achievement was the condemnation of statutes criminalizing consensual same-sex conduct. The ECtHR issued judgments extending *Dudgeon* to sodomy laws in Ireland in 1988 and Cyprus in 1993. Thereafter, the CoE required new accession states—including Eastern European countries with low levels of public acceptance of homosexuality³⁵—to repeal their sodomy laws as a condition of joining the organization.³⁶

Other lesbian and gay rights cases in Strasbourg were unsuccessful, however. The ECtHR rejected a privacy challenge to the prosecution of several gay men for engaging in sadomasochist consensual sex;³⁷ and it found that the censorship, on grounds of blasphemy, of a religious-themed video containing homoerotic imagery, did not violate the right to freedom of expression.³⁸ More consequentially, the Commission summarily dismissed a wide array of challenges to discriminatory laws and policies during the 1980s and 1990s. These included a ban on gays and lesbians serving in the armed forces; a law denying one same-sex partner the ability to continue an apartment lease after another dies; a dismissal of a schoolteacher interviewed on television about her sexual orientation; the deportation of the foreign partner in a same-sex relationship; and discriminatory criminal laws, including a higher age of consent for gay men as compared to heterosexuals and lesbians.³⁹

In sum, as of 1998 the ECtHR had issued only five judgments relating to sexual orientation, and the European Commission had dismissed numerous other applications by gays and lesbians. Importantly, the CoE had responded favorably to the Court’s trio of sodomy law cases by requiring all member states to decriminalize consensual homosexual conduct. Yet governments retained broad discretion to regulate other areas of LGBT life, and the Strasbourg tribunals were mostly unsympathetic to efforts to use supranational litigation to protect sexual

34. Kees Waaldijk, *Legal Recognition of Homosexual Orientation in the Countries of the World: A Chronological Overview with Footnotes* (Feb. 22, 2009) (unpublished manuscript) (on file with the Leiden Law School) (citing Kees Waaldijk, *Standard Sequences in the Legal Recognition of Homosexuality – Europe’s Past, Present and Future*, 4 AUSTL. GAY & LESBIAN L.J. 50 (1994).

35. Helfer & Voeten, *supra* note 6, at 93.

36. Council of Europe Parliamentary Assembly, *Honouring of Commitments Entered into by New Member States*, Order No. 488 (1993).

37. *Laskey v. United Kingdom*, App. Nos. 21627/93, 21826/93, 21974/93, ¶¶ 36, 45–46, 50 (Feb. 19, 1997), <http://hudoc.echr.coe.int/eng?i=001-58021> [<https://perma.cc/XX2U-7X4U>].

38. *Wingrove v. United Kingdom*, App. No. 17419/90, ¶¶ 59–61 (Nov. 25, 1996), <http://hudoc.echr.coe.int/eng?i=001-58080> [<https://perma.cc/J9MV-MVPJ>].

39. See Laurence R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 VA. J. INT’L L. 157, 174 (1991) (reviewing the European Commission’s rejection of challenges to laws discriminating against sexual minorities); Loveday Hodson, *Sexual Orientation and the European Convention on Human Rights: What of the “L” in LGBT?*, 23 J. LESBIAN STUD. 383, 387–89 (2019) (surveying lesbian rights cases before the ECHR).

minorities.⁴⁰

The lesbian and gay rights cases of this first period, while providing foundational precedents, did not generate mega-political contestation. Although some decisions garnered public attention, they were not met with the deep social divisions or resistance on national sovereignty grounds that Alter and Madsen's definition of mega-politics requires. Nor did ECtHR case law galvanize significant backlash: the Court was deferential to national governments, and its judgments mostly followed national existing trends rather than pushing the boundaries of lesbian and gay rights in the region.

B. Period Two: 1999 to 2009

A decisive shift occurred in 1999, just a few months after the member states restructured the ECtHR as a permanent, full-time international tribunal.⁴¹ Although the Court had previously found violations of the right to privacy, this period saw the first ECtHR judgments concerning gays and lesbians in public life.⁴² In several cases against the United Kingdom, the Court unanimously upheld challenges by servicemembers discharged from the armed forces based on their sexual orientation.⁴³ A few months later, the ECtHR upheld a gay father's parental rights which had been disregarded by Portuguese courts. The unanimous judgment announced that distinctions based on sexual orientation are "not acceptable under the Convention."⁴⁴ This unequivocal statement strongly suggested that the ECtHR would view with skepticism national laws and policies disadvantaging gays and lesbians.⁴⁵

LGBT rights groups took note of the Court's jurisprudential shift. Although continuing to advocate at the national level, these groups recognized that winning before the ECtHR could push governments further and faster toward lesbian and

40. A partial exception concerns the higher age of consent for gay men. In 1997, the Commission reversed its earlier decisions and found such laws to breach the Convention's nondiscrimination clause. The case was appealed to the ECtHR, but later struck off the list after the government equalized the age of consent for all sexual orientations. *Sutherland v. United Kingdom*, App. No. 25186/94, ¶ 20 (Mar. 27, 2001), <http://hudoc.echr.coe.int/eng?i=001-59354> [<https://perma.cc/RZ36-CFCG>]; see also Paul Johnson, *20th Anniversary of the Equalization of the "Age of Consent" in the UK and the Role of the ECHR*, ECHR SEXUAL ORIENTATION BLOG (Nov. 29, 2020), <http://echrso.blogspot.com/2020/11/20th-anniversary-of-equalization-of-age.html> [<https://perma.cc/SZ4T-A2SH>] (recounting the legal history and significance of the age of consent cases in the European human rights system).

41. See discussion *supra* A. Period One: 1950 to 1998 (discussing the restructuring of the ECtHR and abolition of the Commission).

42. The UK government rescinded the ban with immediate effect only a few months after the rulings. Rhona K. M. Smith, *International Decisions*, 94 AM. J. INT'L L. 382, 386 (2000) (noting compliance with the ECtHR judgments).

43. See *Lustig-Prean v. United Kingdom*, App. Nos. 31417/96, 32377/96, ¶ 12 (July 25, 2000), <http://hudoc.echr.coe.int/eng?i=001-59022> [<https://perma.cc/8PYP-KNSQ>] (explaining that investigations of the applicants' sexual orientation intruded into their private lives and led to their wrongful discharges from the armed forces); *Smith v. United Kingdom*, App. Nos. 33985/96, 33986/96, ¶ 12 (July 25, 2000), <http://hudoc.echr.coe.int/eng?i=001-59023> [<https://perma.cc/TPX9-KV9G>] (same).

44. *Salgueiro da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. ¶ 36.

45. See Laurence R. Helfer, *International Decisions*, 95 AM. J. INT'L L. 422, 427 (2001) (reviewing the *Salgueiro* and *A.D.T.* cases in the ECtHR).

gay equality.⁴⁶ Their efforts resulted in a series of favorable rulings from Strasbourg. Reversing several decisions of the European Commission discussed above, the ECtHR upheld challenges to the unequal age of consent, restrictions on consensual sex applicable only to gay men, and discrimination against same-sex couples in housing and social benefits.⁴⁷ The Court also found violations resulting from restrictions on gays or lesbians adopting children and bans on pride rallies.⁴⁸ In all, the ECtHR issued twenty-two merits judgments on sexual orientation issues between 1999 and 2009.⁴⁹

The rapid evolution of case law during this period is illustrated by the ECtHR's willingness to overturn its own prior judgments. In 2002, a sharply divided seven-judge Chamber upheld the denial by French authorities of a gay man's application to adopt a child. The majority reasoned that "the delicate issues raised in the case . . . touch on areas where there is little common ground amongst the member States of the Council of Europe and . . . the law appears to be in a transitional stage, [therefore] a wide margin of appreciation must be left to the authorities."⁵⁰ Only six years later, however, the Grand Chamber reached the opposite result on nearly identical facts, concluding by a ten-to-seven vote that France's refusal to allow a lesbian woman to adopt a child was discriminatory.⁵¹ Citing recent pro-LGBT judgments and the obligation to interpret the Convention "in the light of present-day conditions," the majority emphasized that "[w]here sexual orientation is in issue, there is a need for

46. See Anna van der Vleuten, *Transnational LGBTI Activism and the European Courts: Constructing the Idea of Europe*, in *LGBT ACTIVISM AND THE MAKING OF EUROPE: A RAINBOW EUROPE?* 119, 127 (Phillip M. Ayoub & David Paternotte eds., 2014) (describing the academics and experts leading the LGBT rights litigation in European courts); Loveday Hodson, *Activists and Lawyers in the ECtHR: The Struggle for Gay Rights*, in *RIGHTS AND COURTS IN PURSUIT OF SOCIAL CHANGE: LEGAL MOBILISATION IN THE MULTI-LEVEL EUROPEAN SYSTEM* 181, 193 (Dia Anagnostou ed., 2014) (discussing the increasing focus of LGBT rights NGOs on litigation before the ECtHR).

47. See, e.g., *A.D.T. v United Kingdom*, 2001-IX Eur. Ct. H.R. ¶ 38 (discussing that restrictions on group sex are applicable only to gay men); *SL v. Austria*, 2003-I Eur. Ct. H.R. ¶¶ 39–46 (finding that having a higher age of consent for gay men violated the rights to privacy and non-discrimination); *Karner v. Austria*, 2003-IX ¶¶ 41–43 (determining that a rule prohibiting the surviving member of same-sex couple to inherit an apartment lease was contrary to rights to privacy and non-discrimination).

48. See *Bczkowski v. Poland*, App. No. 1543/06, ¶ 100 (May 3, 2007), <http://hudoc.echr.coe.int/eng?i=001-80464> [<https://perma.cc/Y2V9-CNB5>] (finding that opposition to march for LGBT rights violated applicants' freedom of assembly); *E.B. v. France*, App. No. 43546/02, ¶ 96 (Jan. 22, 2008), <http://hudoc.echr.coe.int/eng?i=001-84571> [<https://perma.cc/QEB7-JKZW>] (holding that rejection of applicant's adoption application constituted discrimination based on sexual orientation).

49. The Court dismissed an additional 43 cases during this decade as inadmissible or following a settlement. The majority of these cases challenged two specific laws—the UK's prohibition of lesbians and gays serving in the armed forces, and the higher age of consent for gay men in the UK and Austria. The dismissal of these cases reflected the fact that the ECtHR had previously found these laws in violation of the Convention and the respective governments subsequently repealed them.

50. *Fretté v. France*, 2002-I Eur. Ct. H.R. ¶ 41.

