Finding Fault: Marriage Equality, Judicial Deference, and *Falcis*

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Abstract: The Philippine Supreme Court in *Falcis III v. Civil Registrar General*, dismissed a petition to declare the definition of marriage under the Family Code unconstitutional. The case was described as "historic" and the Supreme Court's ruling excited members of the LGBTQI community and students of law, anticipating a ruling consistent with *Obergefell*. Unfortunately, the Court dismissed the petition on procedural grounds. This paper prescribes a framework for Courts to adopt in addressing questions of constitutionality, when there is an assertion of discrimination under the due process clause of the Constitution, and granting of pareto–improving individual rights. This framework is applied in the case of *Falcis III v. Civil Registrar General*.

I. Introduction

a. The Case

The Philippine Supreme Court's opinion in *Falcis III v. Civil Registrar General*[1] dismissed a petition to declared the definition of marriage unconstitutional. The definition of marriage under Philippine law discriminates against members of the LGBTQI+ (lesbian, gay, bisexual, transgender, queer, intersex, and other gender and sexual minorities) community.[2] In dismissing the petition, the Court failed to appreciate the Petitioner's unique approach and novel arguments, deciding instead to treat this case as it would any other. In choosing "the path of caution," the majority shirked from its constitutional duty to determine whether "there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[3]

At the very end of the decision, the Court held—quite incredibly:

> Yet, the time for a definitive judicial fiat may not yet be here. This is not the case that presents the clearest actual factual backdrop to make the precise reasoned judgment our Constitution requires. Perhaps, even before that actual case arrives, our democratically-elected representatives in Congress will have seen the wisdom of acting with dispatch to address the suffering of many of those who choose to love distinctively, uniquely, but no less genuinely and passionately.[4]

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[1] Falcis III v. Civil Registrar General, G.R. No. 217910, September 3, 2019.

[2] I use LGBTQ+ to include all forms of non-heterosexual sexual orientations. *See* Praatika Prasad, *More Color More Pride: Addressing Structural Barriers to Interracial LGBTQ Loving,* 87 FORDHAM LAW REVIEW ONLINE 89 (2018), *available at* https://ir.lawnet.fordham.edu/flro/vol87/iss1/16.

[3] CONST., art. VIII, sec. 1.

[4] Falcis III v. Civil Registrar General, G.R. No. 217910, September 3, 2019.

True, the Court's review power, if invoked, is not automatically exercised because "the requirements for the exercise of the Court's judicial review even under its expanded jurisdiction must nevertheless first be satisfied."[5] I argue that *Falcis* satisfies these requirements, or at least is exempt from compliance.

In my view, this case was simply argued, and its resolution is simpler still. Falcis argued that the definition of marriage under the Family Code discriminates against the LGBTQI+ community because it privileges the heteronormative model of marriage. It excludes, by definition, the Petitioner and those similarly situated. I agree. There is no way under Philippine law that Falcis and those in the LGBTQI community would have been granted a license. As such, the sector is discriminated from enjoying the rights and entitlements granted by a marriage contract.

The Supreme Court should have declared Articles 1 and 2 of the Family Code[6] as unconstitutional and, and as a consequence, nullified Articles 46 (4)[7] and 55 (6)[8] of the Family Code as well.

The Supreme Court used every conceivable legal reason to defeat the Petitioner's case. It is a skillful demonstration of mastery of procedural rules. I think, however, that this case is one of those that require a liberal approach in its resolution. In the end, no matter how many procedural issues are thrown onto the Petitioner's path, the fact remains that the law bars the Petitioners from entering into a marriage contract with someone of the same sex. The Court's decision boils down to a simple truth: the Supreme Court is unwilling to rule on the constitutionality of the definition of marriage.

This is an analysis of a Supreme Court decision, and does not look into the dynamics of the movement and their strategies. I make conclusions only about the Supreme Court's approach and resolution of the issues, not about whether Falcis' decision to seek judicial action on the definition of marriage was wise.[9]

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[5] Private Hospitals Association of the Philippines, Inc. v. Medialdea, G.R. No. 234448, November 6, 2018.

[6] According to Exec. Ord. No. 209 (1987), otherwise known as the Family Code of the Philippines:

> ARTICLE 1. Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code. (52a)
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> ARTICLE 2. No marriage shall be valid, unless these essential requisites are present:
> (1) Legal capacity of the contracting parties who must be a male and a female; and
> (2) Consent freely given in the presence of the solemnizing officer.

[7] Exec. Ord. No. 209, art. 46 (1987). Article 46 provides that "Any of the following circumstances shall constitute fraud referred to in number 3 of the preceding Article… (4) Concealment of drug addiction, habitual alcoholism, homosexuality or lesbianism existing at the time of the marriage."

[8] Exec. Ord. No. 209, art. 55 (1987). Article 55 provides that "A petition for legal separation may be filed on any of the following grounds… (6) Lesbianism or homosexuality of the respondent…"

[9] There was disagreement in the use of litigation to attain the goals of the LGBTIQ community. Falcis himself said that "The [LGBT] movement can never be homogenous […] because […] the movement is big. There will be priorities for some sectors over the other." *See* Cesar Garcia, *Falcis legal team: Same-sex marriage petition will help LGBT movement*, Rappler, 21 June 2018, https://www.rappler.com/move-ph/205368-falcis-legal-team-same-sex-marriage-sc-petition-help-lgbt-movement. In his view, the case would do more good than harm and that it would have the effect

b. Framework

There is no marriage equality[10] in the Philippines. By law, marriage is a contract between a man and a woman, thus it discriminates against all non–heterosexual unions. Challenging the definition as unconstitutional is an open and shut case. Due process jurisprudence has cleared a path to an inevitable ruling.

When Courts are faced with this issue, how should it approach the issue? I suggest a framework based on John Ely Hart's theory of judicial review. Although aimed at the problem of political participation, I argue that it can also be used to address discriminatory legislation. According to Hart:

> [T]he Court's job in such cases is to look at the world as it exists and ask whether such a right is in fact being abridged, and if it is, to consider what reasons might be adduced in support of the deprivation, without regard to what actually occasioned it. To the extent that there is a stoppage, the system is malfunctioning, and the Court should unblock it without caring how it got that way.[11]

I use this framework and tweak it to include discrimination that impairs civil inclusion—the enjoyment of rights.

II. Discussion

a. Ripeness

My disagreement with the Court begins with Part IV of the decision. The discussion of the Court fails to explain why the case is not ripe for adjudication, and instead concludes that *Falcis* is not a valid facial challenge.[12] The Court confuses these two different concepts.

The Court began Part IV by explaining that "[i]t is not enough that laws or regulations have been passed or are in effect when their constitutionality is questioned." The Court held that a case cannot be ripe simply because a law was enacted.

