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## Litigation, Referendum or Legislation? The Road to Becoming the First in Asia to Institutionalize Same-Sex Marriage

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LITIGATION, REFERENDUM, OR LEGISLATION?  
THE ROAD TO BECOMING THE FIRST IN ASIA  
TO INSTITUTIONALIZE SAME-SEX MARRIAGE

*Tzu-Chiang Huang\**

ABSTRACT

*In the pursuit of same-sex marriage, advocates in each country evaluate the appropriate decision-making process for addressing this highly disputed issue—litigation, legislation, or referendum. The choice may be partially based on the institutional advantages of each approach, but more importantly, the choice is also conditioned by the legal and political context of each country, such as the authority of the court, the framing of public opinion, and the dynamics between movement and countermovement. Uniquely, all three decision-making processes are involved in the course of the institutionalization of same-sex marriage in Taiwan. This Article, focusing on the experience in Taiwan, examines the approaches and factors that influence the conceptualization and realization of marriage equality, and to what extent the court can be involved in the process of major social reforms. At first glance, the polarizing events subsequent to the Taiwan Constitutional Court's (TCC) decision seem to reflect the judicial backlash thesis, which suggests that court intervention is counterproductive, as it engenders political resistance. However, this Article argues that the way the TCC adjudicated may actually be a workable alternative approach for other courts to introduce same-sex marriage. In particular, the combination of a "remedial period" for the legislature and "supplemental judicial law-making" allows the courts to facilitate substantial social change while ensuring more democratic deliberation.*

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## INTRODUCTION

On May 24, 2017, the Taiwan Constitutional Court (hereinafter “the TCC”) captured the attention of media around the world with its landmark decision<sup>1</sup>—*Judicial Yuan Interpretation No. 748* (hereinafter “*J.Y. Interpretation No. 748*”)<sup>2</sup>—ruling that the prohibition of same-sex couples from “[creating] a permanent union of intimate and exclusive

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1. Benjamin Haas, *Taiwan’s Top Court Rules in Favour of Same-Sex Marriage*, GUARDIAN (May 24, 2017), [https://perma.cc/E6HW-KANW]; Chris Horton, *Court Ruling Could Make Taiwan First Place in Asia to Legalize Gay Marriage*, N.Y. TIMES (May 24, 2017) [https://perma.cc/EV8A-3A2P].

2. Article 171 of the Taiwan Constitution delegates the Judicial Yuan (i.e., the TCC) with the task of constitutional interpretation, and therefore the official title of the TCC’s decision is “Judicial Yuan Interpretation.” The Judicial Yuan Interpretations are numerically designated.

nature for the purpose of living a common life” is unconstitutional.<sup>3</sup> Considering that Taiwan only embarked on the journey to democratic reform and political liberalization in the late 1980s, *J.Y. Interpretation No. 748* is undoubtedly a breakthrough in the course of its democratization.<sup>4</sup> It is a testimony to how far Taiwan has moved away from a patriarchal society under an authoritarian regime and transformed into a pluralistic and inclusive democratic country.<sup>5</sup> It also marks Taiwan as a regional LGB<sup>6</sup> rights pioneer with the prospect of becoming the first country in Asia to institutionalize same-sex marriage.<sup>7</sup>

However, *J.Y. Interpretation No. 748* is neither the start nor the end of the story in terms of the LGB rights development in Taiwan. On one hand, *J.Y. Interpretation No. 748* is the result of long-term efforts of LGB rights activists.<sup>8</sup> As law professor Kuan Hsiaowei aptly points out, it is the vigorous LGB communities in Taiwan’s society that have gradually fostered a progressive judicial atmosphere that eventually led to this outcome.<sup>9</sup> On the other hand, though *J.Y. Interpretation No. 748* declares it unconstitutional to exclude same-sex unions, it also states that

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3. [Interpretation on (Same Sex Marriage Case), Judicial Interpretation No. 748, ¶ 1 [2017]] [hereinafter J.Y. Interpretation No. 748] (promulgated by Const. Ct. Interp. May 24, 2017), [<https://perma.cc/WDP9-SWUX>] (Taiwan).
  4. For context of the process of democratization in Taiwan, see JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 23-48 (2016); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL’Y J. 531, 536-48 (2002).
  5. Ming-Sung Kuo & Hui-Wen Chen, *The Brown Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light*, 31 COLUM. J. ASIAN L. 72, 74 (2017).
  6. This Article uses the term “LGB” to refer to people who identify themselves as lesbian, gay, or bisexual. In doing so, this Article does not purport to erase or neglect other identities. Rather, it is because the discussion in this Article only focuses on same-sex marriage. Hence, this Article narrows the scope to avoid confusion of the underlying legal issue (for example, when it comes to transgender marriage, the issue concerned is how the state identifies male and female) or misrepresenting other identities.
  7. Emily Rauhala, *In Historic Decision, Taiwanese Court Rules in Favor of Same-Sex Marriage*, WASH. POST (May 24, 2017), [<https://perma.cc/NX8G-WKK6>].
  8. Ming-sho Ho, *Taiwan’s Road to Marriage Equality: Politics of Legalizing Same-Sex Marriage*, CHINA Q. 482, 499 (2019).
  9. Kuan Hsiaowei (官曉薇), *Taiwan Minzhu Hua Hou Tongzhi Renquan Baozhang Zhi Bianqian: Falu Yu Shehui Yundong de Guandian* (臺灣民主化後同志人權保障之變遷：法律與社會運動的觀點) [*The Development of LGBT Rights in Democratic Taiwan: An Analysis from the Perspective of Law and Social Movements*], ZHONGYAN YUAN FAXUE QIKAN (中研院法學期刊) [ACADEMIA SINICA L. J.] 551, 614 (2019).

it is within the discretion of the Legislative Yuan<sup>10</sup> to determine the method of achieving equal protection of the freedom of marriage—i.e., amending the current Civil Code to include same-sex marriage or enacting a special law for same-sex partnerships<sup>11</sup>—which has sparked subsequent polarizing movement and countermovement. In 2018, opponents of marriage equality initiated a referendum in an effort to undermine the legal protection afforded by *J.Y. Interpretation No. 748*. This referendum turned out to be a landslide victory for opponents of marriage equality with more than seven million people approving the referendum proposals that prohibited the legislature from amending the Civil Code.<sup>12</sup> Proponents of marriage equality fought back by pressing the legislature to honor the ruling of *J.Y. Interpretation No. 748*. It was not until the legislature passed the Act for Implementation of J. Y. Interpretation No. 748 in 2019 that Taiwan officially became the first country in Asia to institutionalize same-sex marriage.<sup>13</sup>

From the TCC to the people to the legislature, the eventful path of the institutionalization of same-sex marriage in Taiwan once again demonstrates that the conceptualization of human rights cannot be realized without collective actions that mobilize people and resources to obtain institutional recognition from state authorities.<sup>14</sup> Social movements, in this sense, are collective challenges to advance claims that conflict with the interests of the authority or those whose cultural values are dominant.<sup>15</sup> In this regard, “the study of human rights is the study of a particular context”<sup>16</sup>; the observation of the development of human rights is the observation of how activists advocate for their cause to enlist collective sympathy and public support, and to eventually institutionalize

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10. Legislative Yuan (Lifayuan立法院) is the equivalent of Parliament in Taiwan. Article 62 of the Taiwan Constitution stipulates: “The Legislative Yuan shall be the highest legislative organ of the State, to be constituted of members elected by the people. It shall exercise legislative power on behalf of the people.” For context of the design of the representative system in Taiwan, see YEH, *supra* note 4, at 91-126.

11. J.Y. Interpretation No. 748, *supra* note 3, ¶ 1.

12. Hira Humayun & Susannah Cullinane, *Taiwan Voters Reject Same-Sex Marriage*, CNN (Nov. 25, 2018, 3:01 AM), [https://perma.cc/6CFK-46Z7]; CENT. ELECTION COMM’N, *2018 Referendum Results*, [https://perma.cc/6VR8-HPC9].

13. Chris Horton, *After a Long Fight, Taiwan’s Same-Sex Couples Celebrate New Marriages*, N.Y. TIMES (May 24, 2019), [https://perma.cc/E8YL-HB9G].

14. Kuan Hsiaowei, *supra* note 9, at 554-55. See also Kate Nash, *Is It Social Movements that Construct Human Rights?*, in THE OXFORD HANDBOOK OF SOCIAL MOVEMENTS (Donatella della Porta & Mario Diani eds., 2014).

15. Kuan Hsiaowei, *supra* note 9, at 555.

16. Dominique Clement, *A Sociology of Human Rights: Rights through a Social Movements Lens*, 48 CANADIAN REV. SOC. 121, 123.

their demands.<sup>17</sup> Therefore, even if the demand for protecting human rights—such as marriage equality—is often framed as a universal value, the approach to realize human rights and the substance of human rights are conditioned by the particular political context in each society and vary from one country to another.

In the context of marriage equality, activists often seek state recognition by one of the following decision-making processes: litigation, legislation, or referendum. Most European countries introduced same-sex marriage by legislation after the recognition of civil partnership, with Netherlands becoming the first in the world to institutionalize same-sex marriage in 2001.<sup>18</sup> Drawing on the experience from Europe, some scholars propose the “incrementalist approach” as the political and legal strategy for advocating marriage equality. Advocates of this approach argue that civil partnership legislation is a necessary step prior to the recognition of same-sex marriage, and that same-sex marriage should be institutionalized by legislation instead of litigation, given that social changes introduced by democratically elected representatives are less likely to provoke backlash.<sup>19</sup>

The United States, on the other hand, is perhaps the most eminent example of institutionalizing same-sex marriage by litigation. When the Hawaii Supreme Court issued its progressive ruling that the denial of issuing marriage licenses to same-sex couples violated the state’s constitutional guarantee of equal protection in 1993,<sup>20</sup> it ignited the “culture war”<sup>21</sup> on marriage equality that raged for more than two decades in the

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17. Kuan Hsiaowei, *supra* note 9, at 553. *See also* Nash, *supra* note 14; Bryan S. Turner, *Outline of a Theory of Human Rights*, 27 J. BRIT. SOCIO. ASS’N 489, 489 (1993).

18. Adam Taylor, *What Was the First Country to Legalize Gay Marriage*, WASH. POST (Jun. 26, 2015, 12:51 PM), [<https://perma.cc/BQQ6-PLQ8>].

19. *See generally* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 308-37 (2002); Frances Hamilton, *Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change*, 25 J. TRANSNAT’L L. & POL’Y 121, 141 (2015-16); William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 650-52 (2000).

20. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

21. The late Justice Scalia often referred to LGB rights issues as “culture war” in his dissenting opinions. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“It is clear from this that the Court has taken sides in the culture war, departing from its

U.S. The well-funded opponents of same-sex marriage deployed mass mobilization and were successful in introducing legal restrictions on same-sex marriage at both the state<sup>22</sup> and the federal<sup>23</sup> level. In the end, though the Supreme Court authoritatively introduced same-sex marriage at the federal level in *Obergefell v. Hodges*,<sup>24</sup> some scholars still question the court's institutional capacity to bring about substantial social reforms, as court involvement often leads to more political backlashes.<sup>25</sup>

In terms of referendum, LGB rights activists do not consider it the preferred strategy in general, since empirical evidence demonstrates that in most cases minority rights would be denied by the majority.<sup>26</sup> Ireland became the first country in the world to introduce same-sex marriage by referendum in 2015.<sup>27</sup> The unlikely victory seems particularly uplifting for LGB rights activists around the world, given that Ireland only de-

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role of assuring, as neutral observer, that the democratic rules of engagement are observed.”).

22. Many state supreme court rulings introducing same-sex marriage were subsequently overruled by state constitutional amendment. For example, “Proposition 8” passed in 2008 effectively banned same-sex marriage in California, and overturned the California Supreme Court’s ruling that denying same-sex couples the right to marry was unconstitutional. Jessica Garrison, Cara Mia Dimassa & Richard C. Paddock, *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES (Nov. 5, 2008, 12:00 AM), [<https://perma.cc/3LWN-VDAA>].
23. The Defense of Marriage Act (DOMA) in 1996 was arguably the most devastating setback for same-sex marriage advocacy in the U.S., owing to the fact that DOMA not only defined marriage as exclusively heterosexual unions at the federal level, but relieved states from recognizing same-sex marriages recognized in other states. See Christy M. Glass, Nancy Kubasek & Elizabeth Kiester, *Toward a ‘European Model’ of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKELEY J. INT’L L. 132, 136 (2011). In *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013), the Supreme Court struck down DOMA in part, on the ground that DOMA rested on a “bare congressional desire to harm a politically unpopular group.”
24. *Obergefell v. Hodges*, 576 U.S. 644 (2015).
25. See, e.g., Hamilton, *supra* note 19, at 150 (arguing that “by not taking an incremental approach the Supreme Court runs the risk that there may be a lack of substantive support in every U.S. state.”).
26. Glass et al., *supra* note 23, at 170-71 (analyzing the case in Belgium and Norway and concluding that “local, state, or national referendums should not be seen as a critical, or even preferred, strategy for achieving same-sex marriage rights”); Elzbieta Kuzelewska, *Same-Sex Marriage—A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe*, 24 BIALSTOCKIE STUDIA PRAWNICZE 13, 18-23 (2019) (analyzing the failed referendum experience in Croatia, Slovakia, Slovenia, and Romania, and concluded that referendum “lead[s] to the possibility that majority of voters allows sexual minorities to be oppressed.”).
27. Danny Hakim & Douglas Dalby, *Ireland Votes to Approve Gay Marriage, Putting Country in Vanguard*, N.Y. TIMES (May 23, 2015), [<https://perma.cc/FT6A-6WLC>].

criminalized homosexual conduct in 1993.<sup>28</sup> However, most countries that have attempted this path have failed.<sup>29</sup> Six years later, Switzerland became the second country in the world that successfully institutionalized same-sex marriage by referendum.<sup>30</sup>

Uniquely, all three mechanisms—litigation, referendum, and legislation—are involved in the course of the institutionalization of same-sex marriage in Taiwan. This Article, focusing on the experience in Taiwan, examines each of these approaches in turn, exploring the factors that influence the conceptualization and realization of marriage equality, and then turning to the extent to which the court can be involved in the process of major social change. In addition, given that “comparative constitutionalism is advantageous in evaluating the experience of other nations in tackling the same problem and planning a strategy to achieve same-sex marriage,”<sup>31</sup> this Article then compares the experience of Taiwan to other countries, such as the United States and several European countries, when such a comparison is useful in demonstrating how the political context or advocacy strategy can result in different or similar outcomes.

This Article is structured as follows: it first provides a summary account of the three stages of institutionalizing same-sex marriage in Taiwan and analyzes which factors contributed to the outcome in each stage. Part I discusses how the proponents of marriage equality adopted the incrementalist and assimilationist approach that successfully appealed to both the public and the TCC, which led to the promulgation of *J.Y. Interpretation No. 748*. Part II accounts for the referendum in 2018, in which proponents failed to construct a favorable public narrative because they adopted a legal-reasoning framework rather than resorting to emotive pleas. Part III examines the legislation in 2019, which, unprecedentedly, established a legal institution without a name by deliberately avoiding both the terms “marriage” and “partnership.”

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28. Harry Brent, *Homosexuality was Decriminalised in Ireland 28 Years Ago Today*, IRISH POST (June 24, 2021), [https://perma.cc/4QZS-D8A8].

29. Law professor Oran Doyle points out that, unlike most referendums that are the choices of the political actors, the nature of the referendum in Ireland is a “legal necessity” for constitutional amendment, and therefore the merits of the Irish experience are unlikely to be applied to other jurisdictions. See Oran Doyle, *Minority Rights and Democratic Consensus: The Irish Same-Sex Marriage Referendum*, 15 NAT’L TAIWAN UNIV. L. REV. 21, 23 (2020).

30. Noele Illien, *Swiss Voters Approve Law Allowing Same-Sex Marriages*, N.Y. TIMES (Sept. 28, 2021), [https://perma.cc/LNC7-YTKA].

31. Hamilton, *supra* note 19, at 151.



After an account of the three stages, Part IV of this Article turns to discuss the court's role, if any, in institutionalizing same-sex marriage. Scholars consider whether courts should mandate social reforms based on their normative explanations for judicial backlash: Opponents of court intervention contend that judicially mandated social change would only lead to more resistance and backlash, which are counterproductive to the cause,<sup>32</sup> while those welcoming court rulings argue that backlash engendered by court rulings actually helps forge public opinion.<sup>33</sup> Drawing on the experience in Taiwan, the polarizing events subsequent to *J.Y. Interpretation No. 748* seem to indeed reflect the judicial backlash thesis. Nevertheless, this article argues that the way which the TCC adjudicated in *J.Y. Interpretation No. 748* may actually provide a plausible alternative approach for other courts to introduce same-sex marriage. In particular, the combination of a "remedial period for the legislature" and "supplemental judicial law-making" allows the court to facilitate substantial social change while ensuring more democratic debate to forge public opinion.