51. *E.B. v. France*, App. No. 43546/02, ¶ 96 (Jan. 22, 2008), <http://hudoc.echr.coe.int/eng?i=001-84571> [<https://perma.cc/FQ3Z-XQJ5>]; see also Kathleen A. Doty, *From Fretté to E.B.: The European Court of Human Rights on Gay and Lesbian Adoption*, 18 *L. & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES* 121, 121–22 (2009) (describing the two cases as having "virtually identical facts").

particularly convincing and weighty reasons to justify a difference in treatment.”⁵² For the dissenting judges and commentators, there was no doubt that the Court had overruled its earlier decision.⁵³

Formally, each of these pro-LGBT judgments applied only to the respondent state in each case. In practice, however, the case law had *erga omnes* effects, leading national actors to proactively and voluntarily liberalize laws and policies in response to ECtHR rulings against other countries.⁵⁴ For example, legislators in the Bundestag invoked judgments against the United Kingdom to abrogate the ban on homosexuals serving in the German military, and constitutional courts in Hungary and Portugal overturned the unequal age of sexual consent statutes in reliance on earlier Strasbourg decisions against the United Kingdom’s age-of-consent statute.⁵⁵

Growing support for lesbian and gay rights within the member states and by CoE institutions also encouraged ECtHR judges to view their mandate as “includ[ing] the defense of LGBTI people . . . rooted in the ‘European idea.’”⁵⁶ The ideological alignment of governments, supranational officials, and Strasbourg judges suggested that lesbian and gay rights would continue to advance, with reforms at the national level providing support for the Court to expand rights in applications against countries that lagged behind progressive regional trends. This convergence of interests, in conjunction with the absence of organized opposition, explains why lesbian and gay rights did not reach the level of mega-political contestation in this second period. Litigation over the rights of sexual minorities gained increased visibility and political salience at both the domestic and regional levels, but the momentum was decidedly in favor of the progressive expansion of rights.

52. *E.B.*, App. No. 43546/02, ¶¶ 91–92.

53. *Id.* (Loucaides, J., dissenting) (“the judgment in this case overturns the *Fretté v. France* judgment”); see also Doty, *supra* note 51, at 141 (“By overruling *Fretté v. France*, the EC[t]HR took a major step towards recognizing the full equality of gays and lesbians in Europe.”) (alteration in original).

54. See Helfer & Voeten, *supra* note 6, at 95–96 (empirically documenting *erga omnes* effects of ECtHR’s LGBT rights judgments); see also Effie Fokas & Dia Anagnostou, *The “Radiating Effects” of the ECtHR on Social Mobilizations Around Religion and Education in Europe: An Analytical Frame*, 12 POL. AND RELIGION S9, S10–S11 (2019) (explaining how ECtHR judgments “raise public consciousness, change how social actors perceive and articulate their grievances and claims, empower national rights institutions, or prompt mobilization among civil society”); Jillienne Haglund & Ryan M. Welch, *From Litigation to Rights: The Case of the European Court of Human Rights*, 65 INT’L STUD. Q. 210, 219 (2021) (empirical study showing that an “enabling domestic environment characterized by robust civil society and the presence of a NHRI [national human rights institution]” increases government expectations of mobilization following favorable ECtHR rulings and enhances respect for human rights) (alteration in original).

55. Helfer & Voeten, *supra* note 6, at 89–90.

56. Anna van der Vleuten, *supra* note 46, at 139; see also M. Joel Voss, *Europe’s Supranational Courts and LGBT Rights*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 1, 24–27 (Dec. 2020) (arguing “Europeanization is affecting the [ECtHR’s] willingness to adjudicate cases on LGBT issues”).

C. Period Three: 2010 to 2020

A second key shift in ECtHR jurisprudence occurred in two judgments issued in 2010. The two cases exemplify, respectively, the rights-expanding and rights-contracting dynamics of lesbian and gay rights litigation analyzed in Part III. These cases signal the Court's increased receptivity to discrimination claims, as well as heightened contestation over sexual orientation issues. Those contestations set the stage for LGBT rights litigation in Strasbourg to rise to the level of mega-politics as defined by Alter and Madsen, an issue we explore in Part IV.

In the first case, *Schalk and Kopf v. Austria*, the ECtHR held that the Convention did not require states to recognize same-sex marriage.⁵⁷ The Court began by reviewing historical and textual sources indicating that the right to marry applied only to unions between a man and a woman.⁵⁸ The ECtHR nevertheless recognized that “the institution of marriage has undergone major social changes since the adoption of the Convention” and that, as a result, it “would no longer consider that the right to marry . . . must in all circumstances be limited to marriage between two persons of the opposite sex.”⁵⁹ However, in the absence of a more developed European consensus, “the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.”⁶⁰

The Court next considered whether the Convention requires recognition of same-sex partnerships in a form other than marriage. Accepting for the first time that same-sex couples fall within the sphere of “family life,”⁶¹ the ECtHR nevertheless concluded that “there is not yet a majority of States providing for legal recognition of same-sex couples.”⁶² Characterizing the issue as “one of evolving rights with no established consensus,” the Strasbourg Court held that states “enjoy a margin of appreciation in the timing of the introduction of legislative changes” and in the substantive legal protections they provide to same-sex couples and families.⁶³

The second 2010 decision, *Alekseyev v. Russia*, challenged bans on gay Pride rallies in Moscow.⁶⁴ The government attempted to defend the restrictions on three grounds. First, the local authorities had received numerous objections from groups opposed to the events, some of which threatened violence. These protests, the government asserted, made it impossible to guarantee the safety of

57. *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. ¶ 108.

58. *Id.* ¶ 51; *see also* GONZALEZ SALZBERG, *supra* note 17, at 122–24 (providing a detailed analysis of the *Schalk and Kopf* judgment).

59. *Schalk*, 2010-IV Eur. Ct. H.R., ¶¶ 58, 61.

60. *Id.* ¶ 61. The Court's review of national laws revealed that “[a]t present no more than six out of forty-seven Convention States allow same-sex marriage.” *Id.* ¶ 58.

61. *Id.* ¶ 94.

62. *Id.* ¶ 105.

63. *Id.*

64. *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09 (Oct. 21, 2010), <http://hudoc.echr.coe.int/eng/?i=001-101257> [<https://perma.cc/7HRE-WZGM>].

participants in the Pride events.⁶⁵ Second, Russia “claimed a wide margin of appreciation in granting civil rights to people who identify themselves as gays or lesbians, citing the alleged lack of European consensus on issues relating to the treatment of sexual minorities.”⁶⁶ Third and most expansively, the government argued that LGBT pride events “should be banned as a matter of principle” because the state “must protect society from destructive influence on its moral fundamentals, and protect the human dignity of all citizens,” including the rights of the majority whose “religious and moral beliefs included a negative attitude towards homosexuality.”⁶⁷

The ECtHR unequivocally and unanimously rejected each of these arguments, condemning Russia for banning the Pride events without adequately assessing the risk of unrest or taking appropriate steps to protect peaceful protestors. According to the Court, the government had, in effect, endorsed the threats of anti-gay violence by invoking those threats and the opposing views of religious and other groups to justify denying permits for the rallies.⁶⁸ Further extending its case law on LGBT equality, the ECtHR asserted that “particularly weighty reasons need to be advanced” to justify a difference of treatment based on sexual orientation. When assessing such distinctions, “the margin of appreciation afforded to the State is narrow, and... the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances.”⁶⁹

Taken together, the two judgments in 2010 sent a strong signal that the ECtHR would be receptive to two types of challenges: (1) cases relying on evolving European standards to expand the protections available to same-sex couples and non-traditional families, mainly in Western Europe; and (2) cases challenging efforts to roll back LGBT equality, mainly in Russia and other post-Soviet states that committed or condoned violations of bodily integrity and political rights.

LGBT litigants and NGOs capitalized on this judicial receptivity. The rights-expanding cases filed with the ECtHR over the next decade include challenges to the non-recognition of same-sex marriages and civil unions;⁷⁰ restrictions on

65. *Id.* ¶ 57. For a detailed analysis, see Paul Johnson, *Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v. Russia*, 11 HUM. RTS. L. REV. 578 (2011) (arguing that the *Alekseyev* decision’s shortcomings undermine the integrity of the ECtHR’s analysis of the Convention).

66. *Alekseyev*, App. Nos. 4916/07, 25924/08, 14599/09, ¶ 83.

67. *Id.* ¶¶ 60, 78.

68. *Id.* ¶ 109.

69. *Id.*

70. See, e.g., *Przybyszewska v. Poland*, App. No. 11454/17 (June, 20 2020) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-203744> [<https://perma.cc/2FNK-WC8R>] (challenging a law defining marriage as union of a man and a woman); *S.K.K. v. Romania*, App. No. 5926/20 (May 25, 2020) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-202677> [<https://perma.cc/Q4XC-4LU7>] (claiming that a lack of legal recognition of same-sex relationships is discriminatory); *Schermi and Van Dijk v. Italy*, App. No. 41089/15 (Nov. 3, 2019) (communicated case),

parental rights and adoption;⁷¹ and discrimination in taxes, inheritance, state benefits, and public accommodation.⁷² The rights-contracting cases submitted to the Court during this period include restrictions on Pride rallies;⁷³ violence, harassment, and hate speech by public officials and private groups;⁷⁴ and the failure to prevent, investigate or prosecute such actions.⁷⁵

<http://hudoc.echr.coe.int/eng?i=001-198694> [<https://perma.cc/G2KJ-V5D8>] (objecting to the refusal to register a same-sex marriage that was entered into abroad); *Barmaxizoglou v. Greece*, App. No. 53326/14 (Sept. 8, 2020) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-205002> [<https://perma.cc/7VGQ-AJ5X>] (challenging legislation recognizing “cohabitation pacts” during the period when recognition was available only to different-sex couples); *Fedotova v. Russia*, App. No. 40792/10 (May 2, 2016) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-163362> [<https://perma.cc/37RQ-H3F2>] (challenging the absence of official recognition of same-sex unions comparable to that available to different-sex couples).

71. *See, e.g., Callamand v. France*, App. No. 2338/20 (Sept. 7, 2020) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-204971> [<https://perma.cc/KV6W-9UHY>] (contesting a refusal of visitation rights to child of former same-sex partner); *A.D.-K. v. Poland*, App. No. 30806/15 (Feb. 26, 2019) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-192049> [<https://perma.cc/R88N-UMRN>] (challenging an inability to register the birth certificate of a same-sex couple’s child); *R.F. v. Germany*, App. No. 46808/16 (Jan. 13, 2017) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-170890> [<https://perma.cc/B46Y-T2E>] (complaining of a refusal to recognize the genetic parent-child relationship of one member of a same-sex couple).