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of showing that "being gay is okay," a message that "a lot of people did not hear in the past." There was a low turnout of demonstrators outside the Supreme Court during oral arguments "due to fears of public backlash and reactionary anti-LGBT sentiments in the Philippines." *See* Cesar Garcia, *id*. The use of litigation to achieve social change is not always favored by social movements. Some sociolegal scholars believe that social movements squander time and money and should press for change through the political system. Litigation cedes decision-making to lawyers, impair mobilization efforts, and make their missions more conservative. Many question whether law and legal institutions can ever produce progressive social change given that the courts are unlikely to be much ahead of public opinion. *See* Mary Bernstein, *Perry and the LGBTQ Movement*, 37 N.Y.U. REV. L. & SOC. CHANGE 23 (2013).

[10] Marriage equality is based on the notion that the right of access to marriage is a civil right, important for full political participation and social recognition, predicated on the legal and social significance of marriage. *See* Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37 (2011).

[11] JOHN ELY HART, DEMOCRACY AND DISTRUST 136 (1981).

[12] A facial challenge is defined in Falcis III v. Civil Registrar General, G.R. No. 217910, September 3, 2019, as follows: " '[…] an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operation to the parties, but also on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech or activities.' It is distinguished from 'as-applied' challenges, which consider actual facts affecting real litigants."

However, seemingly inconsistent with this holding, the Court then cited decisions in Part IV(B) of the decision where "this Court exercised the power of judicial review in cases involving newly-enacted laws," beginning with quoting *Pimentel v. Aguirre*.[13] In Pimentel, the Court held that when an act "is seriously alleged to have infringed the Constitution and the laws, as in the present case, settling the dispute becomes the duty and the responsibility of the courts." In line with this doctrine in *Pimentel,* the majority then cites *Province of North Cotabato*,[14] where the Court held that "[w]hen an act of a branch of government is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute." The Court then proceeds to cite the following cases to qualify and illustrate its position how to determine whether there is an actual case or controversy.

It first refers to *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,*[15] to stress the qualification that "there must be sufficient facts to enable the Court to intelligently adjudicate the issues."

It then cited *Belgica v. Ochoa*[16] as an illustration of the Court's liberality in determining whether there is an actual case or controversy. Here, the Court held that the requirement of contrariety of legal rights is clearly satisfied by the antagonistic positions of the parties on the constitutionality of the "Pork Barrel System." Next in line was *Araullo v. Aquino III*[17] where the Court held the following:

> The issues being raised herein meet the requisite ripeness considering that the challenged executive acts were already being implemented by the DBM, and there are averments by the petitioners that such implementation was repugnant to the letter and spirit of the Constitution. Moreover, the implementation of the DAP entailed the allocation and expenditure of huge sums of public funds. The fact that public funds have been allocated, disbursed or utilized by reason or on account of such challenged executive acts gave rise, therefore, to an actual controversy that is ripe for adjudication by the Court.
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> The Court then proceeds to *Spouses Imbong v. Ochoa, Jr*., where it held that:
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> Considering that the RH Law and its implementing rules have already taken effect and that budgetary measures to carry out the law have already been passed, it is evident that the subject petitions present a justiciable controversy. As stated earlier, when an action of the legislative branch is seriously alleged to have infringed the Constitution, it not only becomes a right, but also a duty of the Judiciary to settle the dispute.
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> Finally, the Court added (although not quoted in *Falcis*) that:
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> [P]ractitioners or medical providers are in danger of being criminally prosecuted under the RH Law for vague violations thereof, particularly public health

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[13] Pimentel, Jr. v. Aguirre, G.R. No. 132988, July 19, 2000.
[14] Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, G.R. Nos. 183591, 183752, 183893, 183951 & 183962, October 14, 2008.
[15] Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, G.R. Nos. 178552, 178554, 178581, 178890, 179157 & 179461, October 5, 2010.
[16] Belgica v. Ochoa, G.R. Nos. 208566, 208493, 209251 & L-20768, November 19, 2013.
[17] Araullo v. Aquino III, G.R. Nos. 209287, 209135, 209136, 209155, 209164, 209260, 209442, 209517 & 209569, July 1, 2014.

officers who are threatened to be dismissed from the service with forfeiture of retirement and other benefits. They must, at least, be heard on the matter NOW.[18]

The Family Code went into effect on August 1988. Surely these precedents cited support the view that the case is ripe for adjudication. So many years have passed since the Code went into effect and no member of the LGBTQI+ community has founded a family under its provisions.

On the aspect of ripeness, the Court instead concluded this section by saying that *Falcis* is not a valid facial challenge citing *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*.[19] However, the validity of a facial challenge is not related to the ripeness of the case. They are two separate issues. Falcis did argue that his was a facial challenge, and as such the Court should have known that a facial challenge does not determine the ripeness of a case for adjudication. A conclusion on whether a case is ripe for discussion or not can be arrived at without discussing facial challenges. *Araullo v. Aquino III* dwelt on ripeness but both the original decision[20] and the resolution of the Motion for Reconsideration[21] did not discuss facial challenges. The decision in *Spouses Imbong* devoted discussion to facial challenges *after* it held that the case was ripe for adjudication.

In contrast, *Southern Hemisphere* discussed facial challenges because the Petitioners claimed that the definition of terrorism under Republic Act No. 9372 was intrinsically vague and impermissibly broad.

My objection is not just on principle that the case was ripe for adjudication because an act of Congress is "seriously alleged to have infringed the Constitution"[22] but on the approach of both the petitioners and the Court of linking facial challenge with ripeness.

b. Case or controversy

In Part V of the Opinion, the Court again stressed that "[j]urisprudence on justiciability in constitutional adjudication has been unequivocal on the requirement of actual cases and controversies." The Court held that "[p]leadings before this Court must show a violation of an existing legal right or a controversy that is ripe for judicial determination." Parties coming to court must show that the assailed act had a direct adverse effect on them. The Court thus concluded that the petitioners failed to show this.

How does the LGBTI+ show that the their rights are violated or that the Family Code had a diverse effect on them? I would think it is obvious that the entire LGBTI+ community is deprived of the right to marry. Do they really have to apply for a license and be denied? My view is that it

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[18] Spouses Imbong v. Ochoa, Jr., G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172 & 207563, April 8, 2014.

[19] Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, G.R. Nos. 178552, 178554, 178581, 178890, 179157 & 179461, October 5, 2010.

[20] Araullo v. Aquino III, G.R. Nos. 209287, 209135, 209136, 209155, 209164, 209260, 209442, 209517 & 209569, July 1, 2014.

[21] Araullo v. Aquino III, G.R. No. 209287 (Resolution), February 3, 2015.