## I. THE LANDMARK CONSTITUTIONAL COURT RULING IN 2017

### A. *Incrementalism and the Social Movements* *Prior to J.Y. Interpretation No. 748*

Observing the LGB rights development in several European countries, law professor Kees Waaldijk concludes that despite the fact that it took place at very different speeds, the development of LGB rights in virtually all European countries conforms to a standard sequence of the following three steps: decriminalization, anti-discrimination, and partnership legislation.<sup>34</sup> Waaldijk argues that there is "internal logic" for this pattern as each phase paves the foundation for the next phase.<sup>35</sup> "Once people engaging in homosexual activity are no longer seen as criminals but . . . citizens," they would demand not to be discriminated based on (criminally irrelevant) sexual orientation and be treated equally in school, the workplace, etc.<sup>36</sup> After reaching a more equal status in most

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32. See *infra* notes 254-61 and accompanying text.

33. See *infra* notes 262-67 and accompanying text.

34. Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CANADIAN J. FAM. L. 62, 66 (2000).

35. *Id.* at 86.

36. *Id.*

of their daily life, they would further demand not to be excluded from the institution of marriage “simply because of the gender of the person [they] happen to love.”<sup>37</sup> Writing in the late 1990s, Waaldijk cautiously used the term “partnership” legislation to describe the nature of the third step of the LGB rights developments. Waaldijk nonetheless optimistically predicted that partnership legislation would ultimately transform to marriage legislation,<sup>38</sup> which turns out to be the case for most European countries.<sup>39</sup>

Waaldijk’s theory was later termed as the “incrementalist approach”<sup>40</sup> or the “policy evolution thesis,”<sup>41</sup> endorsed by many legal scholars and LGB rights activists alike.<sup>42</sup> The main theme of the theory is that major social reforms can only be achieved after advancing small cumulative policy changes.<sup>43</sup> In this regard, decriminalization of same-sex sexual behavior is usually the first step toward considering “sexuality” to be an inalienable component of gay and lesbian identity.<sup>44</sup> In addition, prior to the legislation of same-sex marriage, the legislation of civil partnership is a necessary intermediate stage.<sup>45</sup> Advocates for the incrementalist approach also prefer to achieve legal reform by legislation rather than litigation.<sup>46</sup> This is again based on the premise that only gradual changes can lead to “lasting, substantively effective and enduring change,”<sup>47</sup> because slow changes allow “public opinion to adjust gradually to the changes sought by social movement.”<sup>48</sup> From this perspective, social changes should be introduced by democratically elected representatives to ensure there is sufficient public deliberation and consensus.<sup>49</sup> Judicially mandated social reforms, on the contrary, are counterproductive

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37. *Id.*

38. *Id.* at 87.

39. See generally Glass et al., *supra* note 23, at 142-65 (analyzing the process of the introduction of same-sex marriage legislations in several European countries).

40. Hamilton, *supra* note 19, at 129.

41. Glass et al., *supra* note 23, at 165, 168.

42. Hamilton, *supra* note 19, at 121; WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 229 (2002).

43. ESKRIDGE, *supra* note 42, at 115.

44. See Kuan Hsiaowei, *supra* note 9, at 568.

45. MERIN, *supra* note 19, at 333.

46. Hamilton, *supra* note 19, at 141.

47. *Id.* at 134.

48. Kathryn L. Marshall, *Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed*, 2 WM. & MARY POL’Y REV. 194, 200 (2010).

49. Hamilton, *supra* note 19, at 141.

as they often result in generating political backlash and polarizing public opinion.<sup>50</sup>

The development of LGB rights in Taiwan conforms to the incrementalist approach to some extent, but with three notable differences. First, Taiwan never criminalized homosexual behavior; the first stage focused on the destigmatization, rather than the decriminalization, of homosexual behavior.<sup>51</sup> Second, proponents of marriage equality in Taiwan rejected the notion that civil partnership is a necessary transitional stage. Rather, they argued that the civil partnership scheme would constitute a “separate but equal” regime, which is discriminatory in nature.<sup>52</sup> And third, instead of solely relying on legislative action, the institutionalization of same-sex marriage in Taiwan was a result of collaboration between the judicial and legislative branch.<sup>53</sup> The following sections discuss the endeavors set forth by LGB rights activists in pursuit of their goals in each phase, and how these endeavors fostered a progressive judicial atmosphere that led to the issuance of *J.Y. Interpretation No. 748*.

### 1. Destigmatization of Same-Sex Sexual Behavior

Influenced by its colonial history, Taiwan never criminalized homosexual behavior.<sup>54</sup> Taiwan was colonized by Japan until the end of World War II, and therefore subject to Japanese criminal law. The Japanese Criminal Act of 1880 was based on French criminal law; due to the fact that French criminal law had already abolished penalties for homosexual behavior as early as 1791,<sup>55</sup> there was no punishment for such conduct in the Japanese Criminal Act of 1880. After Taiwan gained independence from Japan, the Criminal Code of 1935 continued the practice of not criminalizing same-sex behavior.<sup>56</sup>

However, this does not mean that homosexual behavior was accepted by the public in Taiwan. The stigmatization and degradation as-

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50. For example, prior to *Obergefell*, state supreme courts' decisions to institutionalize same-sex marriage were later overturned by state referendum. For a more detailed discussion of this dynamics, see *infra* notes 254-261 and accompanying text.

51. See *infra* notes 54-75 and accompanying text.

52. See *infra* notes 113-14 and accompanying text.

53. See *infra* notes 156-60 and accompanying text.

54. Kuan Hsiaowei, *supra* note 9, at 568.

55. *Id.*

56. *Id.*

sociated with homosexual behavior was rampant.<sup>57</sup> Before the 2000s, the LGB community was constantly harassed by the police with unlawful searches and inspections, and LGB people had become scapegoats for the spread of AIDS. As a result, LGB rights activists focused on destigmatizing homosexual behavior at this stage, and they have achieved momentous success in this field.<sup>58</sup> For instance, after years of lobbying, LGB rights activists have pushed the legislatures to amend the HIV Infection Control and Patient Rights Protection Act. The Act that once treated the LGB community as the subject of “regulation” and “control” has now transformed to treat the LGB community as the subject of “protection” and explicitly prohibits discrimination against AIDS patients.<sup>59</sup>

Another major achievement in this phase was to make the publication and display of homosexuality a form of constitutionally protected speech. In the 1990s, LGB movements mostly focused on cultural aspects.<sup>60</sup> The mobilization during this phase can be characterized as “identity-based social movements.” The purpose of identity-based social movements is to construct shared group consciousness and collective identity, so that members of the LGB community realize that their shared traits (i.e., sexual orientation) are the contributing factor for social stigma and oppression, thus galvanizing them to advocate for their rights.<sup>61</sup> During this period, LGB rights activists sought to promote their visibility and change the public’s perception of homosexuals by creating spaces that accommodated publications, performances, or art relating to the depiction of homosexuality.<sup>62</sup> Amongst these endeavors, one of the most prominent establishments is Gin-Gin bookstore, a bookstore dedicated to displaying publications and hosting cultural events pertaining to the depiction of homosexuality, which made itself a target for law enforcement.<sup>63</sup>

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57. *Id.* at 569.

58. See Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 80-81.

59. Article 4, Section 1 of the HIV Infection Control and Patient Rights Protection Act: “The dignity and the legal rights of the infected shall be protected and respected . . .” For full text of the official English version of the HIV Infection Control and Patient Rights Protection Act, see HIV Infection Control and Patient Rights Protection Act, LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (TAIWAN), [<https://perma.cc/QZ6G-UM7L>].

60. Kuan Hsiaowei, *supra* note 9, at 581.

61. See, e.g., William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 439-42 (2001).

62. Ming-sho Ho, *supra* note 8, at 486.

63. Kuan Hsiaowei, *supra* note 9, at 582.

In 2003, Zheng-Zhe Lai, the owner of Gin-Gin bookstore, was prosecuted under Article 235 of the Criminal Code. Article 235 of the Criminal Code prohibits anyone from “distribut[ing], broadcast[ing], sell[ing], publicly display[ing], or by other means show[ing]” any “obscene” materials.<sup>64</sup> Lai was convicted and sentenced to 50 days of detention under Article 235 of the Criminal Code, as many of the publications in his bookstore involved sexual depictions of homosexuality. Lai filed a constitutional complaint arguing that Article 235 of the Criminal Code unconstitutionally infringed on his right to freedom of speech.<sup>65</sup> Lai maintained that the publications displayed in the bookstore are essential to the identity of the LGB community. Reading descriptions and images of sexuality is important in forming and validating one’s identity, and the value of the publications does not diminish simply because they involve nudity or sex. Therefore, even though the purpose of Article 235 of the Criminal Code is to preserve and uphold moral norms, it should nonetheless consider and respect the diverse sexual moral norms.<sup>66</sup>

Despite Lai’s arguments, the TCC upheld the constitutionality of Article 235 of the Criminal Code while limiting the scope of its application by applying the constitutional avoidance canon<sup>67</sup> in *J.Y. Interpretation No. 617*. The TCC first established that “the expression of sexually explicit language and the circulation of sexually explicit material” are constitutionally protected.<sup>68</sup> In particular, the TCC recognized the importance of protecting the rights of “sexual minority groups.”<sup>69</sup> That be-

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64. For full text of the official English version of the Criminal Code, see Criminal Code of the Republic of China (Taiwan), LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (TAIWAN), [<https://perma.cc/8HGDG-VD9Y>].

65. “The people shall have freedom of speech, teaching, writing and publication.” Constitution of the Republic of China and the Additional Articles art. 11 (1947).

66. Kuan Hsiaowei, *supra* note 9, at 581-82.

67. “Constitutional avoidance canon” refers to the statutory interpretation methodology that directs the court to interpret statutes to avoid raising serious questions of constitutionality. Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 92 (2018).

68. Interpretation on Crimination Offense of Disseminating Obscene Material, Judicial Yuan Interpretation No. 617 [¶ 1] (Council of Grand Justs. of the Judicial Yuan October 26, 2006) [hereinafter *J.Y. Interpretation No. 617*] [<https://perma.cc/SYZ9-8FSC>].

69. In explaining the importance of protecting the rights of sexual minority groups, the TCC reasoned that “depending on the various sexual cognitions of members who hear or read any sexually explicit language or material, it may generate different effects on different individuals. An individual social group’s distinctive cultural cogni-

ing said, the TCC still held that the legislature can regulate sexually explicit content in order to “maintain sexual morality and social decency.”<sup>70</sup> To strike a balance between maintaining sexual morality and protecting the rights of minority sexual groups, the TCC categorized sexually explicit speech into hardcore explicit speech (i.e., speech that involves “violence, sexual abuse, bestiality but is lacking in artistic, medical or educational value”<sup>71</sup>) and softcore explicit speech (i.e., “any other obscene material or object . . . that is so sexually stimulating or gratifying by objective standards that the average person will either find it not publicly presentable or find it so intolerable as to be repulsive”<sup>72</sup>) content, and confined Article 235 of the Criminal Code to penalize only the dissemination of hardcore content and the dissemination of softcore content without adopting “adequate protective and isolating measure[s]” before disseminating to the general public.<sup>73</sup>

Though the promulgation of *J.Y. Interpretation No. 617* was an important step in destigmatizing homosexual behavior—insomuch that it holds that the display and publication of homosexual content are exempted from criminal liability so long as adequate protective and isolating measures are applied—it was still one limited step. *J.Y. Interpretation No. 617* is heavily criticized for prioritizing the majority’s moral view over the minority’s sexual culture.<sup>74</sup> More importantly, the TCC deliberately circumvented the word “homosexual” and adopted the equivocal term “minority sexual groups” throughout the holding and reasoning of *J.Y. Interpretation No. 617*, suggesting that public endorsement of homosexuality was still taboo at the time, and that the TCC failed to appreciate and address the oppression faced by the LGB community.<sup>75</sup>

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tion and physical and mental development may give rise to a distinctive reaction to various types of sexually explicit language and materials.” *J.Y. Interpretation No. 617*, *supra* note 68, at ¶ 2.

70. *J.Y. Interpretation No. 617*, *supra* note 68, at ¶ 2.

71. *J.Y. Interpretation No. 617*, *supra* note 68, at ¶ 3.

72. *J.Y. Interpretation No. 617*, *supra* note 68, at ¶ 3.

73. *J.Y. Interpretation No. 617*, *supra* note 68, at ¶ 3.

74. *See, e.g.*, *J.Y. Interpretation No. 617*, *supra* note 68 (Justice Lin, dissenting) (to “recognize the protection of sexual morality and social decency as legitimate governmental interests to restrict people’s freedom of sexual expression is equivalent to letting the majority direct how the minority should live and what values the minority should have, which in turn fails to respect each person’s ability to make his or her own choices for his or her life, and to deny the dignity of each independent individual.”).

75. *See* Huang Chengyi (黃丞儀), *Bei Hefa de Yuwang, Bei Xiaoshi de Tongzhi: Jingjing Shuku An (Shizi Di Liuyiqi Hao) Ji Xiangguan Sifa Shiwu de Zai Sikao (被合法的慾望、被消失的同志：晶晶書庫案(釋字第六一七號)及相關司法實務的再思考)* [*Constitutionalizing Desire, Liquidizing Homosexuality: Revisiting Judicial Yuan In-*

## 2. Anti-Discrimination

Since the late 1990s, LGB rights activists in Taiwan have been advocating for equal protection and espousing anti-discrimination legislation for the LGB community.<sup>76</sup> So far, LGB rights activists have been successful in persuading the legislature to establish anti-discrimination measures in educational institutions<sup>77</sup> and the workplace.<sup>78</sup> In terms of educational reforms, it was not until the unfortunate death of Yung-Zhi Yeh that the public began to demand that the government prevent discrimination against students with different sexual orientations.<sup>79</sup> In response, the Ministry of Education amended its draft from “Sex Equality” to “Gender Equality” Education Act, indicating its determination to incorporate a more inclusive concept of equality.<sup>80</sup> That is, instead of adopting a binary classification based on the biological characteristics of males and females, the draft purported to take sexual orientations and different gender identities into consideration. Though the legislation is an important step towards establishing a more inclusive and diverse learning environment, critics point out that it is still too narrow as it focuses mostly on prevention and remedies for sexual assault and harassment, yet neglects the necessity

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*terpretation No. 617 and No. 623*], 83 TAIWAN SHEHUI YANJIU JIKAN (臺灣社會研究季刊) [TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES] 313, 321-22 (2011).

76. Kuan Hsiao-wei, *supra* note 9, at 584.

77. Chapter 2 of the Gender Equity Education Act provides various anti-discrimination measures. For example, Article 12 requires educational institutions to provide a “gender-fair” campus learning environment; Article 13 prohibits admission policies that discriminate against sexual orientation. See Fawubu Quanguo Fagui Ziliaoku [Fawubu Fagui Ziliaoku] [Ministry of Justice Laws and Regulations Database], Jan. 1, 2022, Gender Equity Education Act, [<https://perma.cc/76RP-LMR6>].

78. Article 5, Section 1 of the Employment Service Act. See Fawubu Quanguo Fagui Ziliaoku [Fawubu Fagui Ziliaoku] [Ministry of Justice Laws and Regulations Database], Nov. 28, 2018, Employment Service Act, [<https://perma.cc/76RP-LMR6>].

79. Yung-Zhi Yeh was often bullied by his classmates because of his feminine character, which made him afraid to go to the restroom with other students during recess, and he therefore could only go alone during class time with the teacher’s permission. On April 19, 2000, Yung-Zhi Yeh fell and hit his head in the restroom, and due to the fact that he went to the restroom alone during class time as usual, he missed the opportunity to receive first aid and died the next day. For a more detailed account of the incident and its aftermath, see Bi Hengda (畢恆達), Cong Liangxing Pingdeng Dao Xingbie Pingdeng: Ji Ye Yongzhi (從兩性平等到性別平等：記葉永誌) [From Gender Equality to Sex Equality: Remembering Yeh Yung-Zhi], 13 LIANGXING PINGDENG JIAOYU JIKAN (兩性平等教育季刊) [GENDER EQUALITY EDUC. Q.] 125 (2000).