72. *See, e.g., Meskes v. Poland*, App. 11560/19 (July 6, 2020) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-203743> [<https://perma.cc/2NHN-9U9M>] (claiming discrimination against same-sex couples in inheritance tax); *Grochulski v. Poland*, App. 131/15, (July 6, 2020) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-203742> [<https://perma.cc/GF28-JKEG>] (asserting a lack of private life insurance for same-sex couples); *Lee v. United Kingdom*, App. No. 18860/19 (Mar. 23, 2020) (communicated case), <http://hudoc.echr.coe.int/fre?i=001-202151> [<https://perma.cc/H69Z-LGDU>] (challenging the dismissal of discrimination suit against bakery that refused to prepare a cake with a message supporting same-sex marriage); *Aldeguer Tomás v. Spain*, App. No. 35214/09, ¶ 91 (June 14, 2016), <http://hudoc.echr.coe.int/fre?i=001-163660> [<https://perma.cc/L5S3-CL96>] (raising the issue of discrimination against member of same-sex couple denied survivor’s pension).

73. *See, e.g., Berkman v. Russia*, App. No. 46712/15, ¶ 59 (Dec. 1, 2020), <http://hudoc.echr.coe.int/fre?i=001-206266> [<https://perma.cc/QH8T-QJMN>] (claiming the arrest of pro-LGBT demonstrators was unlawful); or *evi v. Serbia*, App. No. 5591/10, ¶ 61 (Jan. 17, 2017), <http://hudoc.echr.coe.int/eng?i=001-171323> [<https://perma.cc/762E-PDDW>] (asserting a right to hold Pride Parades); *Identoba v. Georgia*, App. No. 73235/12, ¶ 100 (May 12, 2015), <http://hudoc.echr.coe.int/eng?i=001-154400> [<https://perma.cc/EE49-LJ6V>] (holding that police’s failure to protect pro-LGBT demonstrators was unlawful); *Genderdoc-M v. Moldova*, App. No. 9106/06, ¶ 54 (June 12, 2012), <http://hudoc.echr.coe.int/eng?i=001-111394> [<https://perma.cc/A54V-M2E3>] (finding the government’s ban on pro-LGBT demonstrations contrary to the Convention).

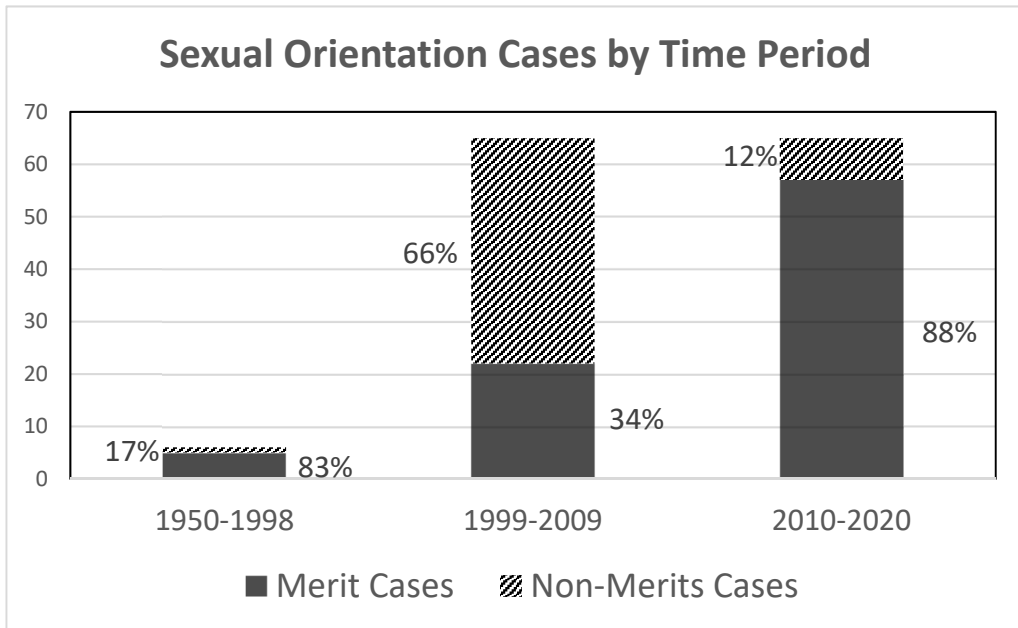
74. *See, e.g., Aghdgomelashvili v. Georgia*, App. No. 7224/11, ¶ 49 (Oct. 8, 2020), <http://hudoc.echr.coe.int/eng?i=001-204815> [<https://perma.cc/YDF6-Y5GM>] (challenging abusive police conduct during search of premises of an LGBT NGO motivated by homophobia); *Lapunov v. Russia*, App. No. 28834/19 (Nov. 14, 2019) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-199016> [<https://perma.cc/AHN9-ZDXB>] (complaining of abduction, imprisonment, and ill-treatment by state agents); *Oganezova v. Armenia*, App. Nos. 71367/12, 72961/12 (May 17, 2019) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-193663> [<https://perma.cc/JC82-KBMF>] (contesting the failure to protect a lesbian woman from physical abuse, threats, and intimidation because of her sexual orientation).

75. *See, e.g., Valaitis v. Lithuania*, App. No. 39375/19 (June 3, 2020) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-203419> [<https://perma.cc/3LUW-5DCL>] (complaining of a failure to investigate anti-gay hate speech); *M.C. v. Romania*, App. No. 12060/12, ¶ 124 (Apr. 12, 2016), <http://hudoc.echr.coe.int/eng?i=001-161982> [<https://perma.cc/Q6QC-278H>] (concerning the failure to investigate violent homophobic attacks against LGBT pride participants); *Women’s Initiatives*

D. Comparing Trends Across the Three Periods

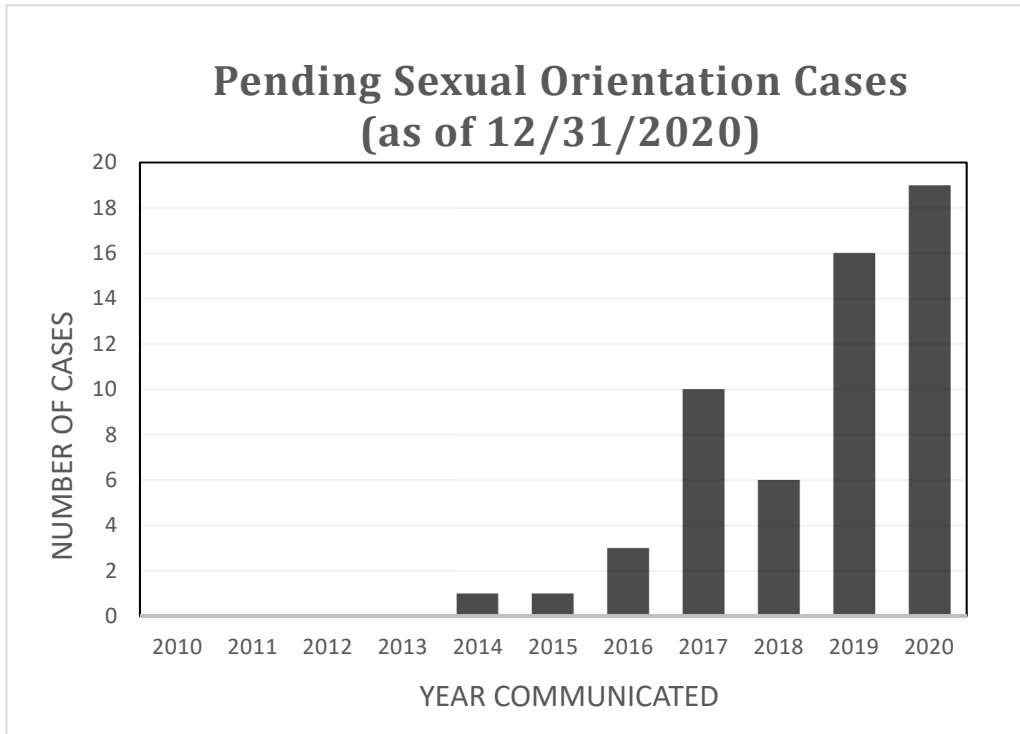
The sharp rise in lesbian and gay rights litigation in Strasbourg during this period is striking when compared with the previous two periods. Between 2010 and 2020, the ECtHR issued fifty-seven merits judgments and eight admissibility and other non-merits decisions on sexual orientation issues (excluding, as explained above, cases relating to asylum). In contrast, the Court issued only five merits judgments and one admissibility decision prior to 1998, and twenty-two merits judgments and forty-three non-merits decision between 1999 and 2009. **Figure 1** illustrates these trends, displaying the number and percentage of judgments and non-merits decisions in each time period.

Figure 1



The increase in the number of merits judgments revealed by Figure 1 actually understates the ECtHR's growing attention to lesbian and gay rights. As previously explained, several years usually elapse between the filing of an application in Strasbourg and a final judgment. At some point during this period, the Court may communicate the case to the respondent state, an action which demonstrates that the case has passed the initial threshold of admissibility. **Figure 2** shows the large number of communicated cases (fifty-six in total) that remained pending as of the end of 2020.

Supporting Group v. Georgia, App. No. 73204/13 (Aug. 24, 2015) (communicated case), <http://hudoc.echr.coe.int/eng?i=001-157298> [<https://perma.cc/C5WT-AB84>] (asserting that a peaceful rally to mark International Day Against Homophobia was violently disrupted by counter-demonstrators).

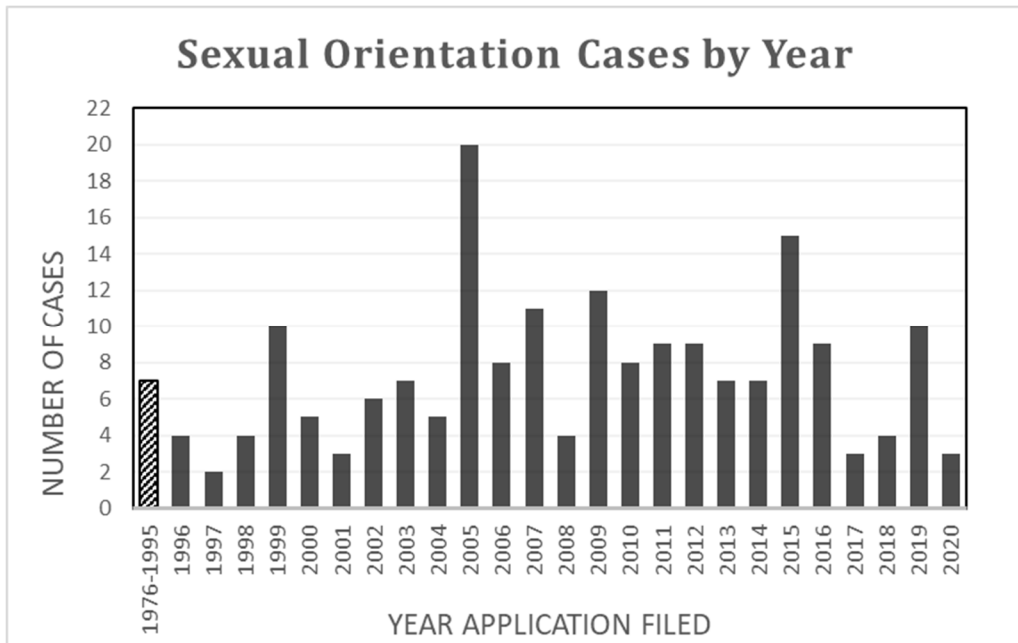
Figure 2

The increasing attention to sexual orientation issues in Strasbourg can also be observed by examining the number of applications filed each year that raise such issues. **Figure 3** shows sexual orientation cases by the year of application filed, including both decided cases and pending cases that have been communicated to the government. Figure 3 suggests that applications have remained relatively stable since 1999, with two peaks in 2005 and 2015.