[22] The Family Code was an Executive Order promulgated by then President Aquino in the exercise of her extraordinary legislative power under the Freedom Constitution. But it is no different from any other law, and subject to amendment or repeal by the plenary power of Congress. *See* Atitiw v. Zamora, G.R. No. 143374, September 30, 2005.

is the fact that the Family Code precludes a future of civil inclusion for the LGBTI+ community that creates the controversy.

c. Minority rights

In Part VI of the Opinion, the Court stressed that "[t]he need to demonstrate an actual case or controversy is even more compelling in cases concerning minority groups." It explained that the Supreme Court is a court of law and that the Justices:

> […] are equipped with legal expertise, but [...] are not the final authority in other disciplines. In fields such as politics, sociology, culture, and economics, this Court is guided by the wisdom of recognized authorities, while being steered by our own astute perception of which notions can withstand reasoned and reasonable scrutiny. This enables us to filter unempirical and outmoded, even if sacrosanct, doctrines and biases.

The Court is suggesting that because they are dealing with a case that involve minority groups, more robust studies and sociological evidence by experts must be presented to help the Court make an informed judgement regarding the case. In this regard, the Court repeatedly stressed that "the Petition is woefully bereft of sufficient actual facts to substantiate its arguments."

What facts should Falcis have alleged? Did he need to produce evidence that he and the LGBTQI+ community suffers discrimination? The simple fact of the matter is that he will be denied a marriage license. All he needs to allege, as he did, is the fact that the Family Code discriminates against him. I do not see the need for the Petitioner to show that an entire sub-population of Philippine society is similarly discriminated.

With all due respect, the only empirical question that needs an answer was whether the rights of the minority are being impinged by the lack of access to enter into a marriage contract. The Court does not need to be an expert in other social sciences to answer this. The granting of rights to LGBTQI+ to enter into marriage contracts does not cause any negative externality to society. This is a pareto–improving policy that can only make some members of society better off without making anyone worse off. The demand for sociological, anthropological or even economic analysis is misplaced. Equality is a principle that society should value regardless of cost and the Court should advocate that. It should always favor the protection of individual rights and the ability to exercise the same rights as other members of society, especially if it does not pose any harm on others. The Supreme Court was asked to assess the constitutionality of a law—which is something within the Court's expertise.

The Court proceeded to recite the history of the LGBTQI+ community ending with this pronouncement:

> The history of erasure, discrimination, and marginalization of the LGBTQI+ community impels this Court to make careful pronouncements — lest it cheapen the resistance, or worse, thrust the whole struggle for equality back to the long shadow of oppression and exclusion. The basic requirement of actual case or controversy allows this Court to make grounded declarations with clear and practical consequences.

With all due respect, the constitutionality of the Family Code should not depend on how the LGBTQI+ movement will be affected by the Court's decision. It is either constitutional or not.

d. More facts and Choice of Respondent

The Court chastises Falcis for using a concurring opinion in *Ang Ladlad LGBT Party v. Commission on Elections*.[23] The Court correctly explained the following:

> This Court, however, cannot recognize Ang Ladlad Party-List's allegations, since they were made by a different party, in a different case, on a different set of facts, for a different subject matter, concerning a different law, to a different governmental body. These are not "actual facts" sufficient to engender a justiciable controversy here. They cannot be summarily imported and given any weight in this case, to determine whether there is a clash of rights between adversarial parties.

But then it continues:

> All told, petitioner's 29-page initiatory pleading neither cites nor annexes any credible or reputable studies, statistics, affidavits, papers, or statements that would impress upon this Court the gravity of his purported cause. The Petition stays firmly in the realm of the speculative and conjectural, failing to represent the very real and well-documented issues that the LGBTQI+ community face in Philippine society.

I cannot understand why the Court continues to require other facts—"well-documented issues that the LGBTQI+ community face"—for *Falcis* to succeed. Here is a fact that is necessary for the resolution of the case: Falcis cannot marry under Philippine law because the definition of marriage discriminates against the LGBTQI+ community.

The Court criticizes petitioner's choice of respondent (the Civil Registrar General) to expose the lack of an actual case or controversy. But who should Petitioner implead? Former President Corazon C. Aquino, who is technically the author of the Family Code? The Commission that drafted the Family Code? Congress?

Had Falcis applied for a marriage license, then he could have impleaded government officials who denied his application. However, surely that is but a technicality, since we know it would be denied anyway. Whether or not an application was made, the law is still unconstitutional. Moreover, there were Petitioners-intervenors Reverend Agbayani, Felipe, and Ibañez, who were supposedly denied a marriage license on August 3, 2015.

Part X of the Court's Opinion demolished the intervenors' standing to sue, saying that the Petition-in-Intervention:

> […] was a veiled vehicle by which petitioner sought to cure the glaring procedural defects of his original Petition. It was not a bona fide plea for relief, but a sly, tardy stratagem. It was not a genuine effort by an independent party to have its cause litigated in the same proceeding, but more of an ill-conceived attempt to prop up a thin and underdeveloped Petition.

The Court criticizes it further:

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[23] G.R. No. 190582, April 8, 2010.

> The Petition-in-Intervention suffers from confusion as to its real purpose. A discerning reading of it reveals that the ultimate remedy to what petitioners-intervenors have averred is a directive that marriage licenses be issued to them. Yet, it does not actually ask for this: its prayer does not seek this, and it does not identify itself as a petition for mandamus (or an action for mandatory injunction). Rather, it couches itself as a petition of the same nature and seeking the same relief as the original Petition. It takes pains to make itself appear inextricable from the original Petition, at the expense of specifying what would make it viable.
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> It does not escape this Court's notice that the Petition and Petition-in-Intervention were prepared by the same counsel, Falcis, the petitioner himself. The Petition-in-Intervention impleaded the same single respondent, the Civil Registrar General, as the original Petition. It also merely "adopt[ed] by reference as their own all the arguments raised by Petitioner in his original Petition[.]" Notably, a parenthetical argument made by petitioner that barely occupied two (2) pages of his Petition became the Petition-in- Intervention's entire subject: the right to found a family according to one's religious convictions.
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> Even though petitioners-intervenors Reverend Agbayani and Felipe, and Ibañez and her partner, all claim that they have "wish[ed] to be married legally and have applied for a marriage license but were denied[,]" they only echoed the original Petition's prayer, merely seeking that Articles 1, 2, 46 (4), and 55 (6) of the Family Code be declared unconstitutional. Despite impleading respondent Civil Registrar General and asserting that they have a fundamental right to marry their partners, petitioners-intervenors never saw it proper—whether as the principal or a supplemental relief—to seek a writ of mandamus compelling respondent Civil Registrar General to issue marriage licenses to them.