80. *Id.* at 132.

of introducing more comprehensive educational programs and materials to affirmatively foster a more inclusive and tolerant learning environment.<sup>81</sup>

The Ministry of Education attempted to introduce more inclusive educational programs in the 2010s, which was confronted with a groundswell of opposition. The proposed new outlines for gender education included subjects such as “understanding diverse sexual orientations” and “accepting your own gender identity.” The materials for these subjects involved the description of sex and revealed a more positive attitude towards same-sex marriage, which triggered tremendous conservative backlash.<sup>82</sup> As law professor Tobias Barrington Wolff identifies, discrimination against the LGB community is often achieved through erasure,<sup>83</sup> such as making it a taboo to discuss diverse sexual orientations and gender identities in schools. To erase the LGB community from the public sphere, opponents of LGB rights often establish a narrative that “speak[s] ominously about the seductive power of gay sexuality and its capacity to lead unwitting heterosexuals into same-sex practices.”<sup>84</sup> In this case, the conservative parties enlisted support from worrying parents by accusing the new programs of trying to “turn children gay” and initiated a lobbying campaign which successfully dissuaded the Ministry of Education from implementing the proposed program.<sup>85</sup> The rapid rise of opposition in this stage was primarily driven by substantial financial support from conservative and Christian backers, which has gradually evolved into well-organized groups dedicated to repudiate any advancement of LGB rights, such as same-sex marriage.<sup>86</sup>

### 3. Same-Sex Marriage Litigation and Legislation

Though advocacy for marriage equality in Taiwan dates back to as early as the late 1980s, the advocacy was limited to incidental events and lacked organized action. Chia-Wei Chi, a pioneer and veteran activist in LGBT rights,<sup>87</sup> was the first to petition the Legislative Yuan for the le-

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81. Kuan Hsiaowei, *supra* note 9, at 592.

82. *Id.*

83. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 209 (2012).

84. *Id.* at 210.

85. Kuan Hsiaowei, *supra* note 9, at 593.

86. *Id.* at 593-94.

87. See generally Ye Yujuan, *From A 1 Person March To 250,000 Strong: Chi Chia-Wei's LGBT-Rights Marathon*, THE REPORTER (Dec. 15, 2016), [<https://perma.cc/DB8T-G6Q6>]



galization of same-sex marriage in 1986. The Legislative Yuan rejected the petition on the ground that “[same-sex marriage] is not only in conflict with good morals of the society, but also incompatible with our national conditions and traditional culture.”<sup>88</sup> In 2000, Chi filed a constitutional complaint to the TCC, arguing that it is unconstitutional to limit marriage to the union of men and women. Unsurprisingly, it turned out to be another fruitless attempt. The TCC summarily dismissed the case on procedural grounds, holding that “[the petitioner] did not specifically explain how the statutes or regulations applied in the court decisions violated the Constitution.”<sup>89</sup> During this phase, public discourse concerning same-sex marriage was usually sparked by occasional social events that triggered a brief discussion. For example, when Taiwanese director Ang Lee made headlines by winning the award for best director at the 78th Academy Awards in 2006 for *Brokeback Mountain*,<sup>90</sup> it cast light on the public consciousness of same-sex couples. While these early incidents have contributed to an atmosphere of social support for same-sex marriage, the lack of organized mobilization significantly limited the possible broader impact of those events.<sup>91</sup>

The reason that the push for marriage equality was rather sporadic before the 2000s is because the LGB rights activists used to lack consensus regarding whether to put advocacy for same-sex marriage on their agenda.<sup>92</sup> Just as the LGB rights advocates in the U.S. had heated debates over whether to pursue same-sex marriage in the 1990s,<sup>93</sup> the LGB

88. J.Y. Interpretation No. 748, *supra* note 3, at ¶ 11.

89. J.Y. Interpretation No. 748, *supra* note 3, at ¶ 14.

90. Susan King, *Ang Lee Wins Director's Award for 'Brokeback'*, L.A. TIMES (Jan. 29, 2006), [https://perma.cc/GKQ2-T779].

91. See Chien Tsuchieh (簡至潔), *Cong "Tongxing Hunyin" Dao "Duoyuan Jiating": Chaoxiang Qinmi Guanxi Minzhu Hua de Lifu Yundong (從「同性婚姻」到「多元家庭」：朝向親密關係民主化的立法運動)* [From "Same Sex Marriage" to "Pluralistic Family Arrangements": The Legislative Movement for Democratic Intimate Relationship], 1 TAIWAN RENQUAN XUEKAN (台灣人權學刊) [TAIWAN HUM. RTS. J.] 187, 188 (2012).

92. See *id.* at 191-92; Kuan Hsiaowei, *supra* note 9, at 594.

93. In particular, two prominent LGB rights lawyers—Tom Stoddard and Paula Ettelbrick—had different views on the subject matter. Stoddard asserted that including same-sex couples into marriage would challenge the patriarchal structure of marriage and advance the full equality for the LGB community, while Ettelbrick argued that entering the institution of marriage would force same-sex couples to assimilate and thus erase their identities. For a more detailed account of their arguments, see Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 753-56 (Mark Blasius & Shane Phelan eds., 1997); Paula Ettelbrick, *Since When Is Marriage*

rights activists in Taiwan dealt with the same controversy in the late 2000s. Proponents maintained that it is only when the LGB community are able to enjoy the right to enter the institution of marriage without discrimination that they can be treated as equal citizens. In addition, the socioeconomic benefits associated with marriage, such as tax deductions and medical care, are imperative to their livelihood.<sup>94</sup> Conversely, opponents argued that entering marriage would only reinforce the supremacy of marriage and the legitimacy of monogamy, thus forcing gays and lesbians to assimilate and conform to the norms of heterosexuals. On top of that, as a practical matter, the limited resources possessed by LGB rights activists made them ill-equipped to engage in advocacy for same-sex marriage.<sup>95</sup>

It was not until the establishment of the first nongovernmental organization focusing on advocacy for marriage equality—the Taiwan Alliance to Promote Civil Partnership Rights (hereinafter “TAPCPR”)—that LGB rights activists started to advocate for marriage equality in a systematic and organized manner. In 2012, the TAPCPR published the draft of “Pluralistic Family Arrangements Act” and advocated to amend the Civil Code, which confined marriage to a monogamous union between members of opposite sex.<sup>96</sup> The draft featured three legislative proposals to introduce diverse models of “family,” ranging from the institutionalization of same-sex marriage to the establishment of partnership

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*a Path to Liberation?*, in SAME-SEX MARRIAGE: PRO AND CON: A READER 118-24 (Andrew Sullivan ed., 2004).

94. Chien Tsuchieh, *supra* note 91, at 192; Kuan Hsiaowei, *supra* note 9, at 594-96.

95. *Id.*

96. To be more precise, the Civil Code actually provides no statutory definition for “marriage,” it only stipulates that the contracting parties for the agreement to marry are confined to male and female (Article 972 of the Civil Code: “An agreement to marry shall be made by the male and the female parties in their own [con]cord.”). However, the prevalent interpretation of the Civil Code suggests that, since two persons cannot enter the institution of “marriage” without prior “agreement to marry,” Article 972 of the Civil Code effectively confines marriage to the union of opposite sexes. See Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 78; David KC Huang, *The Court and the Legislation of Same-Sex Marriage: A Critical Analysis of the Judicial Yuan Interpretation No. 748 (2017)*, 14 U. PA. ASIAN L. REV. 63, 77-78 (2019).

for both homosexuals and heterosexuals<sup>97</sup> to the recognition of multiple-person households.<sup>98</sup>

The three-bill package was confronted with harsh criticism from both allies and antagonists of marriage equality. Proponents of marriage equality pointed out that strategically speaking, it was a poorly chosen approach because it invited the opponents to launch a counterattack. The avant-garde proposals were particularly vulnerable to false allegations, which might have resulted in perpetuating the public's misconception of marriage equality, thus undermining the legitimacy of the cause.<sup>99</sup> Unsurprisingly, the ahead-of-the-times proposals were stigmatized as encouraging incest and even bestiality. Furthermore, advocacy for a diverse vision of family backfired and facilitated the opponents' mobilization. Under the impact of a globalized religious conservative movement, many prominent opposition organizations—such as the League for the Happiness of Our Next Generation and the League of Taiwan Guardians of Family—were established in the wake of growing advocacy for marriage equality in Taiwan.<sup>100</sup>

Facing the influence of the countermovements and the political reality, the TAPCPR and other affiliated LGB rights activists decided to devote their attention and resources to the same-sex marriage campaign instead of advocating for diverse visions of family and marriage.<sup>101</sup> Proponents of marriage equality retreated from their previous abolitionist approach—which viewed heterosexual marriage as inherently unjust and sought to replace it with other institutions, such as multiple-person households<sup>102</sup>—and adopted the assimilationist approach, which emphasized the similarity of same-sex couples and heterosexual couples. “Love” became the central theme for same-sex marriage movements.<sup>103</sup>

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97. The Partnership Rights Bill recognized non-marital partnership, which ensured caretaker equality by requiring household labor be compensated, and protected autonomy by relieving the obligation of sexual loyalty to their partner. *See* Chao-ju Chen, *Migrating Marriage Equality Without Feminism: Obergefell v. Hodges and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L. J. 65, 81 (2019).

98. The Multi-Person Household Bill incorporated the notion of a chosen family, which licensed two or more persons “who cohabit and support each other to register as a household...regardless of their sexual intimacy.” *Id.*

99. *See id.* at 81-82.

100. *Id.* at 82-86.

101. Kuan Hsiaowei, *supra* note 9, at 598.

102. *But see* Chao-ju Chen, *supra* note 97, at 82 (arguing that the three-bill package proposal “does little to undermine the privileges of conventional marriage and the inequalities within marriage”).

103. *Id.* at 83.

Just as advocates in the U.S. did, proponents of marriage equality in Taiwan presented the LGB community as like heterosexuals in all but the gender of their sexual partner. In particular, their ability to love and willingness to build a stable marriage are no different from heterosexuals.<sup>104</sup> The assimilationist approach has produced substantial success and fostered a social atmosphere supporting the LGB community.<sup>105</sup> Despite the stalemate in the Legislative Yuan, the public opinion in Taiwan had already changed in favor of gay rights. By the end of 2014, Taiwan was proclaimed as the “beacon” for the Asian LGB community by *The New York Times* as Taiwan regularly held the largest annual gay parade in Asia.<sup>106</sup>

The opponents’ campaign has transformed from a gay-disparaging to a gay-respecting narrative over time as the public became more sympathetic to the LGB community. As Wolff acutely identifies, the “defining feature of contemporary institutional homophobia” rests on “an obsession around the issue of same-sex intimacy, particularly between men.”<sup>107</sup> Studies have shown that public opinion tends to be less sympathetic to homosexuals if they are perceived as promiscuous.<sup>108</sup> The central theme of the opponents’ anti-same-sex-marriage advocacy was to depict the LGB community as promiscuous and explain why gay sex is unhealthy. The messages involved describing gay sex life in detail, constantly associating the LGB community with AIDS and promiscuity, and even blatantly claiming that each gay person has around 1000 sex partners in their life.<sup>109</sup> However, considering that the gay-disparaging

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104. *Id.*

105. Though the assimilationist approach proved to be effective in advocating for same-sex marriage in both the U.S. and Taiwan, it was also criticized for its exclusionary nature that can produce harmful effects on other subgroups, such as transgender people. See generally Marie-Amelie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 601-14 (2019).

106. Andrew Jacobs, *For Asia’s Gays, Taiwan Stands Out as Beacon*, N.Y. TIMES (Oct. 29, 2014), [<https://perma.cc/39LZ-6KYF>].

107. Wolff, *supra* note 83, at 210.

108. See generally David Pinosof & Martie G. Haselton, *The Political Divide Over Same-Sex Marriage: Mating Strategies in Conflict?* 27 PSYCH. SCI. 435 (2016); Corey L. Cook & Catherine A. Cottrell, *You Don’t Know Where He’s Been: Sexual Promiscuity Negatively Affects Responses Toward Both Gay and Straight Men*, 22 PSYCH. MEN & MASCULINITIES 63 (2021).

109. *Yige Tongsinglian Huei You Yician Ge Singbanlyu? Hujiameng: Tongjihib Singwei Huei Ganran* (一個同性戀會有1千個性伴侶？護家盟：同志行為會感染) [*Opponents Claiming Homosexual Behavior is Contagious and Every Gay Person Has 1000 Sex Partners*], SHANG BAO (上報) [UP MEDIA] (Oct. 29, 2016), [<https://perma.cc/2GFX-8PMX>].

narrative was likely to backfire as the LGB community successfully obtained more public support over time with their assimilationist approach, opponents repackaged their campaign to a gay-respecting narrative. The gay-respecting theme professed to be sympathetic to the LGB community and be respectful to their identities; opponents allegedly only rejected same-sex marriage to preserve the basic ethical order of heterosexual marriage.<sup>110</sup> That is, instead of directly attacking the LGB community, the opponents reframed the issue as a matter of traditional family norms.

When the first female president of Taiwan—Ing-Wen Tsai, who passionately espoused marriage equality during her presidential election campaign<sup>111</sup>—assumed her presidency in 2016, and her Democratic Progressive Party (hereinafter “DPP”) also secured the majority of the seats in the Legislative Yuan, both proponents and opponents of marriage equality doubled their mobilization to exert more influence on the government. The well-funded opponents launched various protests and campaigns to recall pro-marriage-equality legislators, which successfully dissuaded some previously supportive legislators from introducing same-sex marriage bills.<sup>112</sup> With mounting opposition, a compromise proposal to enact a special law for same-sex couples instead of amending the Civil Code began to circulate within the DPP government, which was supported by the opponents. The more the opponents supported a special law for partnership, the more the marriage equality campaign opposed it.<sup>113</sup> The TAPCPR once again adamantly rejected the proposal of special legislation for same-sex partnerships, arguing that partnership legislation is nothing but invidious discrimination because it indicates the inferiority of the LGB community by establishing a “separate but equal” regime.<sup>114</sup> On account of lacking consensus both within and outside the DPP, the DPP government did not prioritize same-sex marriage

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110. For example, the Family Guardian Coalition held a press conference prior to the 2016 annual Pride Parade, stating that though they “respect and care for” the LGB community, they nonetheless vehemently oppose same-sex marriage due to ethical concerns. See Yang Jinjie (楊錦傑), Hujiameng Zunzhong Tongxinglian Fandui Tongxing Hunyin (護家盟尊重同性戀 反對同性婚姻) [Family Guardian Coalition Claims to Respect Gays While Opposing Same-Sex Marriage], Ziyoushibao (自由時報) [Liberty Times Net] (Oct. 30, 2016), [<https://perma.cc/AB5X-X9K4>].

111. Max Bearak, *Taiwan is on the Verge of Becoming the First Asian Country with Marriage Equality*, WASH. POST. (Oct. 31, 2016), [<https://perma.cc/2YBA-R8B9>].

112. Ming-sho Ho, *supra* note 8, at 491-92.

113. Chao-ju Chen, *supra* note 97, at 93.

114. *Id.*

on its agenda. In the end, President Tsai's campaign promise seemed to be nothing but lip service.<sup>115</sup>

Realizing that the legislative approach was almost guaranteed to result in deadlock, the TAPCPR gradually shifted its focus to litigation.<sup>116</sup> When the veteran LGB rights advocate Chia-Wei Chi was once again denied registry for marriage and had his case dismissed by the Supreme Administrative Court in September 2014, the TAPCPR finally had their first case eligible to petition to the TCC.<sup>117</sup> The TAPCPR filed the constitutional complaint on August 20, 2015. Meanwhile, under the newly elected mayor Wen-Je Ko, whose mayoralty campaign emphasized the candidate's support for marriage equality, the Taipei Municipal Government forwent its long-established position that confining marriage to the union of opposite sex couples raised no constitutional issues and requested that the Ministry of Interior refer the dispute to the TCC.<sup>118</sup>

On February 10, 2017, the TCC announced its admission, and the consolidation, of the two constitutional petitions by Mr. Chi and the Taipei Municipal Government into one case. More shockingly, it announced that it would hold a public oral hearing on March 24, 2017,

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115. See Brian Hioe, *Efforts by Tsai Ing-wen to Wash Her Hands of the Issue of Gay Marriage?*, NEW BLOOM (Mar. 2, 2017), [<https://perma.cc/A2FZ-QNAY>].