However, this data must be viewed with caution. The ECtHR does not publish statistics on the subject matter of applications, nor does it announce when an application is filed. Rather, the application number and date can be identified only if and when the Court later communicates the case to the government, issues a judgment on the merits, or publishes a decision declaring a case inadmissible or striking it due to a settlement.⁷⁶ As a result, Figure 3 likely understates the number of applications involving lesbian and gay rights filed during the last several years that will later be communicated to the government.⁷⁷

76. *See supra* Part II.A.

77. As an example, consider a pending challenge to restrictions on blood donations by gay men in France. The applicant filed two complaints, one in 2016 and one in 2018, but the Court did not communicate the case to the government until early 2021. *Drelon v. France*, App. Nos. 3153/16, 27758/18 (Jan. 27, 2021), <http://hudoc.echr.coe.int/eng?i=001-208208> [<https://perma.cc/R5K2-WPYF>]. Because our dataset of LGBT rights cases ends in 2020, this case is not included in Figure 3.

Figure 3

Figures 4 and 5 reveal changes in the subject matter of sexual orientation cases and respondent states during the three time periods in our study. **Figure 4** shows the increase in the number and percentage of cases involving same-sex relationships and family issues as compared to other sexual orientation cases (which primarily involve physical integrity and political rights but exclude asylum applications). **Figure 5** reveals that decided and pending cases against Russia, former Soviet republics, and countries in Eastern Europe have increased in absolute and percentage terms relative to the cases against other CoE member states.⁷⁸ This increase is even more striking for the fifty-six cases pending at the end of 2020, forty-seven of which (eighty-four percent) were against those governments.

78. The countries in the “Eastern Europe” category in Figure 5 are: Bulgaria, Croatia, Georgia, Lithuania, Moldova, Poland, Romania, Russia, Serbia, and Slovenia. The ECtHR has issued no sexual orientation decisions against other states that were formerly part of the Soviet Union or the Soviet bloc.

Figure 4

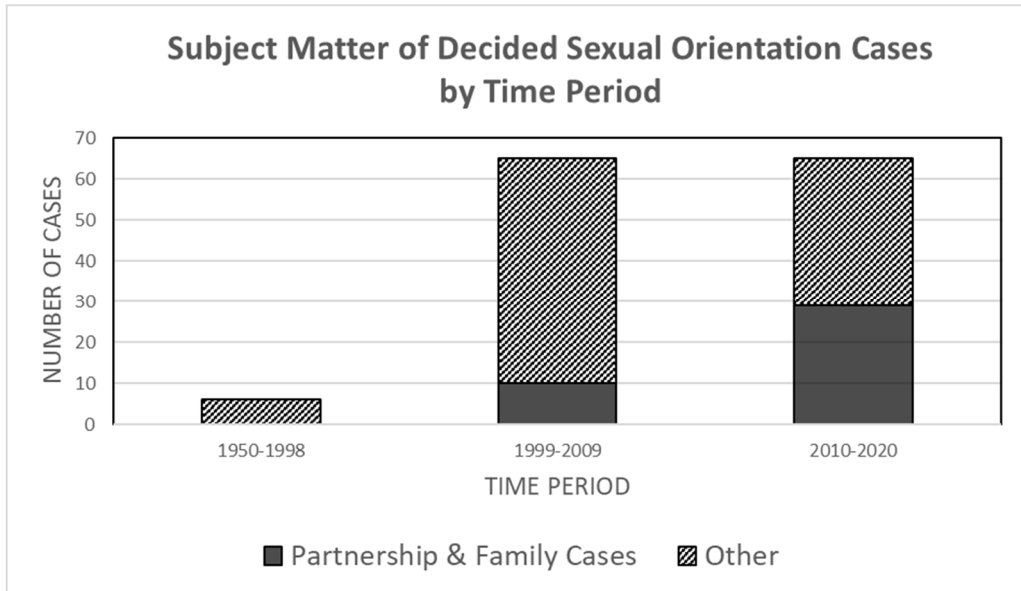
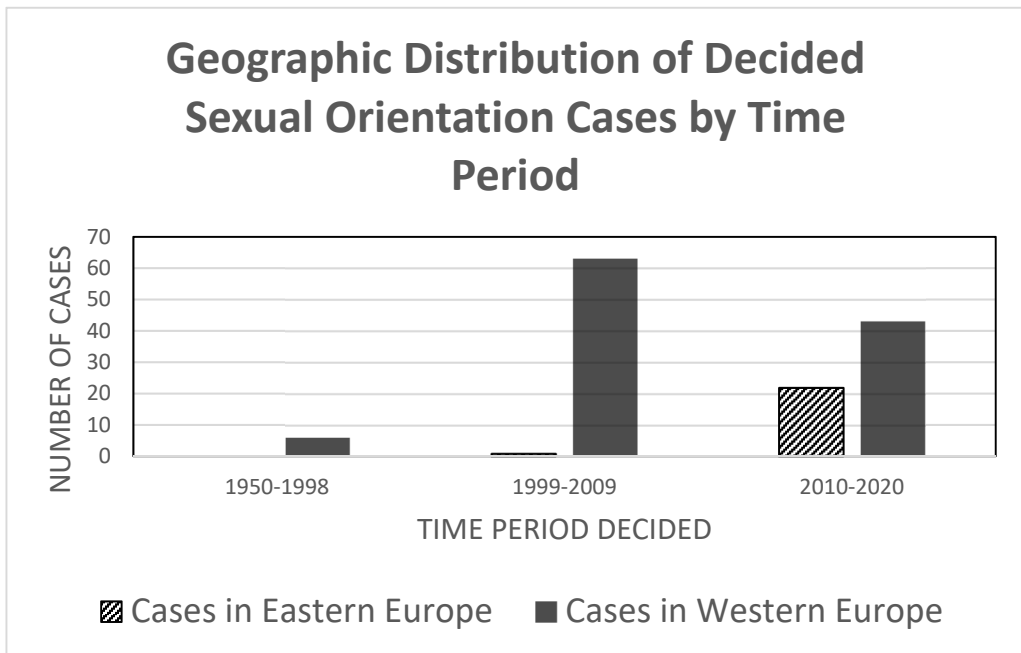


Figure 5



IV

THE RISE OF MEGA-POLITICAL RIGHTS CONTESTATION BEFORE THE ECtHR

The previous Part cataloged the rise in lesbian and gay rights litigation before the ECtHR, including the recent explosion of judgments and pending cases. This Part asks three related questions in an effort to understand how and why the Court is becoming an increasingly central player in mega-political contestations over LGBT rights. First: Why the increase? In other words, what domestic forces are pushing cases to Strasbourg? Second: Why Strasbourg? That is, why do advocates choose the ECtHR as the preferred forum for contestation as opposed to other legal or political venues? Third: Why LGBT rights, i.e., what makes claims involving sexual minorities uniquely suited to contestation before the Strasbourg Court? The answers to each of these three questions provide insight into how and why the ECtHR's docket of lesbian and gay rights cases have become mega-political over the last decade.

A. Why the Increase?

We argue that the increase in lesbian and gay rights applications to the ECtHR since 2010 can be traced to two forces: one rights-expanding and the other rights-contracting. In Part III, we organized our data on the basis of substantive rights and geography. This Part shows how these substantive categories correspond to functional differences in the nature of rights claims, the impetus for taking disputes to the ECtHR, and the Court's response to those claims.

1. Rights-Expanding Cases

The first force pushing cases to Strasbourg is the expansion of legal protections in domestic legal systems. These are "rights expanding" cases in two senses: first, because they are driven by growing recognition of LGBT equality by many member states, and second, because the applicants call for the ECtHR to expand the boundaries of LGBT rights at the European level. Rights-expanding cases often involve marriage equality, parentage rights, and other benefits for same-sex couples. As gays and lesbians gain recognition of their rights across Europe, often through mega-political contestation at the domestic level, LGBT individuals and NGOs are encouraged to file more cases before the ECtHR. By filing applications in Strasbourg, these actors seek to further develop a European consensus on lesbian and gay equality, both substantively and geographically. During Period Two and the early part of Period Three, these cases tended to arise from Western European countries; in recent years, however, Southern and Eastern European countries account for a larger share of rights-expanding cases.⁷⁹

The strategy of bringing rights-expanding cases to the ECtHR is aided by the margin of appreciation doctrine. The aspect of the doctrine most relevant to our

79. See discussion *supra* Part III.D.

inquiry is that as a larger number of member states recognize LGBT rights, the scope of discretion that the ECtHR provides to other governments narrows.⁸⁰ Although this process is not unique to LGBT rights, these cases illustrate the point well. Because the margin of appreciation doctrine is dynamic and responsive to progressive changes at the national level, the ECtHR's case law regarding same-sex relationships and families incrementally keeps up with these developments and leads the Court to expand rights protections at the supranational level.⁸¹

To illustrate this incremental approach, consider the evolution of the Court's judgments on same-sex partnerships over the last decade. As noted above, the Court's 2010 judgment in *Schalk and Kopf* avoided the question of whether any form of legal recognition for same-sex couples was required under Articles 8 and 14 of the Convention, emphasizing the margin of appreciation available to states in legal recognition of families.⁸² In 2013, the Grand Chamber held in *Villianatos v. Greece* that, if a state chose to offer a legal alternative to marriage to different-sex couples, it must also extend it to same-sex couples, although it did not decide whether states were required to provide for civil unions or registered partnerships.⁸³ Two years later, in *Oliari v. Italy*, the ECtHR answered this unresolved question, holding that states must provide some form of legal recognition for same-sex couples.⁸⁴ The Court explained that

in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship⁸⁵

The Strasbourg Court continued to chip away at member states' ability to distinguish between same and different-sex couples in *Taddeucci and McCall v. Italy*, the first case to find indirect discrimination on the basis of sexual orientation.⁸⁶ The Italian Court of Cassation held that it was permissible to exclude an unmarried same-sex couple from obtaining a residence permit for the

80. See, e.g., KANSTANTZIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2015).

81. Laurence R. Helfer & Clare Ryan, *Indirect Sexual Orientation Discrimination Before the European Court of Human Rights*, in INDIRECT DISCRIMINATION AND SEXUAL ORIENTATION OR GENDER IDENTITY at 47, 55 (Oct. 2020) (unpublished manuscript), http://hrp.law.harvard.edu/wpcontent/uploads/2021/05/IndirectDiscrimination_WorkshopProceedings_October2020.pdf [<https://perma.cc/R6WV-F6JX>].