Very well. But were the intervenors given a license to marry? They were denied the license because the intervenors were gay. They cannot marry under Philippine law. But the Supreme Court will not rule on it because their intervention is imperfect.

e. Impact on other laws

This is the longest, most mind-boggling part of the Court's Opinion. The Court said:

> A proper ventilation of issues requires an appreciation of marriage past its symbolic value and towards a holistic view of its practical, cross-cutting, and even permanent consequences. This entails an overlapping process of articulation, deliberation, and consensus, which members of the LGBTQI+ community must undertake within their circles and through the political branches of the government, towards crafting a policy that truly embraces the particularities of same-sex intimacies.

The Court has given so much weight on the reaction and cause of LGBTQI+ movements and communities that it tends to be prescriptive on how the policy on marriage has to be shaped. However, the Court was remiss in performing its sole obligation of recognizing that the Family Code is discriminatory and, therefore, unconstitutional. The Court should have pursued this decision, regardless of how this will shape the future actions of the LGBTQI+ movement.

The Court added:

> [D]espite seeking access to the benefits of marriage, petitioner miserably fails to articulate what those benefits are, in both his filed pleadings and his submissions during oral arguments. Further, the Court said, "More than being the "foundation of the family[,]" the state of marriage grants numerous specific rights and privileges that affect most, if not all, aspects of marital and family relationships."

I doubt that a recitation of the benefits of marriage will aid in the determination of the constitutionality of the law. Besides, the Court already knows what the benefits are and proceeded to enumerate them. The Court went on for nearly 30 pages to discuss the impact of marriage on family obligations, taxation, labor laws, the Rules of Court, and other special laws.

Suppose the petitioners had recited the impacts of the case on these laws, would that resolve the issue of the constitutionality of the law?

The Court then held:

> Limiting itself to four (4) specific provisions in the Family Code, the Petition prays that this Court "declare Articles 1 and 2 of the Family Code as unconstitutional and, as a consequence, nullify Articles 46 (4) and 55 (6) of the Family Code." However, should this Court rule as the Petition asks, there will be far- reaching consequences that extend beyond the plain text of the specified provisions.

I agree. But these consequences should be dealt with separately. There will always be consequences whenever the Supreme Court strikes down a law as unconstitutional. The legal system will adjust accordingly.

In 1965, the Court struck down Executive Orders Nos. 93 to 121, 124 and 126 to 129 which created thirty-three municipalities pursuant to Section 68 of the Revised Administrative Code. [24] The Court did not stop to consider the consequences of its actions. It performed its function, which is to determine whether the Act of the President was consistent with the Constitution.

Part of Section 10 of Republic Act No. 8042 was declared unconstitutional but the Court did not worry about the potential consequences of the their actions.[25]

While it is true that laws are presumed to be constitutional, that presumption is not by any means conclusive and in fact may be rebutted.[26] If there is a clear showing of their invalidity, and of the need to declare them so, then "will be the time to make the hammer fall, and heavily."[27]

The world will not collapse if a law is declared unconstitutional. An unconstitutional act is not a law is inoperative as if it has not been passed at all.[28] But ss a matter of equity, certain acts done pursuant to a legal provision which was just recently declared as unconstitutional cannot be undone because not only would it be highly impractical to do so, and unfair to those who have relied on the said legal provision prior to the time it was struck down.[29] In applying the doctrine of operative fact, courts ought to examine with particularity the effects of the already

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[24] Pelaez v. Auditor General, G.R. No. L-23825, December 27, 1965.
[25] Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, March 24, 2009.
[26] Ynot v. Intermediate Appellate Court, G.R. No. 74457, March 20, 1987.
[27] *Id.*
[28] Film Development Council of the Philippines v. Colon Heritage Realty Corp., G.R. Nos. 203754 & 204418 (Resolution), October 15, 2019.
[29] *Id.*

accomplished acts arising from the unconstitutional statute, and determine, on the basis of equity and fair play, if such effects should be allowed to stand.[30]

The Court insisted:

> The litany of provisions that we have just recounted are not even the entirety of laws relating to marriage. Petitioner would have this Court impliedly amend all such laws, through a mere declaration of unconstitutionality of only two (2) articles in a single statute. This Court cannot do what petitioner wants without arrogating legislative power unto itself and violating the principle of separation of powers.

This is an odd statement coming from the Court.

There is nothing in the Constitution that prevents the Court from exercising judicial review if it has the effect of amending other laws.

The exercise of judicial review is merely the performance by the Supreme Court of a duty specifically enjoined upon it by the Constitution, as part of a system of checks and balances."[31] When the legislature or the executive acts beyond the scope of its constitutional powers, it becomes the duty of the judiciary to declare what the other branches of the government had assumed to do as void.[32]

The classic formulation of the judicial review provides:

> And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed "judicial supremacy" which properly is the power of judicial review under the Constitution.[33]

The Supreme Court does not arrogate legislative powers when it exercises judicial review. It exercises a constitutionally-mandated duty to review legislation. Judicial review is an integral component of the system of checks and balances which forms the bedrock of the Philippines' republican form of government and insures that its vast powers are utilized only for the benefit of the people for which it serves.[34] The scope of that power has been extended to the determination of whether in matters traditionally considered to be within the sphere of appreciation of another branch of government, an exercise of discretion has been attended with grave abuse.[35]

The Court's pronouncement in *Falcis* creates another problem. Let us suppose that Falcis complied with all the procedural requirements that irked the Supreme Court in this case. Let us assume that he applied for a marriage and license which application was denied. Under the Court's logic, it still cannot rule on the constitutionality of the definition of marriage under the Family

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[30] *Id.*
[31] Dabuet v. Roche Pharmaceuticals, Inc., G.R. No. L-45402, April 30, 1987.
[32] Demetria v. Alba, G.R. No. 71977, February 27, 1987.
[33] Angara v. Electoral Commission, G.R. No. 45081, July 15, 1936.
[34] Francisco, Jr. v. House of Representatives, G.R. Nos. 160261, 160262, 160263, 160277, 160292, 160295, 160310, 160318, 160342, 160343, 160360, 160362, 160370, 160376, 160392, 160397, 160403 & 160405, November 10, 2003.
[35] Saguisag v. Ochoa, Jr., G.R. Nos. 212426 & 212444, January 12, 2016.

Code because this will have the effect of amending other laws. It cannot, according to the Court, because it would violate the principle of separation of powers. Thus, the definition of marriage would be impervious to judicial review.

The Court correctly explained the rule in *Republic v. Manalo*[36] when it said that:

> While the Congress is allowed a wide leeway in providing for a valid classification and that its decision is accorded recognition and respect by the courts of justice, such classification may be subjected to judicial review. The deference stops where the classification violates a fundamental right, or prejudices persons accorded special protection by the Constitution. When these violations arise, this Court must discharge its primary role as the vanguard of constitutional guaranties, and require a stricter and more exacting adherence to constitutional limitations. If a legislative classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class *strict* judicial scrutiny is required since it is presumed unconstitutional, and the burden is upon the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least restrictive means to protect such interest.[37]

I never understood judicial review to empower the Court to say that a law is unconstitutional but that it would be better for Congress to rewrite the law because of the magnitude of the consequences that will flow from that ruling.