116. See Kuan Hsiaowei, *supra* note 9, at 600.

117. Unlike the U.S.—which adopts a decentralized judicial review system in which any lower court can declare a statute unconstitutional—Taiwan adopts a centralized review system, which has the power to review the constitutionality and nullify statutes in a single organ, the TCC. Therefore, the Supreme Administrative Court cannot decide on the constitutionality of the Civil Code. For a more detailed account regarding the comparative institutional design of constitutional courts, see Tom Ginsburg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia*, 2 GLOB. JURIST 1, 15-17 (2002). Under Article 5 of the Constitutional Interpretation Procedure Act of 1993, which governed the procedure for filing constitutional complaint (the act was later repealed by the Constitutional Court Procedure Act of 2019), an individual alleging their constitutional right being infringed must exhaust all the remedies provided by law before petitioning to the TCC. Constitutional Interpretation Procedure Act of 1993, Chapter II, Art. 5, [<https://perma.cc/S8WJ-NTGF>].

118. Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 78. The appeal requested by the Taipei Municipal City was a request for a “compulsory advisory opinion,” which asks the TCC to clarify the meaning of the constitution when a government agency, in carrying out its function, has doubt about the meaning of a constitutional provision or has doubt on the constitutionality of the statute. David KC Huang, *supra* note 96, at 74-75.

an optional procedure which the TCC rarely practices.<sup>119</sup> The decision to hold a public oral hearing was critical because it indicated that the TCC would decide on the case swiftly. According to the Constitutional Interpretation Procedure Act and the TCC's bylaw on oral public hearing, the TCC must render its decision no later than two months after a hearing is held.<sup>120</sup> That is, the TCC would finally answer to the advocacy on marriage equality of more than three decades and issue its first nationally binding decision on same-sex marriage by May 24, 2017.

#### B. *Assimilationism*, *Obergefell*, and *J.Y. Interpretation No. 748*

On May 24, 2017, the TCC issued *J.Y. Interpretation No. 748*, holding that the prohibition of same-sex couples from “creat[ing] a permanent union of intimate and exclusive nature for the purpose of living a common life” is unconstitutional.<sup>121</sup> Many legal scholars have spotted remarkable resemblance between the reasoning of *J.Y. Interpretation No. 748* and that of *Obergefell*.<sup>122</sup> This should come as no surprise in light of the TCC's long-established tradition to borrow legal doctrines from foreign jurisprudence—especially those from the U.S. or Germany—when adjudicating similar issues,<sup>123</sup> even though the TCC often does so without explicit references.<sup>124</sup> Nevertheless, given that *J.Y.*

119. For a more detailed account of the oral public hearing on the same-sex marriage case, see David KC Huang, *supra* note 96, at 74-82.

120. Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 90-91.

121. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 1.

122. See, e.g., Chao-ju Chen, *supra* note 97, at 65; Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 91-107.

123. See generally David S. Law & Wenchen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011) (arguing that borrowing foreign law at TCC is an acceptable practice, because like many other new democracies, the TCC did not have many domestic resources to rely on). See also ALLAN R. BREWER-CARIAS, *CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE STUDY* 191 (2011) (noting that it is now a common practice for constitutional courts to consider foreign law when deciding on similar matters or principles).

124. It is worth noting that the TCC exceptionally cited *Obergefell* in *J.Y. Interpretation No. 748*. See *J.Y. Interpretation No. 748*, *supra* note 3, ¶ 26. However, it is also quite peculiar that the TCC did not cite *Obergefell* for its legal doctrines; instead, the TCC only cited *Obergefell* as a source of confirming the immutable nature of sexual orientation, in which the Supreme Court of the United States has no comparative expertise. In respect of this uncommon practice of explicit reference, law professor Chien-Chih Lin asserted that the TCC purported to maintain the legitimacy of *J.Y. Interpretation No. 748* by referring to one of the most authoritative courts in the world. Lin Chienchih (林建志), *Yingjie Sihfaguo de Daolai? Yi Shibzi Di 748 Hao Jieshi Wei*

*Interpretation No. 748* was made within a very different political context from *Obergefell*, there are still remarkable differences between these two decisions. By analyzing how *J.Y. Interpretation No. 748* mirrors or diverges from *Obergefell*, the discussion in this section illustrates the limits of comparative law and judicial borrowing when put into different political backgrounds, and to what extent the TCC's reasoning responded to, or is restrained by, the claims made by the proponents and opponents of marriage equality.

To begin with, both *J.Y. Interpretation No. 748* and *Obergefell* rebuilt their previous jurisprudence on the definition of marriage.<sup>125</sup> In *Obergefell*, the U.S. Supreme Court rejected the proposition that the dicta from previous cases were intended to confine marriage to the union of a man and a woman.<sup>126</sup> Rather, the Supreme Court emphasized that like many institutions, the Supreme Court “has made assumptions defined by the world and time of which it is a part.”<sup>127</sup> In *J.Y. Interpretation No. 748*, the TCC acknowledged that it has explicitly depicted marriage as the union of “husband and wife” or “a man and a woman” in previous cases.<sup>128</sup> However, the TCC noted that those decisions “were made within the context of opposite-sex marriage, in terms of the factual backgrounds of the original cases from which they arose.”<sup>129</sup> That is to say, the TCC actually never affirmatively answered the question of whether marriage is an institution that is exclusively for opposite-sex couples only.<sup>130</sup> By doing so, the TCC was able to include same-sex couples without contradicting or overturning any precedents.<sup>131</sup>

In addition, both *J.Y. Interpretation No. 748* and *Obergefell* emphasized how the right to marriage is inextricably associated to one's dignity and autonomy, and that the need for marriage is commonly shared by

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*Li* (迎接司法國的到來？以釋字第748號解釋為例) [*Towards Juristocracy? The Case of Taiwan*], 48 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U.L. REV.] 873, 904-05 (2019). See also Chao-ju Chen, *supra* note 97, at 72.

125. Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 92.

126. *Id.* at 92-93.

127. *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

128. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 17.

129. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 17.

130. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 17. (“Thus far, this Court has not made any Interpretation on the issue of whether two persons of the same sex are allowed to marry each other.”).

131. By contrast, even though the Supreme Court of the United States similarly held that it had never ruled on the issue of the definition of marriage in *Obergefell*, it nonetheless overruled *Baker v. Nelson*, 409 U.S. 810 (1972), a one-line summary decision which held that the exclusion of same-sex couples from marriage did not present a substantial federal question. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).



both heterosexuals and homosexuals; therefore, the right to marriage should be extended to protect same-sex marriage. In *Obergefell*, the majority opinion held that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>132</sup> Furthermore, marriage allows two persons to find intimacy and spirituality, a desire that is “true for all persons, whatever their sexual orientation.”<sup>133</sup> In this regard, “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”<sup>134</sup> Similarly, *J.Y. Interpretation No. 748* held that regardless of sexual orientation, the autonomy to decide whether and whom to marry is “vital to the sound development of personality and safeguarding of human dignity,”<sup>135</sup> and therefore the right to marry is a fundamental right protected by Article 22 of the Constitution.<sup>136</sup>

Another similarity between *J.Y. Interpretation No. 748* and *Obergefell* is their fixation on the assimilative function of marriage and the endorsement of the supremacy of marriage.<sup>137</sup> In *Obergefell*, the majority opinion noted the enduring value of marriage before addressing the doctrinal analysis: “From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage.”<sup>138</sup> The majority opinion then repeatedly emphasized the centrality of marriage in American society,<sup>139</sup> and how the institution of same-sex marriage enhances stability by allowing same-sex couples to

132. *Obergefell*, 576 U.S. at 665.

133. *Obergefell*, 576 U.S. at 666.

134. *Obergefell*, 576 U.S. at 666.

135. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 19.

136. Article 22 of the Taiwan Constitution—the General Freedom of Action Provision—is the “functional equivalent” of the substantive due process clause in the U.S., which empowers the TCC to recognize unenumerated constitutional rights. *See* Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 97.

137. Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1212 (2016) (describing the majority opinion in *Obergefell* as “a love letter to marriage”). Chao-ju Chen, *supra* note 97, at 65 (arguing that both *J.Y. Interpretation No. 748* and *Obergefell* “embrace formal equality, endorse marriage supremacy, and render feminist critique of marriage irrelevant or insignificant”).

138. *Obergefell*, 576 U.S. at 656.

139. *See* *Obergefell*, 576 U.S. at 657 (“The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together.”). *See also id.* at 669 (“[T]his Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”); *id.* at 681 (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”).

conform to social norms,<sup>140</sup> before reaching the conclusion that the right to marriage should be extended to same-sex couples. In *J.Y. Interpretation No. 748*, the TCC emphasized that the recognition of same-sex marriage will not disrupt social norms and morals—instead it would reinforce moral norms by making same-sex couples a part of the “the bedrock of a stable society”:

Creation of a permanent union of intimate and exclusive nature for the purpose of living a common life by two persons of the same sex will not affect the application of those provisions on betrothal, conclusion of marriage, general effects of marriage, matrimonial property regimes, and divorce as provided for in Sections 1 through 5 of the Marriage Chapter, to the union of two persons of the opposite sex. Nor will it alter the social order established upon the existing opposite-sex marriage. Furthermore, the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriage.<sup>141</sup>

This section is critical to appreciating how the TCC responded to the proponents’ and opponents’ claims on marriage equality. In theory, the constitutional court is a countermajoritarian institution,<sup>142</sup> and its insulation from the political branch allows the court to be unswayed by majority opinion and to protect minority rights. In practice, however, the TCC’s decisions often reflect public opinion because “members of the Court are part of the society whose constitution they interpret.”<sup>143</sup> From this perspective, it can be speculated that the TCC adopted the

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140. See, e.g., *Obergefell*, 576 U.S. at 667 (“[Marriage] safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”); *id.* at 668 (“By giving recognition and legal structure to their parents’ relationship, marriage allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

141. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 19.

142. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). *But see* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (arguing that the policy views dominant in the Supreme Court largely reflect the preference of the public).

143. CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* 142 (2009).

assimilationist narrative in this section in order to strike a balance between protecting the right to marriage for same-sex couples and mitigating backlash from the majority opposing same-sex marriage. On one hand, it echoes proponents' assimilationist approach, which characterizes same-sex marriage as identical to heterosexual marriage except for the gender involved in the union. On the other hand, it reassures the opponents that the basic moral order would remain unchanged, if not reinforced, by indicating that there is an interest convergence on the subject matter. That is, the institutionalization of same-sex marriage not only benefits same-sex couples, but also the majority of heterosexual couples because it enables same-sex couples to abide by monogamy and to act in accordance with traditional family values alongside heterosexual couples.

Despite the similarities between the two cases, there are still two significant differences in the reasoning of *J.Y. Interpretation No. 748* and *Obergefell*, respectively, which distinguish them. First, the two judicial decisions took distinct approaches in their analysis of equal protection.<sup>144</sup> *Obergefell* focuses mainly on liberty and speaks very little of equality. The traditional model framed by the U.S. Supreme Court for equal protection analysis is to identify the classification at issue and apply different level of scrutiny (strict, intermediate, or rational basis) accordingly<sup>145</sup>; however, there is no discernible doctrinal structure in terms of the analysis of the Equal Protection Clause in *Obergefell*. The majority opinion in *Obergefell* states:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.<sup>146</sup>

That being said, the Supreme Court failed to illustrate further how the Due Process Clause and the Equal Protection Clause are “connected” or “instructive” to one another. *Obergefell*'s equality analysis is criticized for diverting from the typical equal protection analysis framework, given that the majority never really identified the classification at issue nor ap-

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144. *But see* Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 100 (arguing that like *Obergefell*, the two parts of the analysis of freedom and equality in *J.Y. Interpretation No. 748* are “effectively interlocked”).

145. Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 163 (2016).

146. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

plied a recognizable level of scrutiny.<sup>147</sup> It is also criticized for establishing “LGBT exceptionalism” that allows the LGBT community to enjoy more protection compared to those in other minority groups.<sup>148</sup>

By contrast, *J.Y. Interpretation No. 748* unequivocally classified the LGB community as a “discrete and insular minority” and applied heightened scrutiny.<sup>149</sup> Although there is no citation in this part of the reasoning, it is apparent that the TCC incorporated “the most celebrated footnote in constitutional law”<sup>150</sup>— footnote 4 in *United States v. Carolene Products*<sup>151</sup>—into its equal protection analysis. The equal protection analysis in *J.Y. Interpretation No. 748* bespoke how drastically and rapidly Taiwanese society has changed in a decade: In *J.Y. Interpretation No. 617*, given that society still condemned homosexuality in general, the TCC deliberately avoided using the term “homosexual” and adopted the ambiguous term “minority sexual groups” as if homosexuality was just an abstract concept that did not exist in society.<sup>152</sup> Conversely, the TCC not only acknowledged the oppression that the LGB community constantly faced, but took into account the lived experience of the LGB community in its equal protection analysis in *J.Y. Interpretation No. 748*. The TCC first classified the LGB community as a “discrete and insular minority” by pointing out the *de facto* and *de jure* discrimination that LGB community continuously encounters, and concluded that classification based on sexual orientation should be subject to heightened scrutiny:

In our country, homosexuals were once denied by social tradition and custom in the past. As a result, they have long been locked in the closet and suffered various forms of *de facto* or *de jure* exclusion or discrimination. Besides, homosexuals, because of the population structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a

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147. “Absent . . . is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the ‘modern Supreme Court’s treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing.” *Obergefell*, 576 U.S. at 706-07 (Roberts, C. J., dissenting).

148. Robinson, *supra* note 145, at 171-85.

149. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 21.

150. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

151. *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938).

152. *See supra* notes 64-72 and accompanying text.

long time, unable to overturn their legally disadvantaged status through ordinary democratic processes. Accordingly, to determine the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied. Such different treatment must be aimed at furthering an important public interest by means that are substantially related to that interest, in order for it to meet the requirements of the right to equality as protected by Article 7 of the Constitution.<sup>153</sup>

The second and more important distinction between the two judicial decisions is that, while *Obergefell* affirmatively brought about nationwide institutionalization of same-sex marriage, *J.Y. Interpretation No. 748* only announced that it is unconstitutional not to provide legal recognition for same-sex relationships, but left some leeway for the Legislative Yuan to determine how to institutionalize the right to marriage for same-sex couples. Instead of recognizing same-sex marriage, *J.Y. Interpretation No. 748* repeatedly used the ambiguous terms of the right to “create a permanent union of intimate and exclusive nature for the purpose of living a common life,” intending to leave the issue partially unsolved, thus allowing the Legislative Yuan to make the final call:

This Court thus orders that the [legislature] shall amend or enact the laws as appropriate in accordance with the ruling of this Interpretation within two years after the date of announcement of this Interpretation. It is within the discretion of the [legislature] to determine the formality (for example, amendment of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the Civil Code, enactment of a special law, or other formality) for achieving the equal protection of the freedom of marriage . . . . If the amendment or enactment of relevant laws is not completed within the said two-year timeframe, two persons of the same sex who intend to create a permanent union of intimate and exclusive nature for the purpose of living a common life may [register under current Civil Law, and] shall be accorded the status of a legally-recognized couple and then enjoy the rights and bear the obligations arising on couples.<sup>154</sup>

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153. J.Y. Interpretation No. 748, *supra* note 3, at ¶ 21.

154. J.Y. Interpretation No. 748, *supra* note 3, at ¶ 23.

The feature of the judgment of *J.Y. Interpretation No. 748* is that it combines a two-year “remedial period” with “supplemental judicial law-making,”<sup>155</sup> allowing the final decision to be made by democratically elected representatives instead of the TCC. On the one hand, the TCC suspended the effect of unconstitutionality of the Civil Code for two years by granting a two-year remedial period for the legislature. By doing so, the TCC “strategically left the political hot potato to the Legislative Yuan.”<sup>156</sup> In this respect, the Legislative Yuan was obliged to decide whether to recognize same-sex “marriage” by amending the Civil Code, or to introduce same-sex “partnerships” by enacting special law. On the other hand, with the supplemental judicial law-making—decreeing that should the Legislative Yuan fail to settle the issue within two years, the current Civil Code would be extended to same-sex couples—the TCC ensured that the right to marriage for same-sex couples would not be sacrificed by legislative inaction. However, the two-year remedial period also resulted in a legal limbo for the institutionalization of same-sex marriage since it opened the door for the opponents of marriage equality to utilize referendum and undermine the legal protection afforded by *J.Y. Interpretation No. 748*.