82. *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. ¶¶ 103–09.

83. *Villianatos v. Greece*, 2013-VI Eur. Ct. H.R. ¶ 92.

84. *Oliari v. Italy*, App. Nos. 18766/11, 36030/11, ¶ 185 (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265> [<https://perma.cc/M6GL-8HK8>].

85. *Id.* ¶ 174.

86. *Taddeucci and McCall v. Italy*, App. No. 51362/09 (June 30, 2016), <http://hudoc.echr.coe.int/eng?i=001-164715> [<https://perma.cc/AW2B-VMHV>]; Giulia Dondoli, *An Overnight Success a Decade in the Making: Indirect Discrimination on the Grounds of Sexual Orientation*, 18 INT'L J. DISCRIM. & L. 5, 13–15 (2018).

non-national partner because “the concept of ‘family member’ extended only to spouses” and could not be extended to “cohabiting partners.”⁸⁷ The ECtHR, however, ruled in favor of the applicants, finding that the Italian government’s formally equal treatment of unmarried different-sex and same-sex couples did not resolve the *indirect* discrimination claim because:

the applicants’ situation cannot, however, be regarded as analogous to that of an unmarried heterosexual couple. Unlike the latter, the applicants do not have the possibility of contracting marriage in Italy. They cannot therefore be regarded as “spouses” under Italian law. Accordingly, as a result of a restrictive interpretation of the concept of “family member” only homosexual couples faced an insurmountable obstacle to obtaining a residence permit for family reasons.⁸⁸

The incremental process of expanding rights has given advocates an incentive to keep filing applications to push the Court’s jurisprudence even further. As one prominent LGBT rights advocate noted in 2010, “if the price of binding human rights law is patience, while consensus builds at the national level, I am happy to pay it.”⁸⁹ The last decade has demonstrated how that patience has been rewarded with incremental, but substantial, expansion of rights.

In recent years, attention has focused not only on expanding the scope of LGBT rights protections but also on extending ECtHR case law geographically. At the start of 2021, there are five pending cases seeking recognition of same-sex marriage; all but one of the applications are against Eastern European countries.⁹⁰ In her 2020 observations on *Buhuceanu v. Romania*, the Council of Europe Commissioner for Human Rights argues that “to be truly effective, legal recognition of same-sex couples must . . . be comprehensive, to cover all aspects of life in a committed, stable relationship.”⁹¹ These observations suggest that the time may be ripe for the Court to issue a ruling in favor of marriage equality—an issue we consider in Part V. Yet the eastward expansion of marriage equality may ultimately result in a collision with a second group of rights-contracting LGBT cases that have been filed against many former Soviet and Eastern European states.⁹²

87. *Taddeucci*, App. No. 51362/09, ¶ 21.

88. *Id.* ¶ 83.

89. van der Vleuten, *supra* note 46, at 135.

90. *Buhuceanu v. Romania*, App. No. 20081/19 (Feb. 3, 2020), <http://hudoc.echr.coe.int/eng?i=001-200952> [<https://perma.cc/H47K-V8K3>]; *S.K.K. v. Romania*, App. No. 5926/20 (May 25, 2020), <http://hudoc.echr.coe.int/eng?i=001-202677> [<https://perma.cc/7NKL-VLU3>]; *Przybyszewska v. Poland*, App. No. 11454/17 (July 6, 2020), <http://hudoc.echr.coe.int/eng?i=001-203744> [<https://perma.cc/C548-CQX>]; *Barmaxizoglou v. Greece*, App. No. 53326/14 (Sept. 28, 2020); *Fedotova v. Russia*, App. Nos. 40792/10, 30538/14, 43439/14 (July 13, 2021), <http://hudoc.echr.coe.int/eng?i=001-211016> [<https://perma.cc/Q2G8-BH9X>].

91. *Third Party Intervention by the Council of Europe Commissioner for Human Rights*, App. No. 20081/19, *Buhuceanu v. Romania*, COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS ¶ 33 (Sept. 14, 2020), <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-in-16809f9b9e> [<https://perma.cc/E35M-73UG>].

92. See *infra* Part IV.

2. Rights-Contracting Cases

The second force driving cases to Strasbourg arises out of systematic state opposition to well-established LGBT rights. These are “rights-contracting” cases because they result from states imposing new limits on established rights or enhancing the enforcement of preexisting restrictions of those rights. These cases mainly involve political rights (such as freedom of association and assembly) or bodily integrity rights (such as failure to protect individuals from violence by public or private actors). The ECtHR has long recognized both sets of rights for all individuals, regardless of their sexual orientation. In the last decade, however, Russia⁹³ and other Eastern European countries have increasingly resisted these previously settled rights.

State opposition drives applications to Strasbourg, since litigants recognize that the ECtHR is likely to apply its prior case law to uphold their challenges even if domestic judges fail to do so. Rights-contracting cases differ from rights-expanding litigation in that they often involve a large number of repeat applications challenging the same or similar conduct. Although ECtHR case law is clear, violations persist even after the Court has ruled against the government.

The Court’s repeated review of Russian bans on Pride demonstrations illustrates the trajectory of rights-contracting LGBT cases over the last decade. As the previous Part described, the ECtHR in the 2010 case of *Alekseyev v. Russia*, categorically rejected a ban on Pride Parades.⁹⁴ Not only did the Court find that the government had breached the applicant’s right to freedom of association and non-discrimination, it also held that Russia had violated Article 13 of the Convention, which obliges states to provide effective domestic remedies. The Court concluded that the judicial remedies in Russia did not “provide[] adequate redress” to the applicants.⁹⁵

In the decade that followed, no fewer than sixteen cases⁹⁶ have been brought against Russia alleging violations of freedom of expression and assembly and discrimination on the basis of sexual orientation.⁹⁷ The ECtHR’s judgments have

93. Russia was not a haven for LGBT rights prior to 2010; however, it is only in the last decade that opposition to LGBT rights has become a cornerstone of the state’s Europe-facing rhetoric and policies. Until the adoption of laws banning homosexual propaganda and restricting LGBT rights beginning in 2013, Russia mostly complied, if only in a pro forma way, with the requirements of membership in the CoE. Russia’s anti-LGBT laws were a break with that practice. Chandler notes that although some observers thought that “globalisation was contributing to the diffusion of democratic norms in Russia. But since 2012, Russia seemed to be more often circumventing these norms and institutions.” Andrea Chandler, *Russia’s Laws on ‘Non-Traditional’ Relationships as Response to Global Norm Diffusion*, 25 INT’L J. OF HUM. RTS., 616, 626 (2020).

94. *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09, ¶¶ 82, 85, 103 (Nov. 4, 2011), <http://hudoc.echr.coe.int/eng?i=001-101257> [<https://perma.cc/6VY2-92H2>] (rejecting the government’s assertion that opposition to a gay Pride Parade justified restricting the exercise of freedom of assembly).

95. *Id.* ¶ 99.

96. This number underestimates the total number of claims against Russia on these grounds, because the Court consolidates many applications into a single case.

97. Russia is not alone in facing repeated applications on these grounds. Armenia, Bulgaria, Croatia, Georgia, Lithuania, Moldova, Romania, Serbia, and Turkey have all had cases brought against them in the last decade on grounds that the states have violated political or bodily integrity rights.

been unequivocal, mostly unanimous, and increasingly frustrated with the government's arguments.⁹⁸ In the 2017 judgment *Lashmankin v. Russia*, the Court held that a prohibition on holding a Pride march was “based on legal provisions which did not provide for adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive and which did not therefore meet the Convention ‘quality of law’ requirements.”⁹⁹ The *Lashmankin* case also emphasized the lack of effective remedy, unanimously finding a violation of Article 13.¹⁰⁰ In so doing, the Court sent a strong signal to Russia that it expected its domestic legal system to effectively address any future LGBT rights claims for which there is clear and well-established ECtHR case law. The required domestic reforms have not been implemented, however, as evidenced by the fact that applications continue to flow to Strasbourg.¹⁰¹

By 2018, another judgment against Russia involving the same topic contained only four brief paragraphs on the merits, a remarkably short opinion, which concluded:

Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion as to the merits of these complaints. Having regard to its case-law on the subject [namely the 2010 *Alekseyev* opinion], the Court considers that in the instant case the ban on holding LGBT public assemblies imposed by the domestic authorities did not correspond to a pressing social need and was thus not necessary in a democratic society. The Court also finds that the applicants suffered unjustified discrimination on the grounds of sexual orientation, that that discrimination was incompatible with the standards of the Convention, and that they were denied an effective domestic remedy in respect of their complaints concerning a breach of their freedom of assembly.¹⁰²

In a 2020 judgment, *Sozayev v. Russia*, the Court went even further. It did not find it necessary to assign the application to a full seven-judge chamber. Rather, a three-judge committee summarily held that Russia's bans on LGBT rallies clearly violated well-established case law.¹⁰³

98. For example, the Strasbourg Court rarely finds that a government lacks a legitimate aim, however, in *Bayev v. Russia*, the Court concluded, “the legal provisions in question [banning “homosexual propaganda”] do not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others . . . [B]y adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.” *Bayev v. Russia*, App. No. 67667/09, ¶ 83 (June 20, 2017), <http://hudoc.echr.coe.int/eng?i=001-174422> [<https://perma.cc/VZG5-HNYK>].

99. *Lashmankin v. Russia*, App. Nos. 57818/09, 51169/10, 4618/11, 31040/11, 19700/11, 55306/11, 7189/12, 47609/11, 59410/11, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12, 37038/13, ¶ 471 (Feb. 7, 2017), <http://hudoc.echr.coe.int/eng?i=001-170857> [<https://perma.cc/VEN3-PYH7>].

100. *Id.* ¶¶ 360–61.

101. See Lisa McIntosh Sundstrom & Valerie Sperling, *Seeking Better Judgment: LGBT Discrimination Cases in Russia and at the European Court of Human Rights*, 24 INT'L J. OF HUM. RTS. 750, 757 (2019).

102. *Alekseyev v. Russia*, App. No. 14988/09, ¶ 21 (Nov. 27, 2018), <http://hudoc.echr.coe.int/eng?i=001-187903> [<https://perma.cc/4XGA-J9LP>].