Falcis in my view is not the proper exercise of judicial review but an abdication of its function as a Court.

f. Standing

In part IX, the Court held that Falcis has no standing to file this case because he has "no material interest, an interest in issue affected by the decree, as distinguished from mere interest in the question involved, or a mere incidental interest."

According to the Court, the fact that Falcis is gay is insufficient says the Court:

> Mere assertions of a "law's normative impact"; "impairment" of his "ability to find and enter into long-term monogamous same-sex relationships"; as well as injury to his "plans to settle down and have a companion for life in his beloved country"; or influence over his "decision to stay or migrate to a more LGBT friendly country" cannot be recognized by this Court as sufficient interest. Petitioner's desire "to find and enter into long-term monogamous same-sex relationships" and "to settle down and have a companion for life in his beloved country" does not constitute *legally demandable rights* that require judicial enforcement. This Court will not witlessly indulge petitioner in blaming the Family Code for his admitted inability to find a partner. (Emphasis supplied)

The Court further said: "[h]is fixation on how the Family Code is the definitive cause of his inability to find a partner is plainly *non sequitur*."

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[36] Republic v. Manalo, G.R. No. 221029, April 24, 2018.
[37] *Id*.

In my view, Falcis is not saying that the law prevents him from finding a partner, rather that the law deprives him of a future that is reserved for heterosexual couples. He may be able to find a partner, but what is the point of doing so if the law deprives him of an opportunity to live in wedded bliss? He is not blaming the Family Code for his inability to find a partner, but the futility of finding a partner under a legal regime that only recognizes heterosexual unions.

The Family Code's impact on Falcis is immediate. Any member of the LGBTQ+ community has standing the instant they are born into a legal regime that denies them the benefits of marriage. Why should we expect them to file for a marriage license when such applications will be, without a shadow of a doubt, denied.

The Court then says something completely unfair:

> It does not escape this Court's notice that the Family Code was enacted in 1987. This Petition was filed only in 2015. Petitioner, as a member of the Philippine Bar, has been aware of the Family Code and its allegedly repugnant provisions, since at least his freshman year in law school. It is then extraordinary for him to claim, first, that he has been continually injured by the existence of the Family Code; and second, that he raised the unconstitutionality of Articles 1 and 2 of the Family Code at the earliest possible opportunity.

It would be extraordinary to expect first year law students to challenge any law that they encounter as students. Perhaps petitioner had already decided to challenge the law, but he wanted to learn procedural law first. Perhaps he may have had to experience the futility of falling in love before realizing the unconstitutionality of the Family Code provisions. Perhaps, as a law student, he was already aware of the need for laying out a legal strategy or working with other members of the LGBTQI community before heading to court.

In all the years I have been teaching, I never expected my students to bolt out of the classroom and file cases questioning the constitutionality of laws at the moment we discuss them. Certainly the clock on "earliest possible opportunity" does not start when a law is discussed in class.

Incidentally, Falcis graduated from the University of the Philippines, College of Law in 2014, passed the Bar in May 2015, and filed the petition two months after.[38] I would say he was not dilly-dallying about this issue.

Additionally, the Court's pronouncement would make it impossible to question the constitutionality of the law because it was enacted in 1987. Unless the petitioner in the next case realizes belatedly (say in 2020) that he is in fact gay and can now have standing to challenge the constitutionality of the law.

The rule is quite different: the party assailing the regulation must show that the question of constitutionality has been raised at the earliest opportunity. Earliest opportunity means that the question of unconstitutionality of the act in question should have been immediately raised in the proceedings in the court below.[39]

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[38] Lian Buan, *"Mistakes" of young lawyer overshadow historic marriage equality hearing*, Rappler, 20 June 2018, https://www.rappler.com/nation/205320-jesus-falcis-petitioner-sc-same-sex-marriage-mistakes.

[39] Sta. Rosa Realty Development Corp. v. Amante, G.R. Nos. 112526 & 118838, March 16, 2005.

This does not mean that the question of constitutionality must be raised immediately after the execution of the state (such as the enactment of a law).[40] If the question of constitutionality has not been raised before, it does not mean that it cannot be raised later. "A contrary rule would mean that a law, otherwise unconstitutional, would lapse into constitutionality by the mere failure of the proper party to promptly file a case to challenge the same."[41]

g. Hierarchy of Courts[42]

The Court faults Falcis for failing to follow the hierarchy of courts.

Following the hierarchy of courts is necessary in order to prevent inordinate demands upon the Supreme Court's time and attention, which are better devoted to those matters within its exclusive jurisdiction. It prevents over-crowding of the Court's docket.[43] There are two reasons for following the hierarchy: (a) it would be an imposition upon the precious time of the Court; and (b) it would cause delay, whether intended or not, in the adjudication of cases. This is because the case may be remanded or referred to a lower court as the proper forum under the rules of procedure, or because these courts are better equipped to resolve the issues because they require the determination of facts.[44]

As a general rule, litigants should not immediately invoke the Supreme Court's jurisdiction after a setback in litigation. Rule 65 of the Rules of Civil Procedure provides that a petition for *certiorari* may only be filed when "there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law." This "plain" and "adequate remedy" is a motion for reconsideration. Normally, a party should file a motion for reconsideration in the court where he or she lost before the filing of a special civil action for *certiorari*. Such rule gives the lower court the opportunity to correct itself.[45]

This rule, however, may be dispensed with if the petition raises an issue of "significant national interest"[46] or "paramount importance and constitutional significance",[47] or if there are "exceptional and compelling circumstances that justify the Supreme Court's exercise of jurisdiction. [48] In such cases, the Court recognizes an exception because "it was dictated by public welfare and the advancement of public policy, or demanded by the broader interest of justice, or the orders complained of were found to be patent nullities, or the appeal was considered as clearly an inappropriate remedy."[49]

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[40] Moldex Realty, Inc. v. HLURB, G.R. No. 149719, June 21, 2007.
[41] *Id.*
[42] This section draws heavily from DANTE B. GATMAYTAN, LEGAL METHOD ESSENTIALS 3.0 40–43 (2018).
[43] Catly v. Navarro, G.R. No. 167239, May 5, 2010. The Supreme Court cannot and should not be burdened with the task of dealing with causes in the first instance. *See* Garcia v. Miro, G.R. No. 167409, March 20, 2009.
[44] Chamber of Real Estate and Builders Association, Inc. v. The Secretary of Agrarian Reform, G.R. No. 183409, June 18, 2010. The Supreme Court enforces the observance of the hierarchy of courts in order to free itself from unnecessary, frivolous, and impertinent cases, and thus afford time for it to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. *See* Saint Mary Crusade to Alleviate Poverty of Brethren Foundation, Inc. v. Riel, G.R. No. 176508, January 12, 2015.
[45] National Association of Electricity Consumers for Reforms, Inc. v. Ilagan, G.R. No. 190795, July 6, 2011.
[46] Ocampo v. Abando, G.R. No. 176830, February 11, 2014.
[47] Lim v. Executive Secretary, G.R. No. 151445, April 11, 2002.
[48] Elma v. Presidential Commission on Good Government, G.R. No. 155996, June 27, 2012.
[49] National Association of Electricity Consumers for Reforms, Inc. v. Ilagan, G.R. No. 190795, July 6, 2011.