## II. THE ANTICLIMACTIC REFERENDUM IN 2018

### A. *The Aftermath of J.Y. Interpretation No. 748*

Infuriated by the TCC ruling, opponents of marriage equality immediately engaged in a counterattack. Considering that *J.Y. Interpretation No. 748* granted a two-year remedial period that allowed the legislature to determine the proper method for realizing the right to marriage for same-sex couples (i.e., amending the Civil Code to incorporate same-sex marriage or enacting a special law for same-sex partnership), opponents aimed to restrict the legislature’s discretion by initiating a

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155. “Judicial rule-making” refers to the practice where the judges establish general rules by adjudication. For a more detailed account of the practice and feature of judicial rule-making, see Tom Ginsburg, *Bounded Discretion in International Judicial Law-making*, 45 VA. J. INT’L L. 631 (2004-2005). This Article uses the term “supplemental” judicial law-making to emphasize the nature of the judicial law-making in *J.Y. Interpretation No. 748* is only conditional and secondary. That is, it would only come into effect if the legislature fails to settle the issue by the deadline prescribed in *J.Y. Interpretation No. 748*.

156. David KC Huang, *supra* note 96, at 65.

referendum for “initiatives on legislative principles.”<sup>157</sup> Coalition for the Happiness of our Next Generation, a prominent anti-gay organization sponsored by religious conservative entrepreneurs, initiated two referenda: Proposition 10 (“Do you agree that marriage defined in the Civil Code should be restricted to the union between one man and one woman?”)<sup>158</sup> and Proposition 12 (“Do you agree to the protection of the rights of same-sex couples in co-habitation on a permanent basis in ways other than changing of the Civil Code?”).<sup>159</sup> In response, Bo-Ya Miao, a Taipei City legislator and a vocal advocate for marriage equality, initiated Proposition 14: “Do you agree to the protection of same-sex marital rights with marriage as defined in the Civil Code?”<sup>160</sup> Both sides soon collected sufficient signatures to reach the threshold for holding referenda, which led to a confusing ballot with three contradicting questions on marriage equality.<sup>161</sup>

After the agenda was set, opponents of marriage equality soon engaged in mass mobilization on an unprecedented scale. With the public less sympathetic to the LGB community since the issuance of *J.Y. Interpretation No. 748* erased their identity as underdogs, the opponents returned to the gay-disparaging narrative and emphasized the disastrous consequences of same-sex marriage. To build such a narrative, the well-funded opponents spent millions on mobilizing and disseminating disinformation.<sup>162</sup> Disinformation was particularly rampant in online group chats where recipients were most vulnerable to disinformation

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157. Unlike several states in the U.S.—which initiated referenda for constitutional amendments that can override the rulings of state supreme courts granting marriage rights to same-sex couples—the referendum for “initiation for legislation principle”; therefore, it is only binding on the legislature and cannot override the ruling of the TCC. For a more detailed discussion, see *infra* notes 203-208 and accompanying text.

158. Scott Morgan, *Same-Sex Marriage Referendums: Taiwan Civil Code May Remain Unchanged*, TAIWAN NEWS (Nov. 24, 2018), [https://perma.cc/8J3K-5YYL].

159. *Id.*

160. *Id.*

161. Brian Hioe, *Referendum Against Gay Marriage Reaches Necessary Threshold*, NEW BLOOM (Apr. 18, 2018), [https://perma.cc/JA83-X8LJ]; Teng Pei-ju, *With 9,000 Signatures Per Day, Taiwan Petition for Marriage Equality Passes Referendum Threshold*, TAIWAN NEWS (Aug. 31, 2018, 12:33 PM), [https://perma.cc/P9L7-4M94].

162. Adam Taylor, *Taiwan was supposed to be the first place in Asia to legalize gay marriage. Then things got complicated*, WASH. POST. (Nov. 23, 2018), [https://perma.cc/T2J3-BXXD]; Hannah Summers, *Uncertainty Grips Gay People in Taiwan as Same-Sex Marriage Goes to the Vote*, GUARDIAN (Nov. 24, 2018), [https://perma.cc/9XC2-RHK6].

and unlikely to be exposed to debunking information.<sup>163</sup> Opponents reinforced the public's misconception of the LGB community by constantly associating them with "AIDS" and "incest." One widely circulated disinformation was that the introduction of same-sex marriage would lead to a significant increase in the number of people contracting AIDS, which would in turn paralyze the health care system.<sup>164</sup> In addition, by wrongfully exaggerating the impact of same-sex marriage on existing heterosexual family norms, opponents successfully enlisted support from concerned parents who were once indifferent to the issue. One particularly influential and false claim was that, if same-sex marriage were to be legally recognized, children would no longer be allowed to address their parents as "Mom" and "Dad" but would have to use the gender-neutral terms "parent one" and "parent two."<sup>165</sup>

In response, the proponents focused their mobilization on debunking disinformation. Using the experience of racial segregation in the U.S. as an example, the TAPCPR argued that history has demonstrated that civil partnership is not the solution because there is no such thing as "separate but equal."<sup>166</sup> In addition, some advocates maintained that the "filter bubbles"<sup>167</sup> facilitated by social media have significantly diminished the effectiveness of online conversation; hence, they initiated the "Marriage Equality Beez" campaign, which featured "decentralized, creative and spontaneous volunteering among the young participants" going out on the street to engage in in-person conversations with the

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163. Guilherme Souza, *Fake News Goes Viral Prior To Taiwan Same-Sex Marriage Referendum*, Gay Cmty. News (Nov. 22, 2018), [https://perma.cc/53MC-KEWK]; Benjamin Haas, *Sex, Lies and Heated Debate: Taiwan Prepares to Vote in Gay Marriage Referendum*, GUARDIAN (Nov. 21, 2018), [https://perma.cc/2UPK-557U].

164. Souza, *supra* note 163; Haas, *supra* note 163.

165. Gabrielle Yang, *Shenfenzheng Shang De Fumu Lan, Shifou Minfa Xiuzheng Hou Hui Gaiwei Shuangqin Yi Shuangqin Er (身分證上的父母欄, 是否民法修正後會改為雙親一雙親二?) [Will the Parents Columns on the Identity Card be Changed to "Parent One" and "Parent Two" after the Amendment to the Civil Code?]*, HUNYIN PINGQUAN PIYAO SHIWUSUO (婚姻平權關謠事務所) [LAW FIRM AGAINST RUMOR] (Nov. 21, 2016), [https://perma.cc/HZ2C-YGWW].

166. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

167. Pariser first coined the term "filter bubble" to describe the phenomenon where social media users are presented with personalized content which caters to their preferences and prevents them from receiving counter-argument. ELI PARISER, *THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK*, 5 (2011). Similarly, law professor Sunstein observed the same phenomenon and termed it "echo chamber." CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA, 116 (2018).



public and dispel misconceptions about same-sex marriage.<sup>168</sup> In sum, the strategy adopted by the proponents largely concentrated on legal reasoning. Rather than affirmatively championing same-sex marriage, they framed the issue as a matter of general principle, such as fairness and equal protection. Eventually, the chaotic referendum war ended with the proponents' landslide defeat: An overwhelming majority of more than seven million people approved opponents' Proposition 10 and Proposition 12 respectively, which meant that the only way to legally recognize same-sex relationship was by enacting special law. Conversely, proponents were only able to secure around three million voters for Proposition 14, while more than twice as many voters vetoed it.<sup>169</sup>

### B. *Referendum, Minority Rights, and Public Narrative*

Though the outcome of the 2018 referendum was a devastating blow to the same-sex marriage agenda, empirical evidence suggests that referendum will likely represent a stumbling rock rather than a stepping stone for marriage equality.<sup>170</sup> The empirical evidence confirms scholars' assertion that referendums are inherently unfair to minority groups such as the LGB community.<sup>171</sup> After all, minority voters, by definition, are almost guaranteed to be outnumbered by majority voters.<sup>172</sup> Aside from the almost inevitable unfavorable result, the process itself might inflict substantial harm on minority groups. Studies reveal that the LGB community experienced continuous psychological stress during the Australian survey-plebiscite on same-sex marriage due to frequent exposure to negative messages about same-sex marriage and their identities.<sup>173</sup> Moreover, unlike the legislative process, which encompasses mechanisms that facilitate deliberation and compromise to prevent extremism,

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168. Ming-sho Ho, *supra* note 8, at 495.

169. *Taiwan Votes Down Same-Sex Marriage as China Welcomes Midterm Results*, GUARDIAN (Nov. 24, 2018, 11:38 PM), [<https://perma.cc/8ZK5-25HU>].

170. *See generally* Kuzelewska, *supra* note 26, at 18-23 (analyzing the failed referendum experience from several European countries); George, *supra* note 105, at 566-72 (analyzing the ballot box defeats in several states in the U.S.).

171. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. 1503, 1552-53 (1990).

172. Maxwell L. Stearns, *Direct (Anti-) Democracy*, 80 GEO. WASH. L. REV. 311 (2012).

173. *See generally* Stefano Verrelli, Fiona A. White, Lauren J. Harvey & Michael R. Pulciani, *Minority Stress, Social Support, and the Mental Health of Lesbian, Gay, and Bisexual Australians During the Australian Marriage Law Postal Survey*, 54 AUSTL. PSYCH. 336 (2019).

referendum lacks such mechanisms for compromise and reduces complex issues into binary choices.<sup>174</sup> The “zero-sum” and “conflict-maximising” nature of referenda is prone to lead to the possibility that “unchecked majoritarianism allows minorities to be oppressed in a way that is unlikely in representative government.”<sup>175</sup>

Aside from the institutional drawbacks of the referenda, the proponents’ strategy to utilize legal reasoning instead of “storytelling” to frame the narrative may have also contributed to the disappointing result. The experiences of referenda on same-sex marriage in other countries has demonstrated that it is more effective to resort to emotion rather than reason. As law professor Marie-Amelie George observed, when advocating for same-sex marriage, the LGB rights advocates in the U.S had “altered their approach from defending marriage rights as a matter of equal access to government benefits (the equality/civil rights frame) to focusing on gays’ and lesbians’ loving family relationships (the emotive /assimilationist frame)” over time.<sup>176</sup> Confronted with referenda for constitutional amendments to overturn state supreme court rulings introducing same-sex marriage, proponents of marriage equality in Hawaii and Oregon organized campaigns which featured the legal reasoning framework, with the former comparing the amendment to the discriminative treatment against Japanese Americans during World War II and the later focusing on the legal rights associated with marriage.<sup>177</sup> Both campaigns’ efforts turned out to be futile as the overwhelming majority of Hawaiian and Oregonian electorates approved the constitutional amendments.<sup>178</sup> Following a series of defeats, and the California Proposition 8 constitutional amendment loss in particular, the LGB rights activists realized the main goal was to frame a narrative that would resonate with the public, and thus they gradually shifted their narrative from the equality framework to the emotive and assimilative approach.<sup>179</sup>

The 2012 Maine referendum demonstrated the effectiveness of the assimilative approach. During the campaign, LGB rights advocates launched videos featuring heterosexual married couples expressing their wishes that their gay and lesbian children can enjoy the same privileges

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174. Stearns, *supra* note 172.

175. Kuzelewska, *supra* note 26, at 14.

176. George, *supra* note 105, at 565.

177. *Id.* at 568, 570-71.

178. *Id.* at 569, 571.

179. *Id.* at 572.

as they do.<sup>180</sup> Marie-Amelie George identified the common theme of these campaigns was that they featured “white, seemingly middle-class family members making the argument for gender-conforming gays and lesbians”<sup>181</sup> so as to frame a narrative that “gays and lesbians expressed the same type of love and commitment in their relationships as heterosexual couples and that marriage was important to their families.”<sup>182</sup> The story-telling and assimilationist strategy generated positive electoral results: Maine became one of the first state to introduce same-sex marriage by popular vote in 2012.<sup>183</sup>

Similarly, drawing on the experience of the 2015 Irish referendum, law professor Oran Doyle concluded that “story-telling of gay people—and the responses of their fellow citizens—may have been more significant than the articulation of more public values, such as equality.”<sup>184</sup> In 2015, the Irish government asked its constituents to vote for the proposed thirty-fourth constitutional amendment changing the definition of marriage to include same-sex marriage.<sup>185</sup> During the referendum campaign, proponents of same-sex marriage encouraged others to engage in conversation with the public about marriage equality, whether in-person with on-street canvassing, or by posting on social media.<sup>186</sup> Story-telling and coming out consisted of the main theme of the campaign. One notable feature was the “Ring Your Granny” campaign, which asked students to share their views on same-sex marriage with their older relatives.<sup>187</sup> The central idea of the proponents’ campaign was to personalize the issue by depicting the lived experiences of real people, rather than articulating the abstract concept of legal doctrine,

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180. See, e.g., MainersUnited, Yes on 1: Mainers United for Marriage—*Will & Arlene Brewster*, YOUTUBE (Nov. 2, 2012), [https://perma.cc/7AYF-Q4RQ]; MainersUnited, Yes on 1: Mainers United for Marriage—*Eric & Jen Humphrey*, YOUTUBE (Oct. 30, 2012), [https://perma.cc/67KQ-WAUW]; MainersUnited, Yes on 1: Mainers United for Marriage—*Pat & Dan Lawson of Monroe*, YOUTUBE (Oct. 19, 2012), [https://perma.cc/DA9A-Q3D3].

181. George, *supra* note 105, at 578.

182. *Id.* at 577.

183. Maryland also adopted the assimilationist approach and introduced same-sex marriage by popular vote in 2012 as well. George, *supra* note 105, at 580 n. 142.

184. Doyle, *supra* note 29, at 23.

185. The 34<sup>th</sup> amendment is now incorporated into Article 41, Section 4 of the Irish Constitution: “Marriage may be contracted in accordance with law by two persons without distinction as to their sex.” CONSTITUTION OF IRELAND 1937, art. 41, § 4.

186. Doyle, *supra* note 29, at 35-36.

187. Nick Duffy, *Ring Your Granny Campaign Aims to Mobilise Elderly Vote for Ireland’s Marriage Referendum*, PINKNEWS (Mar. 18, 2015), [https://perma.cc/9G6C-HRLX].

such as equal protection.<sup>188</sup> As it turned out, the emotive story-telling campaign helped make Ireland the first nation to institutionalize same-sex marriage by referendum.

The experiences in Ireland and the U.S. echo scholars' assertions of the effectiveness of emotive pleas and the importance of framing in forging public opinion.<sup>189</sup> In *Everyday Advocacy*, professor Cathy Fleischer articulated the importance of framing: The communicational gap between the shared-value group and the general public can be overcome if the issue is framed properly.<sup>190</sup> In particular, the general public are not blank slates; on the contrary, most people already have particular frames through which they understand issues, frames that connect to their deeply held values and worldviews.<sup>191</sup> Therefore, the work of advocacy is to first identify the existing frames for a particular issue and understand why these frames have been effective, and to subsequently develop new frames that appeal to the general public and allow them to understand an issue differently.<sup>192</sup>

In the context of same-sex marriage, the public is more likely to understand the necessity for change and support the cause if they are exposed to real-life stories of discrimination faced by the LGB community.<sup>193</sup> Relying on legal reasoning, on the other hand, might backfire and ignite even stronger resistance due to confirmation bias—a phenomenon in which people tend to select information in a way that almost guarantees confirmation of their original assumptions.<sup>194</sup> The implication is that the framing of an issue significantly affects how the audience perceives it.<sup>195</sup> From this perspective, legal reasoning is often counterproductive in public discourse because it is normative, essentially arguing that it is “right” to espouse same-sex marriage and implying that

188. Doyle, *supra* note 29, at 36.

189. See generally Kenneth K. Hsu, *Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriages*, 20 BYU J. PUB. L. 275 (2006); Francesca Polletta & Beth Gharrity Gardner, *Narrative and Social Movements*, in THE OXFORD HANDBOOK OF SOCIAL MOVEMENTS (2015); Lyrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799 (2010).

190. CATHY FLEISCHER & ANTERO GARCIA, *EVERYDAY ADVOCACY: TEACHERS WHO CHANGE THE LITERACY NARRATIVE 18-19* (2021).

191. *Id.* at 19.

192. *Id.*

193. Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 153 (2010).

194. Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 678-79 (2006).

195. See, e.g., Lidsky, *supra* note 189, at 830.

the opponents have the “wrong” understanding of law has generated resistance in opponents because of confirmation bias. By contrast, storytelling is descriptive. By invoking emotions, LGB advocates can make the audience think they are simply reacting to an event based on their own judgment, and thus make them more likely to change their perception about same-sex marriage.