103. See *Sozayev v. Russia*, App. Nos. 67685/14, 35199/15, ¶ 22 (Oct. 13, 2020), <https://laweuro.com/?p=12858> [<https://perma.cc/YVW8-QVH8>] (holding restrictions of peaceful

B. Why Strasbourg?

Conflicts over LGBT rights have become mega-political in Europe over the last decade. Such conflicts have occurred primarily at the domestic level—through political and social advocacy (expanding rights) and the rise of government opposition to sexual minorities in some countries (contracting rights). During the same period, many of these socially divisive disputes have started to congregate at the ECtHR. This raises the question of why proponents and opponents of LGBT rights are focusing their attention on the Strasbourg Court as opposed to other supranational or national legal or political forums. We identify several interrelated answers to this question.

First, an important part of the “idea of Europe” is its supranational legal institutions. The Court’s human rights mandate is a powerful symbol of this idea, which makes it a target for groups that both support and are hostile to the “European project,” as well as a forum in which states and non-state actors can push to expand or erode European legal norms.¹⁰⁴ The “idea of Europe” is used by advocates to situate LGBT issues at the center of European human rights discourse. The idea is also used by opponents to argue—in the language of mega-politics—that the judicially-led expansion of lesbian and gay rights is a potent example of European supranational power encroaching on national authority.

Second, the ECtHR has jurisdiction over countries—including Russia, Armenia, Georgia, Ukraine, and Turkey—that are much more politically, legally, and socially diverse than the member states of the European Union (EU). As such, the Strasbourg Court has (at least until quite recently) more often confronted deep cleavages along the East/West divide than its EU counterpart, the Court of Justice of the European Union (CJEU or Luxembourg Court). The sense of a collective European identity weakens as the ECtHR’s jurisdictional reach extends further from the “core” of Western European states.¹⁰⁵ In addition, transnational networks among civil society groups across the region enable LGBT rights advocates in jurisdictions that are hostile to expanding rights to call on European allies for support. This alliance facilitates greater mobilization—and increases social cleavages—in countries that might otherwise succeed in stifling a fledgling domestic LGBT rights movement.

Third, the ECtHR has a distinctive subject matter expertise and institutional competence. The CJEU hears some cases involving human rights, but its capacious mandate as the top judicial arbiter of all EU law means that it is

participants in a public assembly were unnecessary).

104. The “idea of Europe” or the “European project” includes the values, identities, and political understandings “that become associated with being ‘European.’” Phillip M. Ayoub & David Paternotte, *LGBT ACTIVISM AND THE MAKING OF EUROPE: A RAINBOW EUROPE?* 4 (2014) [hereinafter *A RAINBOW EUROPE*].

105. See Safia Swimelar, *Nationalism and Europeanization in LGBT Rights and Politics: A Comparative Study of Croatia and Serbia*, 33 *EAST EUR. POL. AND SOC’YS AND CULTURES* 603, 613 (2019). Swimelar explains that European identity is relative (Germany is more European than Croatia, which is more European than Serbia, etc.) and as such “tolerance of queer citizens increases as one moves North and West.” *Id.*

unlikely to be inundated by LGBT rights claims.¹⁰⁶ A 2014 study that compared ECtHR and CJEU judgments found that to date, the Luxembourg Court had issued only eleven preliminary rulings on LGBT rights.¹⁰⁷ Moreover, the CJEU has generally been inclined to follow the ECtHR's LGBT jurisprudence rather than expanding the rights of sexual minorities on its own initiative; consequently, rights-expanding activists have tended to favor the Strasbourg Court as their preferred forum.¹⁰⁸

The 2018 CJEU judgment in *Coman v. Romania*—which held that EU member states must extend residence rights to foreign same-sex spouses—is a notable, but ultimately distinguishable, exception to that trend.¹⁰⁹ Interpreting a Directive on the right of EU citizens and their family members to move and reside freely within the member states,¹¹⁰ the Luxembourg Court underscored that Article 7 of the EU Charter of Fundamental Rights has the “same meaning and the same scope” as Article 8 of the European Convention.¹¹¹ The CJEU also cited ECtHR case law on same-sex relationships as key authorities for its judgment.¹¹² The Luxembourg Court's reference to the European Convention, and its interpretation by the Strasbourg Court, suggests that the CJEU is more likely to follow the ECtHR in this area than it is to be a trailblazer—except where EU secondary legislation expressly provides broader protections for LGBT equality. In fact, although the *Coman* judgment undeniably expanded the rights of same-sex couples within the EU, some commentators have criticized the judgment's relatively narrow scope. In particular, they have noted that the CJEU's reasoning is “confined to the context of free movement rights and not to protections against discrimination more broadly.”¹¹³ By contrast, a broader range of sexual orientation claims are regularly litigated before the Strasbourg Court. We thus expect that the ECtHR will continue to be a more attractive supranational judicial forum for most contestations over LGBT rights in Europe.

106. In addition to the competence and jurisdiction of the Strasbourg Court, the two institutions also have different procedures and receive vastly different numbers of claims.

107. van der Vleuten, *supra* note 46, at 125.

108. *Id.* at 138–39.

109. Case C-673/16, *Coman v. Romania*, ECLI:EU:C:2018:385, ¶ 51 (June 5, 2018).

110. See generally Council Directive 2004/38, 2004 O.J. (L 158) 77 (EC), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0038> [<https://perma.cc/SRW7-5VMA>].

111. *Coman*, ECLI:EU:C:2018:385, ¶ 49.

112. *Id.* ¶ 50.

113. Daron Tan, *Adrian Coman v. Romania: A Small Victory with Wasted Potential*, OXFORD HUM. RTS. HUB (June 19, 2018), <https://ohrh.law.ox.ac.uk/adrian-coman-v-romania-a-small-victory-with-wasted-potential/> [<https://perma.cc/NK6P-9PY7>]; see also Manon Beury, *The CJEU's Judgment in Coman: A Small Step for the Recognition of Same-Sex Couples Underlying European Divides Over LGBT Rights*, STRASBOURG OBSERVERS (July 24, 2018), <https://strasbourgobservers.com/2018/07/24/the-cjeus-judgment-in-coman-a-small-step-for-the-recognition-of-same-sex-couples-underlying-european-divides-over-lgbt-rights/> [<https://perma.cc/DQH7-AJ9Q>].

C. Why LGBT Rights?

LGBT rights—and lesbian and gay rights in particular—are more than simply one set of minority rights among many. Instead, LGBT rights are often viewed by supranational institutions and sexual minorities, as well as their opponents, as an emblem of the “European project” and the “idea of Europe.”¹¹⁴ As Philip Ayoub and David Paternotte explain, “[t]he recognition of LGBT rights is . . . increasingly used to define what it means to be European, both at the national level and more recently at the European level.”¹¹⁵ They continue, “[t]he idea of a liberal and cosmopolitan Europe, in which the promotion of LGBT rights was anchored, is opposed on the basis of different understandings of what Europe should be; and LGBT rights are usually regarded as a powerful symbol of Europe’s liberal project.”¹¹⁶ In addition, as Safia Swimelar has recently noted, LGBT rights are a proxy for Europeanization and for those who view it as a threat to the nation: “While there is no natural relationship between nationalism, homophobia, LGBT rights, and imaginations of Europe, the conventional view is to pit nationalism in opposition to a European identity and to marry Europe or ‘the West’ with LGBT rights.”¹¹⁷

These and other scholars have documented two models of perceived threats from the expansion of LGBT rights as part of the European project.¹¹⁸ The “threat to the family” model focuses on LGBT rights as eroding traditional marriage and forms of parentage.¹¹⁹ The “threat to the nation” model, by contrast, sees LGBT rights as a danger to national sovereignty and identity.¹²⁰ These two threat models have not been applied to rights litigation at the European level. As we now explain, however, the models closely track the categories of cases discussed in Part III. We also consider how the threat models relate to the sovereignty driven and social cleavage varieties of mega-politics identified by Alter and Madsen.

Russia’s framing of LGBT rights is consistent with the “threat to the nation” model. The government’s resistance is motivated by animosity toward sexual minorities and Europeanization, and by a robust conception of national

114. Phillip Ayoub & David Paternotte, *Europe and LGBT Rights: A Conflicted Relationship*, in THE OXFORD HANDBOOK OF GLOBAL LGBT AND SEXUAL DIVERSITY POLITICS 1, 9 (Michael J. Bosia et al. eds., 2019).

115. *Id.* at 8.

116. *Id.* at 9; see also Graeme Reid, *Political Homophobia Ramps Up*, OPINIO JURIS (Aug. 12, 2021), <http://opiniojuris.org/2021/08/12/political-homophobia-ramps-up/> [<https://perma.cc/8YAV-7TLW>] (explaining that lesbian and gay rights have become “a potent symbol in a rhetorical clash between ‘traditional values’ and ‘human rights,’” a battle in which “LGBT rights are projected as a marker of modernity, a foreign influence, and an assault on the family and tradition”).

117. Swimelar, *supra* note 105, at 604.

118. See, e.g., Phillip Ayoub, *With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights*, 13 J. OF HUM. RTS. 337, 337 (2014) (outlining how different perceptions of threat define norms in Europe).

119. See *id.* at 345–46 (noting that alternatives to heterosexuality can be portrayed as threatening to families).

120. Swimelar, *supra* note 105, at 608.

sovereignty—ideas that closely align with the “sovereignty” category of mega-politics discussed in the Introduction to this symposium. When Russian politicians criticize “Western” gay rights, they not only raise the specter of eroding “traditional” values, but also of a loss of national identity and autonomy. The two ideas are fundamentally interconnected, as “the nation has often been constructed and framed as masculine, heterosexual, and the symbolic embodiment of what is ‘natural,’ while same-sex relations are often constructed as ‘unnatural’ and threatening to the traditional idea of the nation.”¹²¹ Groups that oppose LGBT rights as a threat to the nation foment mega-political contestation by raising the stakes of disputes. Rather than framing these as uncontroversial cases about established rights, such as freedom of assembly, opponents reframe ECtHR judgments as unjustified verdicts on national sovereignty.

The rights-expanding cases reveal a different kind of contestation, one more aligned with the “threat to the family” model. These cases closely resemble the “social cleavage” concept defined by Alter and Madsen insofar as they involve domestic divisions over definitions of the family. However, social cleavages over LGBT rights need not be framed in terms of “threat to the family,” for instance where a dominant religious group opposes lesbian and gay equality as contrary to religious values. There is, therefore, important conceptual distance between the social cleavage understanding of mega-political contestation over LGBT rights and the “threat to the family” model described here.

The “threat to the family” model of resistance to ECtHR judgments is visible in the litigation over marriage and parentage. In these cases, the Strasbourg Court initially takes an incremental approach, applying a wide margin of appreciation and deferring to governments when national laws exhibit a high degree of variation. When the ECtHR considers narrowing the margin in subsequent cases, opponents respond that the Court is moving too far or too fast, and that states should be allowed to develop their own domestic conceptions of the family.