The character of the facts and circumstances of a case may allow the flexible application of these established legal principles to achieve fair and speedy dispensation of justice.[50] A strict application of the rule is not necessary when the cases brought before appellate courts do not involve factual but legal questions.[51]

The Supreme Court identified the following exceptions to following the hierarchy:

First, a direct resort to the Supreme Court is allowed when there are genuine issues of constitutionality that must be addressed at the most immediate time.

Second, when the issues involved are of transcendental importance.[52]

Third, cases of first impression warrant a direct resort to this court.

Fourth, when the constitutional issues raised are better decided by this court.

Fifth, the time element presented in the case cannot be ignored.

Sixth, the petition reviews the act of a constitutional organ such as the Commission on Elections.

Seventh, there was no other plain, speedy, and adequate remedy in the ordinary course of law that could free them from the injurious effects of respondents' acts in violation of their right to freedom of expression.

Eighth, the petition includes questions that are "dictated by public welfare and the advancement of public policy, or demanded by the broader interest of justice, or the orders complained of were found to be patent nullities, or the appeal was considered as clearly an inappropriate remedy."[53]

It is not necessary that all of these exceptions must occur at the same time to justify a direct resort to the Supreme Court.[54] It appears *Falcis* satisfies the first through the fourth exceptions, so there was no need to follow the hierarchy of courts.

The principle of hierarchy of courts may be set aside for special and important reasons. The Court did so in the following cases:

1. A case involving the employment of the entire *plantilla* of NEA, more than 700 employees all told, who were effectively dismissed from employment in one swift stroke.[55]
2. Justice demanded that the Court take cognizance of a case to put an end to the controversy which has been dragging on for more than twenty years.[56]

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[50] Spouses Chua v. Ang, G.R. No. 156164, September 4, 2009.
[51] Sarsaba v. Vda. De Te, G.R. No. 175910, July 30, 2009.
[52] The Supreme Court held that a case requires immediate resolution if city ordinances adversely affect the property interests of all paying constituents and served as a test case for the guidance of other local government units. Such a case is of transcendental importance and warrants a relaxation of the doctrine of hierarchy of courts. *See* Ferrer, Jr. v. Bautista, G.R. No. 210551, June 30, 2015.
[53] The Diocese of Bacolod v. COMELEC, G.R. No. 205728, January 21, 2015.
[54] *Id*.
[55] United Claimants Association of NEA v. National Electrification Administration, G.R. No. 187107, January 31, 2012.
[56] Dy v. Bibat-Palamos, G.R. No. 196200, September 11, 2013.

3. The petitioners were incumbent party-list representatives, and the possibility of their arrest and incarceration would affect their representation of their constituents in Congress.[57]
4. Direct resort to the Supreme Court was allowed because of the magnitude of the ecological problems contemplated under the Rules of Procedure for Environmental.[58]
5. The implementation of an Ordinance will directly and adversely affect the property interests of around "3,085,786 million" residents of Quezon City.[59]

Certainly, Falcis' plaint falls is as significant if not far more significant than these examples.

The rest of the case—still several pages long—was devoted to chastising petitioner and fellow lawyers for the many procedural sins committed in this case.

III. Statutory Interpretation

Courts should not be unduly strict in cases involving procedural lapses that do not really impair the proper administration of justice. The Supreme Court has supported this position in many cases:

> Since litigation is not a game of technicalities, every litigant should be afforded the amplest opportunity for the proper and just determination of his case, free from the constraints of technicalities. Procedural rules are mere tools designed to facilitate the attainment of justice, and even the Rules of Court expressly mandates that it 'shall be liberally construed in order to promote their objective of securing a just, speedy and inexpensive disposition of every action and proceeding.[60]

Their strict and rigid application should be relaxed when they hinder rather than promote substantial justice. Public policy dictates that court cases should, as much as possible, be resolved on the merits and not on mere technicalities.[61]

The Supreme Court has identified the following as valid reasons to resist the strict application of procedural rules: (a) matters of life, liberty, honor or property; (b) the existence of special or compelling circumstances; (c) the merits of the case; (d) a cause not entirely attributable to the fault or negligence of the party favored by the suspension of the rules; (c) a lack of any showing that the review sought is merely frivolous and dilatory and (f) the other party will not be unjustly prejudiced thereby.[62]

It is true that "resort to a liberal application, or suspension of the application of procedural rules remains the exception to the well-settled principle that rules must be complied with for the orderly administration of justice." It can only be upheld "in proper cases and under justifiable

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[57] Maza v. Turla, G.R. No. 187094, February 15, 2017.
[58] Segovia v. Climate Change Commission, G.R. No. 211010, March 7, 2017.
[59] Alliance of Quezon City Homeowners' Association, Inc. v. Quezon City Government, G.R. No. 230651, September 18, 2018.
[60] Barra v. Civil Service Commission, G.R. No. 205250, March 18, 2013.
[61] Aneco Realty and Development Corp. v. Landex Development Corp., G.R. No. 165952, July 28, 2008.
[62] Malixi v. Baltazar, G.R. No. 208224, November 22, 2017.

causes and circumstances."[63] Invoking "substantial justice" is not "a magical incantation that will automatically compel the Court to suspend procedural rules. Rules of procedure are not to be belittled or dismissed simply because their non-observance may have resulted in prejudice to a party's substantive rights."[64] But *Falcis* is about an unconstitutional provision of law, so the petitioners claim. It deals with an institution denied to a section of Filipino society. It implicates one's liberty, unfairly curtailed by the restrictive definition of marriage.