Since appealing to legal reasoning appears to have a very limited effect, why did the proponents choose to frame the public narrative by legal reasoning instead of storytelling? This Article suggests two possible explanations for the proponents’ strategy: First, considering that the proponents’ campaign was a response to the opponents, their narrative was restrained by the opponents’ framing. The opponents were criticized for inciting fear and anger by spreading information that contradicts scientific findings or legal principles.<sup>196</sup> As a result, the proponents might have thought that the best way to differentiate themselves from the opponents and to legitimize their cause was to resort to reason, instead of emotions. In this regard, the proponents subscribed to the underlying principle of “marketplace of ideas”<sup>197</sup> that the best way to cure the evil of disinformation is by “more speech,”<sup>198</sup> believing that the public would support marriage equality once they were exposed to debunking information.<sup>199</sup>

The second possibility may be that personalizing the issue by storytelling and coming out might pose a risk for those individuals involved; expectations of negative impact on their personal lives may have discouraged the proponents from adopting the storytelling approach. Individuals who share their stories or come out publicly might encounter anti-gay hostility and risk having their personal lives dissected by the public. In addition, the attitude of Taiwan society towards marriage

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196. Chris Horton, *Taiwan Asked Voters 10 Questions. It Got Some Unexpected Answers*, N.Y. TIMES (Nov. 26, 2018), [<https://perma.cc/97L2-GC8R>].

197. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”). See also Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 6-8 (1984).

198. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”).

199. See Lidsky, *supra* note 189, at 801; Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L. J. 55, 61 (2018).

equality can be somewhat characterized as a “generational gap.”<sup>200</sup> Similarly, there are clear generational differences in opinion on same-sex marriage in the U.S., with younger generations continuously expressing more supportive views.<sup>201</sup> In general, the visibility of the LGB community has increased over years, which helps shape favorable public opinion on same-sex marriage amongst younger generations.<sup>202</sup> On the contrary, the elderly are less sympathetic to the LGB community, as they have less opportunities to interact with or learn about the LGB community; therefore, individuals sharing their personal stories could face tremendous family pressure.

### III. THE COMPROMISING LEGISLATION IN 2019

#### A. *The Aftermath of the Referendum*

Two issues were vigorously debated after the 2018 referendum: (1) Does the outcome of the referendum effectively overturn *J.Y. Interpretation No. 748*, and (2) if not, what method is appropriate for the institutionalization of same-sex union? Emphasizing that Proposition 10 was passed with an overwhelming majority, opponents of marriage equality argued that referendum is an exercise of direct democracy, and should therefore supersede the TCC ruling.<sup>203</sup> Conversely, most legal scholars and proponents of marriage equality held that while the referendum reflected public opinion to some extent, it cannot negate *J.Y. Interpretation No. 748*. The referendum only determined the method for realizing the equal protection of the right to marriage; hence, the government is not relieved of the constitutional obligation to enact special legislation

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200. Taylor, *supra* note 162; David KC Huang, *supra* note 96, at 73 (referring to the poll conducted by Ministry of Justice). See also *Over Half of Taiwanese Support Gay Marriage: Survey*, TAIWAN NEWS (Aug. 6, 2013, 4:47 PM), [<https://perma.cc/69AC-MEF5>].

201. Pew Research Center, *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, PEW RESEARCH CENTER (Jun. 8, 2015), [<https://perma.cc/F8H6-G7ZP>].

202. See Hunter Schwarz, *How Gay Marriage Became a Major Issue for a Generation Uninterested in Marriage*, WASH. POST (Jun. 23, 2015, 6:30 AM), [<https://perma.cc/4BJD-4MHX>].

203. You Xinyi (游信義), FACEBOOK (NOV. 26, 2018, 8:14 AM), <https://www.facebook.com/317625268361157/posts/966847410105603/?d=n> (arguing that the referendum has effectively overridden *J.Y. Interpretation No. 748*).

to institutionalize same-sex marriage.<sup>204</sup> These issues were so contentious that even the TCC had to make a press release to clarify its stand on the controversy.<sup>205</sup> The TCC's statement highlighted that the nature of the 2018 referendum was not a "constitutional amendment" but an "initiative on legislative principle."<sup>206</sup> Hence, even though the government is obligated to draft a proposal bill and send it to the Legislative Yuan for deliberation according to the Referendum Act,<sup>207</sup> the substance of the bill cannot defy the holding of *J.Y. Interpretation No. 748* given that the constitution is the supreme law and legislation contradicting the constitution shall be null.<sup>208</sup>

The DPP government was faced with a dilemma: on one side, the institutionalization of same-sex marriage was one of the campaign's promises. On the other side, the majority of the constituents seemed reluctant to embrace same-sex marriage. The predicament was amplified with both the proponents and opponents using the upcoming 2020 presidential and congressional election as their leverage. Nevertheless, one week before the deadline set forth in *J.Y. Interpretation No. 748*, the Legislative Yuan passed the Act for Implementation for J.Y. Interpretation No. 748 (hereinafter "the Act"),<sup>209</sup> which officially made Taiwan the first Asian country institutionalizing same-sex marriage.<sup>210</sup> On May

204. Kyle Knight, *Taiwan's Same-Sex Marriage Vote Is Not the End of the Road*, REUTERS (Nov. 28, 2018), [<https://perma.cc/EP6Q-LG7G>]; TAPCPR's *Public Statement in Response to the Results of the Referendums on November 24, 2018*, TAIWAN ALLIANCE TO PROMOTE CIVIL PARTNERSHIP RIGHTS (Nov. 28, 2018), [<https://perma.cc/CG38-MHD3>].

205. Sifa Yuan (司法院) [Judicial Yuan], Ben Yuan Duiyu Quanguoxing Gongmin Tou-piao An Di 10 An Ji Di 12 An Chuangzhi Zhi Lifa Yuanze Buneng Dichu Shizi Di 748 Hao Jieshi Zhi Shuoming (本院對於全國性公民投票案第10案及第12案創制之立法原則不能牴觸釋字第748號解釋之說明) [*Explanation of this Court's Interpretation of Interpretation No. 748 on the Legislative Principles Created by Cases 10 and 12 of the National Referendum Case*], JUDICIAL YUAN (Nov. 29, 2018), [<https://perma.cc/WBP9-BJYT>].

206. *Id.*

207. Article 30, Section 2 of the Referendum Act: "If a proposal of [initiative of the legislative principles] is adopted . . . the Executive Yuan . . . shall study a proposal of the related laws within 3 months, and send it to the Legislative Yuan . . . for deliberation. The Legislative Yuan shall complete the procedure of deliberation before the adjournment of the next session."

208. XIANFA art. 171 (1947) (China): "Laws that are in conflict with the Constitution shall be null and void."

209. For explanation on why the legislators passed the Act despite tremendous political pressure from the opposition, see *infra* notes 289-93 and accompanying text.

210. Austin Ramzy, *Taiwan Legislature Approves Asia's First Same-Sex Marriage Law*, N.Y. TIMES (May 17, 2019), [<https://perma.cc/MT37-TUVW>].

24, 2019, the very first day the Act took effect, hundreds of same-sex couples celebrated their long-awaited victory by registering their marriage.<sup>211</sup>

### B. *Marriage or Partnership? A Legal Institution Without a Title*

Though the Act is considered a milestone and celebrated both domestically and internationally,<sup>212</sup> a closer examination of the Act reveals that it is only a product of compromise and whether it really institutionalizes same sex “marriage” is in fact questionable. To begin with, the only explicit statutory purpose of the Act is to comply with *J.Y. Interpretation No. 748*, which is unprecedented.<sup>213</sup> Even though the legislature often revises or enacts new statutes in order to comply with TCC rulings,<sup>214</sup> it never did so by making the TCC’s ruling the title of the statute, nor did the legislature explicitly prescribe that the sole purpose of the law is to implement the TCC’s ruling. In contrast, Article 1 of the Act stipulates that “[t]he Act is enacted to enforce the *J. Y. Interpretation No. 748*.”<sup>215</sup> The out-of-the-ordinary title and the statutory purpose implicate the DPP government’s effort to appease both the opponents and the proponents to resolve the extremely dividing issue.<sup>216</sup> On one hand, the statutory purpose of the Act responds to the proponents’ claim for implementing the TCC’s ruling and manifests the DPP government’s determination to abide by the principle of rule of law. On the other hand, by stating a neutral purpose and deliberately omitting “pro-

211. Ralph Jennings, *Hundreds of Same-Sex Couples Marry in Taiwan on First Day It’s Legal*, L.A. TIMES (May 24, 2019, 8:38 AM), [https://perma.cc/2QZ2-89HG].

212. Julia Hollingsworth, *Taiwan Legalises Same-Sex Marriage in Historic First for Asia*, CNN (May 17, 2019), [https://perma.cc/FL8D-44CB]; Jennifer Lu, *Opinion: Taiwan’s Same-Sex Marriage Law Could Change the Debate in Asia Forever*, WASH. POST (May 20, 2019), [https://perma.cc/5RPD-FNFK].

213. Chao-ju Chen, *A Same-Sex Marriage That Is Not the Same: Taiwan’s Legal Recognition of Same-Sex Unions and Affirmation of Marriage Normativity*, 20 AUSTL. J. ASIAN L. 59, 61 (2019).

214. For a detailed discussion of the implementation of TCC rulings, see Lin Chienchih (林建志), Renzhen Duidai Dafaguan Jieshi: Lun Dafaguan Jieshi Zhi Luoshi (認真對待大法官解釋：論大法官解釋之落實) [*Taking Constitutional Court Decisions Seriously: The Implementation of J.Y. Interpretations*], 49 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT’L TAIWAN U. L. REV.] 1777 (2020).

215. For full text of the official English version of the Act, see *Act for Implementation of J.Y. Interpretation No. 748*, LAWS & REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (TAIWAN), [https://perma.cc/H6JR-4DD3].

216. See Chao-ju Chen, *supra* note 213.



protecting LGB rights” as one of the statutory purposes, the DPP government may profess that the sole reason for this legislation is that the government had no choice but to implement the TCC’s ruling as it is a constitutional mandate, thus mitigating resistance from the opponents.

In addition, and more importantly, the legislature strategically applied excessively neutral terms throughout the Act, thus avoiding addressing the most controversial issue of all—the naming of the institution. Article 2 first describes the nature of the relationship recognized by the Act; it stipulates that “[t]wo persons of the same sex may form a permanent union of intimate and exclusive nature for the purpose of living a common life.”<sup>217</sup> Though Article 2 states that such a relationship should be “intimate” and “exclusive” in nature, it deliberately leaves out whether such a relationship should be defined as “marriage” or “partnership.”<sup>218</sup> Similarly, throughout the operative clauses of the Act, the Act refers to the legally recognized institution as the “union as stated in Article 2” instead of either “marriage” or “partnership.”<sup>219</sup> The Act also refers to either party of the union as “one party of the union as stated in Article 2” as opposed to “spouse.”<sup>220</sup> As Chao-ju Chen aptly points out: “[The Act] responds to the issue of naming same-sex union by creating a legal same-sex relationship that literally has no name either in the Act’s title or in its contents.”<sup>221</sup> By doing so, the DPP government once again managed to cater to both sides—given that the proponents rigorously rejected the term “partnership” and the opponents vehemently objected to altering the definition of “marriage”<sup>222</sup>—and to alleviate political backlash.

Lastly, in terms of the substance of the Act, the Act establishes a same-sex marriage regime that resembles the Civil Code marriage in part and diverges from it in part. With regard to the similarities, Article 4 of

217. *Act for Implementation of J.Y. Interpretation No. 748*, *supra* note 215, at ¶ 2.

218. Chao-ju Chen, *supra* note 213, at 60-62.

219. *See, e.g., Act for Implementation of J.Y. Interpretation No. 748*, *supra* note 215, at Art. 4. (“In accordance to the *J. Y. Interpretation No.748* and this Act, a union, as stated in Article 2, shall be effected in writing, which requires the signatures of at least two witnesses, and by marriage registration at the Household Administration Bureau.”) (emphasis added).

220. *See, e.g., Act for Implementation of J.Y. Interpretation No. 748*, *supra* note 215, at Art. 17 (“Where either party of the union as stated in Article 2 meets one of the following conditions, the other party may petition the court for a juridical decree of termination . . .”) (emphasis added).

221. Chao-ju Chen, *supra* note 213, at 62.

222. *Id.* at 61.

the Act assigns the procedure for registering same-sex marriage,<sup>223</sup> a procedure that is exactly the same as the one prescribed for heterosexual marriage in the Civil Code.<sup>224</sup> In addition, several articles in the Act stipulate that the Civil Code shall apply *mutatis mutandis*, such as for spousal inheritance,<sup>225</sup> spousal support,<sup>226</sup> and post-divorce relationships.<sup>227</sup> However, applying the Civil Code *mutatis mutandis* instead of applying it directly also indicates that the extent to which the Civil Code is applicable to same-sex marriage is subject to the discretion of judges, and that necessary changes in details may be made. Amongst the various disparities between same-sex and opposite-sex marriage, the most notable one is perhaps Article 20 of the Act, which only confers the right to adopt “the genetic child of the other party” and stays silent on joint adoption for same-sex marriage.<sup>228</sup> Evidently, the issue of joint adoption by same-sex couples is even more controversial than the recognition of same-sex marriage itself. Both the legislature and the TCC have sought to circumvent addressing it. In *J.Y. Interpretation No. 748*, the TCC narrowed its holding by explicitly stating that “[t]his Interpretation only addresses the issues of whether the provisions of the Marriage Chapter, which do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life together, violate the freedom of marriage protected by Article 22 and the right to equality guaranteed by Article 7 of the Constitution. This Interpretation does not deal with any other issues.”<sup>229</sup>

As it happened, the strategic use of ambiguous terms appealed to both the proponents and opponents of marriage equality, and the once seemingly endless unrest has finally stabilized because of the passage of the Act. Though the Act still faced criticism from both the proponents and opponents, they both considered the Act satisfactory and there was no mass mobilization from either side after the passage of the Act. Proponents of marriage equality once adamantly contended that enacting any kind of special legislation instead of amending the Civil Code is dis-

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223. *Act for Implementation of J.Y. Interpretation No. 748*, *supra* note 215, at Art. 4.

224. Ministry of Justice Laws and Regulations Database of the Republic of China 法務部全國法規資料庫 (L. & Reg. DB) (English), Civil Code, Art. 982 [https://perma.cc/77948-T8CP]: “A marriage shall be effected in writing, which requires the signatures of at least two witnesses, and by the registration at the Household Administration Bureau.”

225. *Act for Implementation of J.Y. Interpretation No. 748*, *supra* note 215, at Art. 23.

226. *Id.* at Art. 22.

227. *Id.* at Art. 19.

228. *Act for Implementation of J.Y. Interpretation No. 748*, *supra* note 215, at Art. 20.

229. *J.Y. Interpretation No. 748*, *supra* note 3, at ¶ 24.

criminatory and constitutes a “separate but equal” regime.<sup>230</sup> Nonetheless, frustrated by the outcome of the 2018 referendum, the proponents have adopted a more pragmatic approach and endorsed the constitutionality of the Act.<sup>231</sup> The TAPCPR made an official statement in which it applauded the DPP government for not succumbing to the tremendous political pressure from the opposition and asserted that the Act honors the holding of *J.Y. Interpretation No. 748*.<sup>232</sup> Opponents, on the other hand, were most concerned with upholding the traditional definition of marriage.<sup>233</sup> In a press release, the Family Guardian Coalition noted that they found the Act acceptable as the Act avoids using terms such as “marriage” and “spouses.”<sup>234</sup>

In a sense, the Act makes both the proponents and opponents losers and winners at the same time. Proponents of marriage equality lost because the Act does not constitute a full endorsement of marriage rights comparable to its counterpart in the Civil Code; opponents also lost because even though the institution established by the Act is partially different from the Civil Code marriage regime, media coverage,<sup>235</sup> legal scholars, and commentators<sup>236</sup> still refer to the Act as introducing same-sex “marriage.” On the other hand, proponents won because the Act recognizes same-sex marriage registration and provides certain access to the substantive legal consequences of marriage<sup>237</sup>; opponents also won because the Civil Code remains intact, and the legal definition of “marriage” remains unchanged.<sup>238</sup>

230. See *supra* notes 114-15 and accompanying text.

231. Chao-ju Chen, *supra* note 213, at 62.

232. Zouguo Jingji, Yiqi Maixiang Yige Geng Pingdeng, Geng Meihao De Taiwan: Banlu Meng Dui Hangzheng Yuan “Sifayuan Shizi Di 748 Hao Jieshi Shihang Fa” Caoan De Huiying (走過荊棘，一起邁向一個更平等、更美好的台灣：伴侶盟對行政院《司法院釋字第748號解釋施行法》草案的回應) [*Formal response to the draft bill, The Enforcement Act of Judicial Yuan Interpretation No. 748, promulgated by the Executive Yuan, Taiwan*], TAIWAN BANLU QUANYI TUIDONG LIANMENG (台灣伴侶權益推動聯盟) [TAIWAN ALLIANCE TO PROMOTE CIVIL PARTNERSHIP RIGHTS] (Feb. 21, 2019), [<https://perma.cc/7VDY-RK7H>].