Unlike the repeat violations of well-established rights against states such as Russia, in which resistance to implementing Strasbourg judgments is a symbol for resistance to the European project, pushback on rights-expanding cases has not primarily originated with governments. Instead, contestation is more acute within civil society (although some politicians also oppose expanding lesbian and gay rights, including in Western Europe).¹²² Our research into civil society participation in LGBT rights cases, for example, reveals that religious liberty NGOs have filed third-party interventions (akin to amicus briefs) opposing LGBT equality in nine cases involving marriage and parentage rights, but have intervened in only one case involving political or bodily integrity rights.¹²³

121. *Id.* at 609.

122. Ayoub and Patternote, for example, observe a coalition of “right-wing populists and religiously inspired activists” resisting LGBT rights. *See* Ayoub & Paternotte, *supra* note 114, at 10.

123. The cases in which we identified third-party interventions from groups opposed to expanding

Opposition to marriage equality in France provides another contrast between the national and family threat models. Civil society groups that opposed same-sex marriage, which was passed by domestic legislation in 2013, focused on “threat to the family” arguments by linking marriage to expanded parentage rights for lesbian and gay couples. Raising the specter of increased demand for assisted reproductive technologies and especially surrogacy by same-sex couples, these groups linked the marriage question to an issue then pending before the ECtHR—whether France was obliged to recognize the parent-child relationship for children born via surrogacy.¹²⁴ The Strasbourg Court’s surrogacy judgments, issued in 2014, showed deference to French domestic politics, while incrementally expanding rights for children born via surrogacy (although in the context of different-sex parents).¹²⁵ By 2020, when the Macron government introduced a new law to expand access to reproductive technology to same-sex couples, it was supported by a majority of the French population.¹²⁶ Through an iterative process between incremental rights expansion in Strasbourg and domestic legal reforms, LGBT rights in France have expanded considerably over the last decade. Opposition to same-sex marriage and parentage rights did not disappear, but it was unable to gain momentum. We contend that this is due in part to the fact that the “threat to the family” framing did not inspire significant backlash against Strasbourg’s judgments by either the French public or the government.

In closing, we note a plausible interaction effect between the rights-expanding and rights-contracting cases. The repressive laws and policies adopted by post-Soviet countries are partly a reaction to the expansion of LGBT rights in Western

LGBT rights include: *S.W. v. Austria*, App. No. 1928/19 (Feb. 12, 2019), <http://hudoc.echr.coe.int/fre?i=001-191607> [<https://perma.cc/EQ2S-JMF4>] (same-sex parentage); *A. D.-K. v. Poland*, App. No. 30806/15 (Feb. 26, 2019), <http://hudoc.echr.coe.int/eng?i=001-192049> [<https://perma.cc/99PB-XK5Y>] (same-sex partnership); *Schlittner-Hay v. Poland*, App. Nos. 56846/15, 56849/15 (Feb. 26, 2019), <http://hudoc.echr.coe.int/eng?i=001-192050> [<https://perma.cc/DS2Q-VPGV>] (same-sex parentage); *R.F. v. Germany*, App. No. 46808/16 (Jan. 13, 2017), <http://hudoc.echr.coe.int/eng?i=001-170890> [<https://perma.cc/C8XD-S67K>] (same-sex parentage); *Orlandi v. Italy*, App. Nos. 26431/12, 26742/12, 44057/12, 60088/12 (Mar. 14, 2018), <http://hudoc.echr.coe.int/eng?i=001-179547> [<https://perma.cc/XY2X-5MPB>] (same-sex marriage); *Oliari v. Italy*, App. Nos. 18766/11, 36030/11 (Oct. 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265> [<https://perma.cc/9L2F-9UU4>] (same-sex partnership); *Ladele v. the U.K.*, App. No. 51671/10 (Aug. 27, 2010), <http://hudoc.echr.coe.int/eng?i=001-111187> [<https://perma.cc/LG36-GUPL>] (refusal to serve same-sex couples); *X v. Austria*, 2013-II Eur. Ct. H.R. (same-sex parentage); *Charron and Merle-Montet v. France*, App. No. 22612/15 (Jan. 19, 2017), <http://hudoc.echr.coe.int/eng?i=001-171223> [<https://perma.cc/3HSV-SE24>] (same-sex parentage). The one case falling into the “contracting rights” category in which a third-party intervention took the side of the government was *Bayev v. Russia*, App. No. 67667/09 (Nov. 13, 2017), <http://hudoc.echr.coe.int/eng?i=001-174422> [<https://perma.cc/6UVU-7LPC>], which involved a challenge to Russia’s gay propaganda law.

124. See Clare Ryan, *Europe’s Moral Margin: Parental Aspirations and the European Court of Human Rights*, 56 COLUM. J. TRANSNAT’L L. 467, 505 (2018) (describing the political and legal intersection in France between same-sex marriage and parentage for children born via surrogacy).

125. *Id.*

126. Elizabeth Pineau, *French Senate Approves Bill Allowing IVF for Single Women, Lesbians*, REUTERS (Jan. 22, 2020), <https://www.reuters.com/article/us-france-ivf/french-senate-approves-bill-allowing-ivf-for-single-women-lesbians-idUSKBN1ZL33Y> [<https://perma.cc/Q64Z-X9DH>].

Europe.¹²⁷ By endorsing and arguably accelerating that expansion, the Strasbourg Court has helped to make equality for sexual minorities a central tenet of the European project of upholding liberal values and human rights, including LGBT rights. But this linkage has also engendered increasing resistance from states that joined the CoE after the Cold War, many of whose political leaders and citizens perceive that their “national values and morals [are] at stake in the face of a rainbow-tinged European threat.”¹²⁸

V

THE FUTURE OF MEGA-POLITICAL LGBT RIGHTS CONTESTATION AT THE ECtHR

The period from 2010 to 2020 marked a shift in the Strasbourg Court’s relationship to lesbian and gay rights. On the one hand, the ECtHR incrementally expanded its jurisprudence on LGBT partnership and family rights in line with progressive trends in Western Europe. On the other, the Court unequivocally insisted that member states elsewhere on the continent adhere to established political and bodily integrity rights for sexual minorities. Although the ECtHR provided a venue for mega-political contestations during this decade, it was not the primary battleground, largely due to its incremental approach. We predict, however, that the Court can no longer avoid becoming a central forum for mega-political lesbian and gay rights controversies. The expansion of domestic political contestations, as well as recent shifts in Strasbourg case law on marriage equality and asylum, suggest that a new inflection point is at hand.

A. The Mega-Politics of Marriage Equality

As we observed in Part III, all but one of the pending marriage equality cases at the end of 2020 were against former Soviet Union or Soviet bloc countries.¹²⁹ This is partly because most Western European countries already recognize same-sex marriages.¹³⁰ In July 2021, a chamber of the ECtHR issued a judgment in the

127. Chandler, *supra* note 93, at 622.

128. A RAINBOW EUROPE, *supra* note 104, at 1.

129. See *Buhuceanu v. Romania*, App. No. 20081/19 (Feb. 3, 2020), <http://hudoc.echr.coe.int/eng?i=001-200952> [<https://perma.cc/4AMD-NSX2>]; *S.K.K. v. Romania*, App. No. 5926/20 (May 25, 2020), <http://hudoc.echr.coe.int/eng?i=001-202677> [<https://perma.cc/NBN9-X7DG>]; *Przybyszewska v. Poland*, App. No. 11454/17 (July 6, 2020), <http://hudoc.echr.coe.int/eng?i=001-203744> [<https://perma.cc/RLN7-YMQD>]; *Barmaxizoglou v. Greece*, App. No. 53326/14, (Sept. 8, 2020), <http://hudoc.echr.coe.int/eng?i=001-205002> [<https://perma.cc/45E2-L3H4>]; and *Fedotova v. Russia*, App. Nos. 40792/10, 30538/14, 43439/14 (July 13, 2021), <http://hudoc.echr.coe.int/eng?i=001-211016> [<https://perma.cc/84RW-KSN4>]. Greece is the only country with a pending case that falls outside of the former Soviet region. There is also a pending case against the Ukraine, which the Court communicated in February of 2021. *Maymulakhin v. Ukraine*, App. No. 75135/14 (Feb. 8, 2021), <http://hudoc.echr.coe.int/eng?i=001-208008> [<https://perma.cc/3HY7-YPA6>].

130. See *Marriage Equality Around the World*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/marriage-equality-around-the-world> [<https://perma.cc/JSA4-JGDJ>] (listing the current status of marriage equality in every country).

first of these pending cases.¹³¹

In *Fedotova v. Russia*, the Court unanimously concluded that failure to provide any form of legal recognition for same-sex couples violated the government's positive obligations under Article 8 of the Convention.¹³² The judgment followed the Court's incremental approach to rights expansion. It avoided the issue of full marriage equality (which Russian voters had categorically rejected in a 2020 amendment to the Constitution) and instead concluded that "the respondent Government have a margin of appreciation to choose the most appropriate form of registration of same-sex unions taking into account its specific social and cultural context."¹³³ Yet the judgment also bears a striking resemblance to recent rights-contracting cases, in that the Court held that Russia failed to offer a "prevailing community interest" against which to balance the applicants' claim for some form of legal recognition.¹³⁴ By rejecting the government's arguments so thoroughly, while offering a wide margin of appreciation on how to remedy the violation, the *Fedotova* judgment attempted to thread a fine needle. Yet there can be no denying that the ECtHR has now extended its rights-*expanding* jurisprudence to rights-*contracting* member states.

An expansive ruling on marriage equality would have posed several risks for the Court, and still could in future cases. Such a decision would have instigated a collision between same-sex marriage and the "threat to the nation" ideology espoused by Russia and some other Eastern European governments. Indeed, it could be seen to vindicate the rhetoric of resistance to "European values" by those who have long warned that European supranational institutions would undermine national sovereignty by requiring same-sex marriage or equivalent legal protection.¹³⁵

Even after the more deferential decision in *Fedotova*, the ECtHR also faces a risk of systemic non-compliance. If Russian officials refuse to implement the judgment and continue to deny any legal recognition to same-sex couples, and if domestic courts uphold that denial, it will fall to Strasbourg judges to provide a remedy.¹³⁶ In addition, if the Court issues similar judgments in the other pending same-sex marriage cases against Eastern European countries, and the governments then ignore those judgments, the number of repeat applications to the ECtHR will surely explode. In effect, recalcitrant states could use the burden

131. This case is listed as pending in our dataset, which tracks cases up to the end of 2020. On October 12, 2021, Russia requested referral of the *Fedotova* case to the Grand Chamber, which the Court granted on November 22, 2021. Eur. Ct. H. R. Press Release, November 22, 2021, <https://hudoc.echr.coe.int/eng-press?i=003-7188910-9760525>.

132. *Fedotova v. Russia*, App. Nos. 40792/10, 30538/14, 43439/14, ¶ 56 (July 13, 2021), <http://hudoc.echr.coe.int/eng?i=001-211016> [<https://perma.cc/L8M2-MBCS>].