Marriage is a permanent union and the foundation of the family. "It is this inviolability which is central to our traditional and religious concepts of morality and provides the very bedrock on which our society finds stability. Marriage is immutable and when both spouses give their consent to enter it, their consent becomes irrevocable, unchanged even by their independent wills."[65] Family law is based on the policy that marriage is a social institution in which the state is vitally interested. The State can find no stronger anchor than on good, solid and happy families.[66]

The petitioners want marriage for themselves. This is not a trifling matter. Our Constitution declares that marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.[67]

Petitioners are deemed unfit for this institution. By law, their partnerships cannot be elevated to the lofty pedestal reserved for heterosexual unions. A better case for discrimination cannot be made. The violation of the equal protection clause is clear. The equal protection clause serves as a guarantee that "persons under like circumstances and falling within the same class are treated alike, in terms of privileges conferred and liabilities enforced."[68] It is a guarantee against "undue favor and individual or class privilege, as well as hostile discrimination or oppression of inequality."[69]

True, every case must be prosecuted in accordance with the prescribed procedure to insure an orderly and speedy administration of justice.[70] But in many instances the Court did not hesitate to set aside rules and proceeded to resolve the case when confronted with cases of national interest and of serious implications.[71]

The case involving the constitutionality of the Reproductive Health Law (Republic Act No. 10354) is one example. In that case, the Court held that in view of the seriousness, novelty and weight as precedents, not only to the public, but also to the bench and bar, the issues raised must be resolved for the guidance of all. The Reproductive Health Law drastically affects the constitutional provisions on the right to life and health, the freedom of religion and expression and other constitutional rights. Mindful of all these and the fact that the issues of contraception and reproductive health have already caused deep division among a broad spectrum of society, the Court entertains no doubt that the petitions raise issues of transcendental importance warranting

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[63] Ng Ching Ting v. Philippine Business Bank, Inc., G.R. No. 224972, July 9, 2018.
[64] *Id.*
[65] Malcampo-Sin v. Sin, G.R. No. 137590, March 26, 2001.
[66] Azcueta v. Republic, G.R. No. 180668, May 26, 2009.
[67] Republic v. Albios, G.R. No. 198780, October 16, 2013.
[68] David v. Senate Electoral Tribunal, G.R. No. 221538, September 20, 2016.
[69] *Id.*
[70] Sajot v. Court of Appeals, G.R. No. 109721, March 11, 1999.
[71] Chavez v. Romulo, G.R. No. 157036, June 9, 2004, *citing* Buklod ng Kawaning EIIB vs. Zamora, G.R. Nos. 142801–02, July 10, 2001; *Fortich vs. Corona*, G.R. No. 131457, April 24, 1998; *Dario vs. Mison*, G.R. No. 81954, August 8, 1989.

immediate court adjudication. More importantly, considering that it is the right to life of the mother and the unborn which is primarily at issue, the Court need not wait for a life to be taken away before taking action.[72]

The right of LGBTQI+ to marry is far more important, I would argue, than any of these grounds.

To illustrate the ease by which this case could have been decided on the merits, let us assume that tomorrow, a gay couple applies for a marriage license which—as expected—is denied. Would that couple have standing to file the case? I argue that they have standing because of the government action (the denial of their application). Can the jilted applicants invoke the jurisdiction of the Supreme Court? Yes, because of the significance of the issue, it would be one of the exceptions to the doctrine of the hierarchy of courts.

Why not just rule on the merits of the petition now? Do we really need a dissertation on the plight of the LGBTQ+ community when the Supreme Court already wrote one into *Falcis*?

Again, the Court's real motivation for turning down an opportunity was its desire to have Congress address the issue of discrimination.

IV. Congress as Solution

Congress' support for the LGBTQI+ community is wanting. There is no legal recognition of LGBT people in the Philippines. A 2016 study reported that there are 15 local government units that passed ordinances against the discrimination of LGBT persons. However, these local ordinances across barangays, cities, and municipalities cover a small number of the population. Only 11.2 percent of the Philippine population are protected by these ordinances, leaving 88.8 percent of the population unprotected of discrimination based on sexual orientation and gender identity and expression.[73]

Bills protecting the LGBTQ+ community have been filed in Congress for the past two decades but are not being passed. The passage of a national law on LGBT human rights has been a struggle of more than two decades.[74] The Catholic Church and its conservative allies from other religions have actively blocked legislative measures pushing for LGBTQ rights since they were first filed in the 1990s.[75] There is no reason to believe that this attitude will change in the near future. Deference to democratic processes controlled by majority sentiments can extend the deprivation of civil rights for many years, to the detriment of the affected minority group and ultimately to the detriment of society as a whole.[76]

Congress is a populist branch. It operates on the framework of majority preferences which are unlikely to champion the cause of the minority. Consistent with my framework, it was

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[72] Spouses Imbong v. Ochoa, Jr., G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172 & 207563, April 8, 2014.

[73] Ma. Theresa Casal De Vela, *The Emergence of LGBT Human Rights and the Use of Discourse Analysis in Understanding LGBT State Inclusion*, 60 PHIL. J. PUB. ADMIN. 72, 81 (2016).

[74] *Id.* at 82.

[75] Jayeel Cornelio & Robbin Charles M. Dagle, *Weaponising Religious Freedom: Same-Sex Marriage and Gender Equality in the Philippines*, 14 RELIGION & HUM. RTS. 65, 76–80 (2019).

[76] Charles R. Calleros, *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*, 2015 MICH. ST. L. REV. 1249, 1310 (2015).

incumbent upon the Supreme Court to check blocks to the exercise of civil exclusion, and to remove them. If history is any indication, then deferring to Congress dooms marriage equality. The constitutionality of the definition of family under Philippine law will remain unresolved.

V. Trends

The legal recognition of same-sex relationships might be the single most important family law issue to emerge in recent years.[77] It is an issue in which constitutional principles have been developed. The issue will raise recognition problems in international private law as more countries give formal recognition to the status of same-sex relationships, and the parties to such relationships move across international borders. It will test the acceptability of many religious and political as well as legal principles which have rested unchallenged for centuries.[78]

Case law from various countries show a judicial turning point which is far ahead of most legislatures. Constitutional and human rights constraints allowed the judges to develop the concept of non-discrimination welcomed by everyone who believes that "human dignity is an attribute to be protected in every person and not just those who belong to a cultural, religious, racial, linguistic or sexual majority. That, after all, is what human rights are all about."[79]

In *Obergefell v. Hodges*,[80] the U.S. Supreme Court held that the Fourteenth Amendment of the U.S. Constitution requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. The world did not fall apart. A marriage license for gay couples in no way affected any other couple, despite contrary claims from religious groups.[81] More than half a million gay and lesbian couples have married in the United States since *Obergefell*, and some $3.2 billion has been spent on weddings, while thousands of traveling wedding guests spent $544 million. The events generated an additional $244 million in state and local taxes, the research found. About 45,000 jobs also were supported by same-sex weddings, according to the study.[82]