233. Chao-ju Chen, *supra* note 213, at 62.

234. Hua Jia Meng (護家盟) [Family Guardian Coalition], FACEBOOK (Feb. 20, 2019), <https://www.facebook.com/1826455407581856/posts/2410507832509941/?d=n>.

235. See, e.g., Ramzy, *supra* note 210; Hollingsworth, *supra* note 212; Horton, *supra* note 13.

236. See, e.g., Chao-ju Chen, *supra* note 97; Ming-Sung Kuo & Hui-Wen Chen, *supra* note 5, at 72; David KC Huang, *supra* note 96, at 63; Ming-sho Ho, *supra* note 8, at 482.

237. Chao-ju Chen, *supra* note 97, at 67.

238. Chao-ju Chen, *supra* note 213, at 62.

The language and the substance of the Act demonstrate how the conceptualization of rights are shaped by social claims in specific contexts instead of theoretical ones. The question of what is the appropriate approach to achieving marriage equality has been extensively debated amongst scholars: Some hold that marriage equality can be accomplished by the introduction of civil partnership schemes,<sup>239</sup> while others assert that advocating for civil partnership is contradictory to the goal as civil partnership is inherently discriminatory, which inevitably consigns same-sex couples to second-class citizenship.<sup>240</sup> Some contend that same-sex marriage is the ultimate goal with civil partnership being an indispensable intermediate stage,<sup>241</sup> while others maintain that civil partnership is not a necessary transitional phase.<sup>242</sup> Despite diverse and contradicting approaches having been introduced, none of them indicate that the complicated issue can be resolved simply by introducing an institution without a legal name. The novel approach of the Act—denying same-sex relationships a legal title and deliberately leaving much room for interpretation—was not inspired by any of the theoretical claims; it is a response to social claims which exist in a very particular political context. It also speaks of the government’s attempt to strike a balance between honoring its campaign promise and to attenuate backlash from the opponents, thus securing the maximum number of votes for the upcoming 2020 election. In this regard, the development of

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239. Aloni, *supra* note 193, at 156-58 (arguing that civil partnership schemes are normatively more desirable than marriage because “marriage does not offer relief from discrimination against LGB individuals who do not seek or live in marriage-like arrangements”).

240. Misha Isaak, Comment, “What’s in a Name?” *Civil Unions and the Constitutional Significance of “Marriage,”* 10 U. PA. J. CONST. L. 607, 612 (2008) (arguing that even if civil partnership provides full economic benefits as marriage, it still “fail[s] to provide marriage’s intangible benefits, such as esteem, self-definition, and the stabilizing influence of social expectations”); Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L. Q. 537, 543 (2007) (arguing that civil partnership statutes are analogous to racial segregation laws as “they are enacted for the purpose of excluding a disfavored group from a legally privileged status available to others”).

241. Hamilton, *supra* note 19, at 139 (arguing that the experience in several European countries to utilize civil partnership as a transitional stage demonstrates “the usefulness of civil partnership as a staging post thereby allowing for a change in public opinion”).

242. Glass et al., *supra* note 23, at 170 (arguing that “achieving full marriage rights at the national level does not necessarily depend on an evolutionary approach to partnership recognition”); Aloni, *supra* note 193, at 109 (arguing that “the adoption of civil unions is sometimes a stumbling block that can significantly delay legal acceptance of same-sex marriage”).

rights in each society, including which ones are being prioritized and their particular substance, are closely related to the activists' agenda setting, the countermovement by the opposition, the resources put into mobilizations, and the framing of the narrative.<sup>243</sup> In other words, the progress and realization of rights are often conditioned on external factors independent of the concept of rights itself.

#### IV. REVISITING THE COURT'S RULE IN INTRODUCING SAME-SEX MARRIAGE

##### A. "Whether" to Adjudicate: The Normative Explanations for Judicial Backlash

Unlike *Obergefell*, in which the Supreme Court authoritatively introduced same-sex marriage at the federal level,<sup>244</sup> *J.Y. Interpretation No. 748* did not affirmatively settle the issue, and it left much room for both the proponents and opponents to interpret the ruling in their own favor. Law professor Hwang Shuperng commented shortly after the issuance of *J.Y. Interpretation No. 748*:

This ruling, which allows various options to continue to exist in a constitutional manner, casts doubt on the implementation of freedom of marriage. In this way, it appears that this decision saves our country from the difficult road taken by

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243. Kuan Hsiaowei, *supra* note 9, at 555.

244. This is not to say that opponents of marriage equality in the U.S. ceased to mobilize any counter-action after *Obergefell*. Rather, opponents have channeled their objections into other issues. See Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1760 (2017) (arguing that "critics of same-sex marriage have appealed to the nation's shared commitment to religious liberty as a ground on which to impose limits on *Obergefell*"); George, *supra* note 105, at 556 (arguing that "backlash to gay and lesbian legal victories increasingly took the form of opposition of transgender rights"). *But see* Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2351 (2019) (arguing that the prevalence of religious exemptions involving LGBTQ child welfare should not be narrowly viewed as backlash against same-sex marriage, but it reveals "a much deeper and darker history of religion and morality shaping laws and public institutions in ways that subordinate LGBTQ youth in need of help from the state").

the advocates of marriage equality in Germany, but in fact, the battle for marriage equality is just beginning.<sup>245</sup>

Hwang's prediction turned out to be accurate as the issuance of *J.Y. Interpretation No. 748* only resulted in more conflicting episodes that deeply polarized Taiwan.<sup>246</sup> The fallout of *J.Y. Interpretation No. 748* once again raises the classical questions that have long baffled political scientists and legal scholars alike: What is the function of the court, if any, in facilitating social changes? From an institutional perspective, should social changes be introduced by the court or the legislature? Advocates for a court-based approach argue that courts are countermajoritarian institutions,<sup>247</sup> and therefore courts are best suited to move ahead of public opinion and protect minority rights.<sup>248</sup> Contrastingly, the "majoritarian thesis"<sup>249</sup> and the "consensus constitutionalism"<sup>250</sup> discard the romanticized image of the court as an absolute autonomous institution capable of safeguarding any minority interests; rather, they emphasize that courts defying popular legislation to protect minority rights is counterproductive because it mobilizes greater resistance and incites political backlash.<sup>251</sup>

In the context of same-sex marriage, as mentioned, defenders of the incrementalist approach favor legislative action, fearing that court-based action would engender backlash and thus be detrimental to the cause.<sup>252</sup> Drawing on the experience in the U.S. in its course to introduce same-sex marriage, law professor Frances Hamilton argues that court decisions outpacing public opinion only result in "achievement of same-sex marriage tak[ing] longer to achieve than if the incremental approach had

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245. Hwang Shuperng (黃舒芃), *Ruoyinruoxian de Lifa Xingcheng Ziyou: Hunyin Ziyou de Baozheng Yihuo Zhangai? Ping Sifa Yuan Shi zi Di 748 Hao Jieshi (若隱若現的立法形成自由：婚姻自由的保證抑或障礙？：評司法院釋字第748號解釋)* [*Legislative Discretion Revisited in Light of J.Y. Interpretation No. 748*], 55 FUREN FAXUE (輔仁法學) [FUREN L. REV.] 1, 2 (2018).

246. See *supra* notes 162-74 and accompanying text.

247. BICKEL, *supra* note 142.

248. Bruce M. Wilson, *Claiming Individual Rights through a Constitutional Court: The Example of Gays in Costa Rica*, 5 INT'L J. CONST. L. 242, 252 (2007). See also Doyle, *supra* note 29, at 49-50.

249. Richard H. Pildes, *Is the Supreme Court a Majoritarian Institution?*, 2010 SUP. CT. REV. 103, 105 (2010).

250. Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757 (2011).

251. JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVES AMERICA* 210 (2006); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTER: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 1669 (2013).

252. See *supra* notes 45-47 and accompanying text.

been followed in the first place.”<sup>253</sup> In particular, reforms introduced by the state supreme courts were later confronted with strong opposition and overruled by state constitutional amendments, which substantially delayed the process of institutionalizing same-sex marriage.<sup>254</sup> In any event, substantial changes are possible only when they take place gradually and are introduced by democratically elected bodies.<sup>255</sup> Furthermore, law professor Michael Klarman identifies three principal reasons as for why court interventions are counterproductive: “They raise the salience of an issue, they incite anger over ‘outside interference’ or ‘judicial activism,’ and they alter the order in which social change would otherwise have occurred.”<sup>256</sup> Prior to *Goodridge v. Dep’t of Pub. Health*,<sup>257</sup> many other legal reforms on issues of sexual orientation (e.g., decriminalization of sodomy, implementation of anti-discrimination laws) had taken place quietly without drawing attention. Nonetheless, after *Goodridge*, the public could no longer overlook the ongoing same-sex marriage campaign because the ruling of the court gave salience to the issue and placed it in the spotlight of public discourse.<sup>258</sup> Besides, by the early 2000s, most Americans were willing to decriminalize sodomy and prohibit discriminatory treatment based on sexual orientation, and some Democratic politicians were prepared to introduce same-sex civil unions as a compromise. Nevertheless, the issuance of *Goodridge* rendered the compromise policy unworkable with same-sex couples across the country demanding marriage licenses.<sup>259</sup>

Contrary to the consensus-constitutionalist thesis, which deems consent as the key source of the constitution’s legitimacy, law professor Reva Siegel argues that the debates over same-sex marriage in the U.S. actually bespeaks the constructive effects of conflicts.<sup>260</sup> Siegel proposes the role-based understandings of “constitutional culture,” which refers to “the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Consti-

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253. Hamilton, *supra* note 19, at 146.

254. *Id.* But see Aloni, *supra* note 193, at 128 (arguing that the experience from Hawaii demonstrates the problem of incrementalist approach).

255. See Hamilton, *supra* note 19, at 153.

256. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473 (2005).

257. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

258. Klarman, *supra* note 256, at 474.

259. *Id.* at 478-79.

260. Siegel, *supra* note 244, at 1755.

tution's meaning."<sup>261</sup> In the context of same-sex marriage, prior to *Obergefell*, several state supreme courts' decisions helped shape public opinion through conflicts. For example, early state supreme court decisions such as *Goodridge* created actual married same-sex couples, which allowed the nation to observe the real consequences of institutionalizing same-sex marriage, and thus effectively discredited many hypothetical claims of the negative impacts on the society.<sup>262</sup> Early state supreme court decisions also legitimized proponents' claims for marriage equality as constitutional, which limited the arguments for opponents. As a result, the opponents' objection to same-sex marriage shifted from a "gay-denigrating" to a "gay-respecting" narrative.<sup>263</sup> From this perspective, *Obergefell* was possible not merely because public opinion changed, but also because the conflicts over the early courts' decisions on same-sex marriage facilitated a different framing of public opinion.<sup>264</sup> In this regard, conflicts generated by judicial decisions are central to constructing public opinion and forging new constitutional understanding, which subsequently leads to substantive social changes.<sup>265</sup>

Going back to the experience in Taiwan, the fallout of *J.Y. Interpretation No. 748* appears to reflect the judicial backlash thesis—court decisions defying popular legislation to protect minority rights are counterproductive to social change because they almost inevitably mobilize greater resistance and incite political backlash.<sup>266</sup> *J.Y. Interpretation No. 748* has undoubtedly raised the significance of the case. Though both the proponents and opponents had already mobilized extensively prior to the ruling,<sup>267</sup> both sides had become more extreme and unlikely to reconcile after the ruling as they strived to recruit more public support for their referendum proposals. Furthermore, *J.Y. Interpretation No. 748* was also confronted with resistance from other political actors. One month after the issuance of *J.Y. Interpretation No. 748*, Yunlin County Council passed a resolution to ask the Control Yuan<sup>268</sup> to impeach the

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261. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1325 (2006).

262. Siegel, *supra* note 244, at 1748.

263. *Id.* at 1749.

264. *Id.* at 1744.

265. *Id.* at 1731.

266. Klarman, *supra* note 256, at 475.

267. *See supra* notes 99-115 and accompanying text.

268. Unlike most democratic countries, which assign the impeachment power to representative bodies, Article 7, Section 1 of the Additional Articles (i.e., the constitutional amendments) of the Taiwan Constitution delegates the impeachment power to Control Yuan, an independent institution whose members are appointed by the president



Justices on the grounds that, *inter alia*, they attempted to aggrandize their power by interfering with legislative and executive matters.<sup>269</sup> After the 2018 referendum, many politicians realized that the majority was still reluctant to embrace same-sex marriage. Thus, they publicly criticized *J.Y. Interpretation No. 748* to gain support for the upcoming election in 2020, which significantly undermined the authority of the TCC. Wen-Je Ko, the mayor of Taipei City, who once passionately advocated for marriage equality during his mayoral campaign in 2014 and filed an appeal to the TCC on behalf of Taipei City which led to the promulgation of *J.Y. Interpretation No. 748*,<sup>270</sup> announced that he voted against marriage equality to enlist support for reelection.<sup>271</sup>

The subsequent polarizing incidents ignited by *J.Y. Interpretation No. 748* seems to resonate with Klarman's analysis that the court lacks the institutional capacity to bring about social reforms without public consensus because "court decisions produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred."<sup>272</sup> In fact, from before the TCC heard the case,<sup>273</sup> dur-

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with the consent of the Legislative Yuan. For context of the institutional design of the representative bodies in Taiwan, see JIUNN-RONG YEH, *supra* note 4, at 91-126.

269. Zhou Lilan (周麗蘭), *Likang Tonghun Shixian: Yunxian Yihui Jiang Hanwen Danhe 14 Dafaguan* (力抗同婚釋憲 雲縣議會將函文彈劾14大法官) [Resisting Same-sex Marriage: Yunlin County Council Writing to Impeach 14 Justices], ZHONGSHI XINWEN WANG (中時新聞網) [CHINA TIMES] (Jun. 23, 2017), [https://perma.cc/E2GF-ENT6].

270. See *supra* note 118 and accompanying text.

271. After the passage of the Act, Ko revoked his previous statement and claimed that he casted a null vote for the referendum to express his objection to deciding minority interests via popular vote. Proponents of marriage equality questioned the authenticity of his claim and suspected he reversed his statement out of political motive. Chang Xiongfeng (張雄風), *Ko Wen-Je Tonghun Gongtou Feipiao Shuo Tongzhi Tuanti Zhiyi Xuanqing Kaoliang* (柯文哲同婚公投廢票說 同志團體質疑選情考量) [Wen-Je Ko Claimed to Have Casted a Null Vote in the Same-Sex Marriage Referendum], ZHONGYANG TONGXUN SHE (中央通訊社) [CAN] (Jun. 27, 2020), [https://perma.cc/G3U6-2VYC].

272. Klarman, *supra* note 256, at 477.

273. On October 16, 2016, Jacques Picoux, a French citizen and respected retired professor of National Taiwan University, committed suicide. Mr. Picoux had suffered from great depression after he was denied the chance to make medical decisions for his long-term male partner because their relationship was not legally recognized. The news circulated nationwide and accumulated public sympathy that called for legislation for same-sex marriage. Nicola Smith, *Professor's Death Could See Taiwan Become First Asian Country to Allow Same-Sex Marriage*, GUARDIAN (Oct. 28, 2016), [https://perma.cc/Y25N-GTPN]. In response, a same-sex marriage bill was introduced in November by DPP legislator Mei-Nu Yu, a vocal women's rights advocate. The bill was welcomed with majority support and entered initial review, which has

ing the oral public hearing of the case,<sup>274</sup> to after the TCC decided the case,<sup>275</sup> the legitimacy of the TCC's intervention has been constantly challenged. Many legal scholars and commentators opposing same-sex marriage also focused their criticism from the standpoint of separation of powers, arguing that the TCC unconstitutionally aggrandized its power by adjudicating on matters that should be decided by the legislature.<sup>276</sup> In *J.Y. Interpretation No. 748*, the TCC acknowledged that the case involved "very controversial social and political issues,"<sup>277</sup> and that in general "[t]he representative body is to conduct negotiations and reach compromise and then to enact or amend the legislation concerned in due time based upon its understandings of the people's opinions and taking into account all circumstances."<sup>278</sup> Still, the TCC decided to adjudicate on the dispute on the grounds that "the timetable for such legislative solution is hardly predictable"<sup>279</sup> and that the case "concern[s] the protection of people's fundamental rights."<sup>280</sup>

From another perspective, though it is true that mass conflicts occurred after the issuance of *J.Y. Interpretation No. 748*, the normative implications of these conflicts should be considered on a longer time

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further cast doubt on the legitimacy of the TCC to review the case, considering that the legislators were already deliberating on the issue. See Kuan Hsiaowei, *supra* note 9, at 601.