133. *Id.*

134. *Id.* ¶ 55.

135. See Swimelar, *supra* note 105, at 604; A RAINBOW EUROPE, *supra* note 104, at 8.

136. See Ba ak Çalı, *Autocratic Strategies and the European Court of Human Rights*, 2 EUR. CONVENTION. ON HUM. RTS. L. REV. 11, 13 (2021) ("For many of the applicants, the ECtHR may be the only judicial institution to detect, pronounce and remedy the abusive use of laws and judicial institutions against fundamental rights.").

of these repeat cases to undermine the ECtHR from within by forcing the Court to allocate its limited resources and time to these claims.

The *Fedotova* judgment mitigates these risks by holding that Russia has discretion to decide what type of legal recognition of same-sex relationships is appropriate for that country. Yet the Court's incremental approach to expanding rights will, we predict, lead ineluctably to future rulings in favor of full marriage equality. In particular, as the domestic protections for same-sex couples expand in the West, the Court's reliance on the margin of appreciation doctrine and a lack of European consensus to avoid such definitive decisions will become ever more difficult to justify.

One might argue that the Court should sidestep the marriage question indefinitely and thus avoid ratcheting up a controversy that is already generating mega-political social cleavages in several CoE member states. Yet avoiding mega-political contestation cannot be the ECtHR's ultimate objective if it is to retain its credibility and legitimacy as a powerful supranational human rights institution. Doctrines of deference and incrementalism allow the Court to raise standards of rights protection across Europe while avoiding or at least deferring expansive rulings that could spark concerted backlash. Yet there is a point after which avoidance or deference amounts to an abdication of the Court's core human rights protecting function, making it impossible for the judges in Strasbourg to avoid becoming enmeshed in mega-politics.

B. LGBT Asylum as a New Mega-Political Frontier

Mega-politics in the next phase of ECtHR sexual orientation cases is unlikely to be confined to Eastern Europe. As previously noted, we excluded from our dataset applications in which a gay or lesbian individual seeks asylum in a CoE member state. These cases differ from those included in our study in that they focus primarily on the human rights situation in the applicant's country of origin. In addition, because the Court long avoided finding a violation in these cases,¹³⁷ they did not raise threat to the family or threat to the nation rationales for opposing lesbian and gay rights. The ECtHR's avoidance of mega-political contestation in this area is poised to change, however, following a recent judgment that portends a significantly expanded role for the Strasbourg Court in reviewing LGBT asylum claims.

For more than two decades, the ECtHR upheld the findings of national authorities that sexual minorities did not face a risk of persecution in their respective countries of origin.¹³⁸ The Court's case law was especially problematic

137. Until 2020, the Court rejected all LGBT asylum claims, either declaring them inadmissible as manifestly ill-founded, striking them from the list, or finding no violation. See Nuno Ferreira, *An Exercise in Detachment: The Council of Europe and Sexual Minority Asylum Claims*, in QUEER MIGRATION AND ASYLUM IN EUROPE 78, 87 (Richard Mole ed., 2021) (explaining that "the only finding of a violation of an ECHR article" occurred in *O.M. v. Hungary*, a decision that was only tangentially related to asylum).

138. Johnson, *supra* note 19. This position is consistent with the ECtHR's restrictive jurisprudence concerning the rights of migrants in general. See generally MARIE-BÉNÉDICTE DEMBOUR, WHEN HUMANS BECOME MIGRANTS: STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN

in deferring to the authorities' conclusion that "gay men [could] ward off a risk of inhuman treatment by living discreetly" in their home countries.¹³⁹ The Court repeatedly reaffirmed this approach even in the face of a contrary judgment by the CJEU¹⁴⁰ and trenchant critiques by scholars, who highlighted the irony that "Strasbourg has become an increasingly 'pro-LGBT' court, but 'anti-migrant' [court] as well."¹⁴¹

The ECtHR broke from this regressive approach in late 2020. In *B and C v. Switzerland*,¹⁴² the Court unanimously overturned the rejection of an asylum petition by a gay man from the Gambia. The Chamber held that the Swiss authorities erred in finding that the applicant's sexual orientation was unlikely to come to the attention of Gambian officials or the Gambian public.¹⁴³ In this respect, the Court declined to follow its prior case law and held, in line with the CJEU, that sexual minorities from countries in which homophobia is widespread may face a genuine risk of ill-treatment regardless of whether they can hide their sexual orientation.¹⁴⁴ Of equal importance, the ECtHR for the first time accepted that non-state actors, as well as state agents, can persecute sexual minorities. The failure of Swiss officials and judges to consider whether the Gambian authorities were able and willing to protect the applicant against ill-treatment from private actors was therefore contrary to the Convention.¹⁴⁵ Although the ECtHR has previously indicated that risk of ill-treatment by third parties could be a factor in the right to asylum, it has also been highly deferential to domestic authorities' characterization of such risks.¹⁴⁶

The *B and C* judgment signals an expansion of ill-treatment protection for LGBT asylum seekers under Article 3 of the European Convention, and a more searching review of domestic asylum decisions. If this proves to be true, *B and C*

INTER-AMERICAN COUNTERPOINT 250–80 (2015) (detailing migrants' struggles to convince the ECtHR to recognize violations of their human rights).

139. Thomas Spijkerboer, *Gender, Sexuality, Asylum and European Human Rights*, 29 LAW & CRITIQUE 221, 227 (2017).

140. Joined Cases C-199/12–C-201/12, *X v. Minister voor Immigratie en Asiel*, ECLI:EU:C:2013:720, ¶ 76 (Nov. 7, 2013) (concluding that "the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation").

141. Ferreira, *supra* note 137, at 83.

142. *B v. Switzerland*, App. Nos. 889/19, 43987/16 (Feb. 17, 2021), <http://hudoc.echr.coe.int/eng?i=001-206153> [<https://perma.cc/794V-3R48>].

143. *Id.* ¶ 63.

144. *See id.* ¶¶ 57–61 (finding that sexual orientation is a fundamental characteristic that "no one may be obliged to conceal . . . in order to avoid persecution," and that ill-treatment can arise from both state and non-state actors).

145. *Id.* ¶¶ 62–63.

146. *See Guide on the Case Law of the European Convention on Human Rights: Immigration*, EUR. CT. OF HUM. RTS. ¶¶ 29–31, https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf [<https://perma.cc/FNG7-T7SE>] (explaining the ECtHR's case law reviewing a domestic authority's characterization of the risks to asylum applicants); *see also* *AA v. Sweden*, App. No. 14499/09, ¶¶ 72, 96 (Sept. 28, 2012), <http://hudoc.echr.coe.int/eng?i=001-111553> [<https://perma.cc/E2E9-S7PY>] (noting that risk of ill-treatment by third parties could be a factor in the asylum analysis, but ultimately concluding that deporting the applicants would not violate Articles 2 or 3).

and its progeny are likely to increase contestations over LGBT rights in Strasbourg for several reasons. First, the ECtHR expanded the rights of lesbians and gays to a new issue area—migration and asylum. Second, in doing so the Court reinforced its link to the “European project” by relying on the pro-LGBT judgment of the CJEU. However, the Strasbourg Court went further than the Luxembourg Court by recognizing that the national authorities must consider the risk of ill treatment by non-state actors. Third, LGBT rights advocates have noted that “Europe has a patchwork of unharmonized policies for determining the legitimacy of a person’s claim.”¹⁴⁷ The result is that domestic authorities—even in LGBT-friendly countries such as the Netherlands—deny most asylum applications from lesbians and gays.¹⁴⁸ The ECtHR is thus likely to receive numerous complaints challenging these denials.

At least some of these disputes are likely to be mega-political in nature. Migration and asylum issues have been central to the sovereignty and national security objections that some governments have raised against European institutions, making control over borders a mega-political issue in the region. However, this issue has generally not been associated with LGBT rights. The *B and C* judgment, and similar future cases, are likely to change that by exacerbating “threat to the nation” and sovereignty arguments for opposing LGBT rights even in progressive Western European states.

VI

CONCLUSION

Sexual minorities have sought human rights protections from the ECtHR since the earliest days of the European human rights system. The role that the Strasbourg Court has played in shaping these rights, however, has changed dramatically over time. As the data reveals, starting in the 2010s, the ECtHR began to issue numerous merits judgments involving lesbian and gay rights—significantly more than in previous decades. This rise in the number of judgments occurred at the same time that LGBT rights claims before the Court were becoming increasingly mega-political, as defined by Alter and Madsen. This article explains both developments by examining the domestic social and political factors that are driving cases to Strasbourg.

This Article explains how the Court’s approach to LGBT rights has taken two separate jurisprudential paths, each shaped by the nature of the legal claims and by very different mega-political contestations in the countries against which

147. Makana Eyre & Martin Goillandeau, *Europe is Telling Gay Asylum Seekers They Are Not Gay Enough*, THE NATION (Jan. 3, 2020), <https://www.thenation.com/article/archive/gay-asylum-netherlands-ind/> [<https://perma.cc/UV65-53SM>].

148. Jon Henley, *LGBT Asylum Seekers’ Claims Routinely Rejected in Europe and UK*, THE GUARDIAN (July 9, 2020), <https://www.theguardian.com/uk-news/2020/jul/09/lgbt-asylum-seekers-routinely-see-claims-rejected-in-europe-and-uk> [<https://perma.cc/PAB7-HBGY>]; COC Netherlands, *Pride or Shame: Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments* (June 2018), <https://www.refworld.org/docid/5c6eb3344.html> [<https://perma.cc/HPN8-KN73>].

applications are filed. In rights-expanding cases, the ECtHR has incrementally raised the floor for lesbian and gay couples' right to private and family life, mostly in judgments against countries in Western Europe. The rights-expanding cases sometimes involve social cleavages mega-politics at the domestic level, in which groups raise "threat to the family" objections to broadening traditional understandings of marriage and parentage. In rights-contracting cases, by contrast, the Court has held the line on core bodily integrity and political freedoms in the face of increasing hostility from states in Eastern Europe. In these cases, opponents frame mega-political contestations in terms of a "threat to the nation"—and resistance to LGBT rights as a defense of sovereignty and identity in the face of oppressive Europeanization.

In light of the increasing mega-politicization of lesbian and gay rights in Europe, we question whether the ECtHR can continue to bifurcate its two jurisprudential pathways and treat the rights-expanding and rights-contracting cases separately. This bifurcated approach has, thus far, allowed the Court to take a supporting rather than a central role in legal disputes over LGBT rights in Europe. With the Court now poised to address challenges to marriage and family rights in Eastern Europe, as well as claims from LGBT asylum seekers in Western Europe, we predict that mega-political contestations over LGBT rights will become an unavoidable part of the ECtHR's docket.