The United States Supreme Court also promulgated *Bostock v. Clayton County, Georgia*,[83] holding that an employer who fires an employee for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Significantly, the Civil Rights Act of 1964 does not make a reference to "sexual orientation" but the Court held that:

> From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't

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[77] Kenneth McK. Norrie, *Constitutional Challenges to Sexual Orientation Discrimination*, 49 INT'L & COMP. L.Q. 755, 777 (2000).
[78] *Id.* at 777-778.
[79] *Id.* at 778.
[80] Obergefell v. Hodges, 576 U. S. 644 (2015).
[81] DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT IN THE AGE OF TRUMP 344 (2018).
[82] Oscar Lopez, *Gay weddings boost U.S. economy by $3.8 billion since landmark ruling,* Reuters, 29 May 2020, https://www.reuters.com/article/us-usa-lgbt-weddings-trfn/gay-weddings-boost-u-s-economy-by-3-8-billion-since-landmark-ruling-idUSKBN23503E.
[83] 590 U.S. ___ (2020), *available at* https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

> matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."[84]

The defendants in that case warned of potential consequences of the Court's decision. But the Court responded:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex…."[85]

What about the employers' religious beliefs? According to the Court, these are questions that will be decided in future cases as well.[86]

The point is that *Bostock* will have consequences on other laws but it did not deter the Court from making a ruling on the question before it. It did not, as the Philippine Supreme Court did, point to Congress to address the claim of unconstitutionality because a ruling on the definition of marriage would affect other laws.

Marriage equality is not only a domestic issue; it has been argued that marriage equality is recognized in international law.[87] LGBTQ+ advocates point to the Yogyakarta Principles that serve not only as more than just a comprehensive guide of international human rights for LGBTI people. The Principles were created for the larger purpose of seeking a human rights response to stigma, violence, and discrimination against people based on their sexual orientation, gender identity and expression, and sex characteristics.[88]

Falcis is hiccup in an otherwise clear trajectory towards marriage equality.

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[84] *Id.* at 9.
[85] *Id.* at 31.
[86] *Id.* at 32.
[87] Maria Janina Ann Bordon, *The Universal Human Rights to Marry and to Found a Family: The Yogyakarta Principles and International Trends Against LGBTQ Discrimination in the Fight For Marriage Equality*, 88 PHIL. L.J. 848, 879-901 (2014).
[88] Andrew Park, *Yogyakarta Plus 10: A Demand for Recognition of SOGIESC*, 44 N.C. J. INT'L L. 223 (2019). The first Principles are meant to "affirm binding international legal standards with which all States must comply." Ten years after their launch, a group of experts met in Geneva, Switzerland, to craft supplemental principles, called Yogyakarta Plus 10, Additional Principles and States Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to compliment the Yogyakarta Principles (hereinafter supplementary Principles). The supplementary principles launched in November 2017 and provide an update to the first Principles.' Park, *id.* at 223-224.

VI. Removing Stigma

There is one other factor that should have encouraged the Court to grant the *Falcis* petition: No one will be harmed by striking down the discriminatory definition of marriage in the Family Code. Recognizing these marriages is a Pareto-improving policy.[89] Recognizing LGBTQI marriages will not affect heterosexual marriages—they will remain valid and the parties will not lose any rights or benefits from the State. No one will be compelled to marry against their will.

Recognizing these marriages will remove the stigma that feeds discrimination against LGBTQI couples and their families. After *Obergefell*, many gays and lesbians who marry find that family members, friends, and coworkers see their relationships in a more positive light and begin to accept them, even if they had previously been hostile or distant. Thus, to a significant extent, the aspects of citizenship associated with belonging and inclusion can indeed be achieved through marriage.[90]

Marriage has a significant place in our understanding of responsible citizenship in a democratic polity. It is seen as a prerequisite to the provision of certain rights and material benefits—there is deep connection between access to the institution of marriage and full citizenship.[91]

Denying marriage to the LGBTQI community has adverse impacts on the health and wellbeing of gay men and lesbians. The absence of marriage equality deprives them of the benefits of marriage and is not only an act of discrimination, it also

a. disadvantages them by restricting their citizenship;
b. hinders their mental health, wellbeing, and social mobility; and
c. generally disenfranchises them from various cultural, legal, economic and political aspects of their lives.[92]

By dismissing the Petition in *Falcis*, the Supreme Court prolongs the LGBTQI community's status as second-class citizens, who will continue to suffer stigma and negative health concerns.

VII. Conclusion

> "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity,

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[89] A Pareto-optimal change is one in which no party is made worse off and at least one is made better off. Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, I Give Him the Best Years of My Life*, 16 J. LEGAL STUD. 267, 275 (1987).

[90] Aaron Hoy, *Invisibility, Illegibility, and Stigma: The Citizenship Experiences of Divorced Gays and Lesbians*, 59 JOURNAL OF DIVORCE & REMARRIAGE 69 (2018), doi: 10.1080/10502556.2017.1375332.

[91] Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSPECTIVES ON POLITICS 269 (2005).

[92] Ryan Anderson, *Evidence is clear on the benefits of legalising same-sex marriage*, World Economic Forum, 25 August 2017, https://www.weforum.org/agenda/2017/08/evidence-is-clear-on-the-benefits-of-legalising-same-sex-marriage.

> devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[93]

There is no other possible conclusion to the issue raised by *Falcis*. The definition of marriage discriminates against the LGBTQI+ community. The only other option for the Court, that does not want to make such a ruling, is to decline to hear the question. How? By throwing procedural obstacles along the way. The Supreme Court would rather have Congress redefine marriage to accommodate the LGBTQ+ community. This is a Congress that had many opportunities to amend the Family Code since the early 1990s, but has failed to do so.

Falcis fails because the Supreme Court approached the case incorrectly. All that the Court was expected to do was to examine an allegation of discrimination and assess the State's justification for such discrimination. If there is a stoppage—civil exclusion—then the Court must unblock it. *Falcis* avoids the marriage equality issue by deferring to Congress. Then it adds substantive requirements for the Petitioner—enumerating the benefits he is seeking and the laws that will be affected by his Petition, and (more by implication), the impact on the LGBTQI+ rights movement. None of these additional requirements contribute to resolving whether the Family Code' definition of marriage is constitutional. Moreover, no one's rights are impaired when courts recognize marriage equality.

It is not the function of the Supreme Court to tend to social movements. The LGBTQI+ will deal with Supreme Court decisions in its own way and in its own time.

The path to marriage equality in the Philippines suffered a setback in *Falcis*. This is a temporary setback because the next case, procedurally pristine, will be filed at some time in the near future. When that moment comes, the Supreme Court will promulgate a ruling striking down the definition of marriage as a blatant violation of the due process clause. That ruling is inevitable.

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[93] Obergefell v. Hodges, 576 U. S. 644 (2015).