274. During the oral public hearing, the Ministry of Justice argued that same-sex marriage is not yet a universal value; thus, it is premature for the TCC to recognize same-sex marriage. David KC Huang, *supra* note 96, at 81.

275. Two justices asserted that the definition of marriage is a non-judicial issue and shall be decided democratically in their dissenting opinions. See *id.* at 91-93.

276. See e.g., Ye Guangzhou (葉光洲), *Cong Posui Zhong Xiufu: Qianlun Dafaguan Shizi Di Qisiba Hao Jieshi* (從破碎中修復：淺論大法官釋字第七四八號解釋) [*Restoration from Break: On the Justice's Explanation of Interpretation No. 748*], 266 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 87, 89-91 (2017) (arguing that the TCC unconstitutionally aggrandized its power by denying the legislature to exercise its legislative power); Ceng Pinjie (曾品傑), *Weiren Taijiao De Dafaguan Jieshi Di Qisiba Hao* (為人抬轎的大法官解釋第七四八號) [*A Commentary on the J.Y. Interpretation No. 748 Relative to the Same-Sex Marriage in Taiwan Constitutional Court*], 266 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 69, 81-83 (2017) (arguing that whether to introduce same-sex marriage shall be decided by the legislature given that it is a highly controversial issue lacking consensus among the public).

277. *J.Y. Interpretation No. 748*, *supra* note 3, ¶ 16.

278. *J.Y. Interpretation No. 748*, *supra* note 3, ¶ 16.

279. In this regard, the TCC also emphasized that the legislature has been deliberating on the issue for more than a decade but failed to produce any result. ("Evidently, after more than a decade, the LY is still unable to pass the legislation regarding same-sex marriage."). *Id.* ¶ 15.

280. *Id.* ¶ 16.

horizon.<sup>281</sup> In this regard, *J.Y. Interpretation No. 748* helped shape public opinion through conflicts in the following ways: First, *J.Y. Interpretation No. 748* altered the course of the debate over marriage equality.<sup>282</sup> Before *J.Y. Interpretation No. 748*, the disagreement centered on “whether” to recognize marriage equality for same-sex couples. After *J.Y. Interpretation No. 748*, the heat of the debate shifted to “how” to realize marriage equality—either by amending the Civil Code or by enacting a special law for same-sex partnership.<sup>283</sup>

Second, *J.Y. Interpretation No. 748* fostered dialogue between the proponents and the opponents of marriage equality.<sup>284</sup> Given that *J.Y. Interpretation No. 748* left the final decision to the legislature, both the proponents and the opponents tried to enlist support from the public to exert pressure on the legislature via referendum.<sup>285</sup> In order to persuade the public to join their cause, each side had to answer to the arguments from the other side. As mentioned, the proponents focused their referendum campaign on debunking disinformation, and they responded to conservative arguments by expressing their desire to assimilate.<sup>286</sup>

Third, *J.Y. Interpretation No. 748* made the issue a priority of the public agenda when the legislature was unwilling or unable to do so.<sup>287</sup> Prior to *J.Y. Interpretation No. 748*, proponents had been advocating for marriage equality for more than three decades, yet they failed to receive any institutional recognition<sup>288</sup>; the legislature had been discussing the possibility of same-sex marriage for more than ten years, yet they reached an impasse and were unable to produce any result.<sup>289</sup> After *J.Y. Interpretation No. 748*, given that the TCC ruling raised the salience of the issue, same-sex marriage was under the spotlight of public deliberation, and it was prioritized in the legislative agenda with interest groups seeking to push their schemes. In this stage, public opinion was forged

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281. Siegel, *supra* note 244, at 1744.

282. Similarly, Siegel argues that early court decisions on same-sex marriage prior to *Obergefell* led to the evolution of objections to same-sex marriage “from gay-denigrating to gay-respecting modes of constitutional argument.” *Id.* at 1749.

283. *See supra* notes 158-61 and accompanying text.

284. Similarly, Siegel argues that each side was obliged to answer arguments of the other in their efforts to persuade judges and the public at large. Siegel, *supra* note 244, at 1749.

285. *See supra* notes 153-57 and accompanying text.

286. *See supra* notes 162-64 and accompanying text.

287. Similarly, Siegel argues that “court decisions put same-sex marriage on the public agenda at a time when legislators would not do so.” Siegel, *supra* note 244, at 1748.

288. *See, e.g.*, *J.Y. Interpretation No. 748*, *supra* note 3, ¶ 14.

289. *J.Y. Interpretation No. 748*, *supra* note 3, ¶ 15.

and transformed through conflicts and compromises. Statistical data demonstrates that though public acceptance for same-sex marriage once dropped shortly after the issuance of *J.Y. Interpretation No. 748*,<sup>290</sup> it nonetheless increased significantly in the long term.<sup>291</sup> From this perspective, the backlash and conflicts provoked by *J.Y. Interpretation No. 748* are not destructive but constructive; like other adjudications about same-sex marriage, *J.Y. Interpretation No. 748* “creates as well as reflects public opinion.”<sup>292</sup>

B. *From “Whether” to “How”: Combining the “Remedial Period” and “Supplemental Judicial Law-Making” as an Alternative Approach to Adjudicate Same-Sex Marriage Cases*

As illustrated above, scholars consider whether courts should mandate social reforms based on their normative explanations for judicial backlash: those opposing court intervention contend that judicially mandated social change would only lead to more resistance and backlash, which are counterproductive to the cause because the conflicts undermine the authority of law,<sup>293</sup> while those welcoming court rulings argue that backlash engendered by court rulings help forge public opinion.<sup>294</sup>

This Article further argues that in terms of the institutional capacity of courts to institutionalize same-sex marriage, it is not just about whether the court should decide, but how the court should decide. In particular, the judgment of *J.Y. Interpretation No. 748*, in which the TCC juxtaposes a remedial period for the legislature<sup>295</sup> and supplemental judicial law-making,<sup>296</sup> provides a plausible middle course for

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290. David KC Huang, *supra* note 96, at 70-71 (finding that the ratio which supported marriage equality dropped dramatically from 56.3 percent to 34.34 percent only one day after the promulgation of *J.Y. Interpretation No. 748*).

291. *Most Taiwanese Support Same-Sex Marriage Two Years After Legalization: Survey*, ALTURI (May 24, 2021), [<https://perma.cc/LA5R-C8QZ>] (finding that the acceptance rate for same-sex marriage increased from 37.4 percent in 2018 to 60.4 percent in 2021).

292. Siegel, *supra* note 244, at 1744.

293. *See supra* notes 249-56 and accompanying text.

294. *See supra* notes 260-65 and accompanying text.

295. J.Y. Interpretation No. 748, *supra* note 3, ¶ 1 (“The authorities concerned shall amend or enact the laws as appropriate in accordance with the ruling of this Interpretation within two years from the date of announcement of this Interpretation.”).

296. J.Y. Interpretation No. 748, *supra* note 3, ¶ 1 (“If the [legislature] fail[s] to amend or enact the laws as appropriate within the said two years, two persons of the same sex . . . shall be allowed to have their marriage registration effectuated . . . in accordance with the [Civil Code].”).

the court to facilitate social change. Even incrementalists, who advocate for legislative action, concede the usefulness of the court suspending its judgment and granting a remedial period to the legislature: “One possible method of court action leading to a successful introduction of same-sex marriage is for courts to adopt a compromise approach by suspending their judgment to give the legislature time to canvas public opinion on the topic and amend legislation.”<sup>297</sup>

Merely suspending the judgment and granting remedial period for the legislature is not enough to guarantee the realization of marriage equality, as it might result in legislative inertia or deadlock. A well-known example of the limitation of a court merely granting a remedial period for the governmental branch is the infamous formulation of “all deliberate speed” in *Brown II*,<sup>298</sup> which has been widely criticized for unwarrantedly encouraging resistance to desegregation by lower courts and government agencies.<sup>299</sup> Going back to the same-sex marriage case in Taiwan, consider the hypothetical case where the TCC only mandates the legislature to decide the appropriate method to recognize same-sex relationships within two years, in which case it would almost be certain that the legislature would choose to defy the TCC decision because the legislature might succumb to the overwhelming political pressure from the opposition. It is well-established amongst political scientists that the legislature would only have the incentive to enact law when it serves their self-interest of reelection.<sup>300</sup> To maximize their chances of reelection, the legislators devote their limited time and resources to more electorally productive activities and avert introducing legislations that invite political backlash.<sup>301</sup> As a result, even though it is a constitutional mandate for the legislature to comply with the TCC rulings,<sup>302</sup> it is much less politically costly to defy the TCC decision compared to enacting a

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297. Hamilton, *supra* note 19, at 142.

298. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955).

299. See, e.g., Charles L. Black Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970); Robert B. McKay, “*With All Deliberate Speed*”—*A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956).

300. David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 960 (1999).

301. *Id.* at 962-63.

302. J.Y. Interpretation No. 185, ¶ 1 (“The Interpretations made by the [TCC] shall be binding upon every government institution and person in the country, and each government institution shall follow these Interpretations when handling relevant matters.”). The official English version of J.Y. Interpretation No. 185 is available on the TCC official website at <https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&cid=310366> [<https://perma.cc/UGJ3-NHHP>].

law with enormous opposition from constituents. After all, it is the people, not the court, who decide whether the legislators will remain in their posts.

By coupling a “remedial period” with “supplemental judicial law-making,” *J.Y. Interpretation No. 748* incentivized the legislature to enact a new law by making legislative inaction more politically costly than legislative action. Consider the hypothetical case where the legislators failed to take any action by the deadline prescribed in *J.Y. Interpretation No. 748*. The legislators would lose votes from both the proponents and opponents of marriage equality. On one hand, the supplemental judicial law-making in *J.Y. Interpretation No. 748* stipulates that if the legislature fails to settle the issue within two years, same-sex couples can register their marriage under the procedure stipulated in the Civil Code. That is, the statutory definition of marriage in the Civil Code—which is the greatest concern for the opponents—would be amended by *J.Y. Interpretation No. 748* if legislative inaction occurs. In this case the legislators would become the scapegoat for not safeguarding the traditional definition of marriage in the eyes of the opponents. On the other hand, the only reason that same-sex marriage was institutionalized in this case was because of the TCC—an independent tribunal that is not subject to the control of the governmental branch. Hence, the legislators would lose votes from the proponents as well because they betrayed their campaign’s promise by failing to contribute to the result. From this perspective, enacting a special law, rather than legislative inaction, becomes the less politically costly option for the legislators, because it allows “the political branch to appease the opposition and to answer to the TCC and the proponents of marriage equality.”<sup>303</sup>

As illustrated by the experience in Taiwan, combining a remedial period for the legislature with supplemental judicial law-making in court decisions can serve as a compromise approach which legitimizes courts’ intervention in social changes and affords legal protection to minority groups at the same time. With a remedial period for the legislature, the court addresses the concerns of both the consensus-constitutionalist and incrementalist theses by allowing more democratic debates to take place. Rather than blocking the possibility for deliberative democracy with a final judgment on the issue, it actually invites more political actors and citizens to engage in the debate, and thus facilitates changes of public opinion, both by allowing the government some

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303. Lin Chienchih, *supra* note 124, at 918.

leeway in their decision and by setting a deadline for discussion.<sup>304</sup> Though the tension during this period “may be distressing to those who participate in or witness it,”<sup>305</sup> considering that both the proponents and opponents of social change try to exert influence on the legislature, the conflicts in this stage can nonetheless “forge relationships that strengthen the constitutional order as a whole.”<sup>306</sup>

On the other hand, with the supplemental judicial law-making, the court played a more progressive role in shaping the contour of constitutional order and asserted its position as the guardian of minority rights. By acting as a “positive legislator,”<sup>307</sup> the court affirmatively brought about social change, which ensured that minority rights will not be sacrificed by the tyranny of the majority. In addition, it further incentivized political actors and citizens to participate in the democratic process during the remedial period, as they realized doing nothing—essentially legislative inertia—is no longer an effective way in rejecting social changes. From this perspective, the question of the role of courts in social change is not just about whether the court should intervene, but how the court should do it. The approach adopted by *J.Y. Interpretation No. 748* perhaps sheds some light on a middle-course approach that allows the court to introduce substantive social changes while keeping the door open for democratic debates.

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304. Diana Kapiszewski & Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings*, 38 LAW & SOC. INQUIRY 803, 826 (2013).

305. Siegel, *supra* note 244, at 1752.

306. *Id.*

307. Hans Kelsen famously characterized constitutional courts as “negative legislators,” which entails that constitutional courts can only establish general norms by annulling statutes that are inconsistent to the constitution. See BREWER-CARIAS, *supra* note 123, at 5-12. Nevertheless, contemporary constitutional comparative law reveals that constitutional courts have progressively assumed the role of “positive legislators” and creating new norms by judicial law-making. See *id.* at 31-40. Law professor Brewer-Carias argues that the interference of the courts in the legislative function can be justified if the case concerns fundamental rights, such as the right to equality and non-discrimination. *Id.* at 33-34. Tzong-Li Hsu, Chief Justice of the TCC, asserts that constitutional courts acting as positive legislators is justified if courts merely play a secondary role, such as the case of *J.Y. Interpretation No. 748*, in which the supplemental judicial law-making would only come into effect if the legislature chose inaction. See Hsu Tzongli (許宗力), *Xianfa Fayuan Zuowei Jiji Lifazhe (憲法法院作為積極立法者)* [*Taiwan Constitutional Court as a Positive Legislator*], 25 ZHONGYAN YUAN FAXUE QIKAN (中研院法學期刊) [ACADEMIA SINICA L. J.] 1, 39 (2019).

## CONCLUSION

From the TCC to the people to the legislature, the arduous path of the institutionalization of same-sex marriage in Taiwan reveals how the decision-making process and the substance of marriage equality are conditioned by the particular political context in each society. The development of LGB rights is significantly affected by the agenda set by and resources available to LGB rights advocates, their strategies for social mobilization, and the power of countermovement. On one hand, *J.Y. Interpretation No. 748* is not a product of mechanical application of constitutional doctrines, but a response to the continuous effort of LGB rights activism. On the other hand, the well-organized countermovement substantially limited the claims that advocates could make. In the end, the highly disputed issue was settled by a compromise piece of legislation, which features strategic use of overly neutral terms that makes it unique legislation compared to its counterparts.

Furthermore, the experience in the U.S. indicates that the institutionalization of same-sex marriage does not equate the end of the conflicts between proponents and opponents of marriage equality. Rather, they will channel their conflicts into new forms.<sup>308</sup> In the following years, it is foreseeable that more mobilizations and conflicts will be generated in Taiwan with respect to subjects of sexual orientation and gender identity, such as transgender rights,<sup>309</sup> the right to jointly adopt children for same-sex couples,<sup>310</sup> and the implementation of a more inclusive gender equality education program.<sup>311</sup>

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308. See Seigel, *supra* note 244.

309. In September 2021, the Taipei High Administrative Court ruled that it is unconstitutional for the Ministry of Interior to ask for proof of surgery as a prerequisite to change the gender on government-issued identification. The landmark ruling is celebrated for advancing transgender rights in Taiwan. James Factora, *A "Landmark" Court Ruling in Taiwan Just Moved Trans Rights Forward*, THEM (Sep. 28, 2021), [https://perma.cc/T67B-ULT7]. However, this is still a very limited step due to the fact that the Taipei High Administrative Court ruling is only binding to the parties in the case (as opposed to the TCC ruling, which is binding nationwide). In addition, the right to obtain gender-conforming identifications is just one of the many transgender rights concerns, there are still many other aspects that need to be addressed, such as the right to employment, housing or to access public bathrooms without discrimination. See generally Shayna Medley, *[Mis]interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports*, 45 N.Y.U. REV. L. & SOC. CHANGE 673 (2022); Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719 (2019).

310. In January 2022, the Kaohsiung Juvenile and Family Court ruled that same-sex couples are eligible to jointly adopt children that neither of them are related to, on the



Since the Netherlands became the first country in the world to institutionalize same-sex marriage in 2001,<sup>312</sup> 32 countries have followed suit,<sup>313</sup> with the most recent being Cuba in March 2022.<sup>314</sup> With the recognition of same-sex marriage being a global trend in the past two decades, it is foreseeable that more countries will continue down this path in the following years. LGB rights activists in those countries would face the choice about the appropriate decision-making procedure for addressing this highly disputed issue: litigation, legislation, or referendum. The choice may be partially based on the institutional characteristics of each mechanism: judicial action can outpace public opinion and protect minority rights, but at the expense of motivating political resistance and backlash.<sup>315</sup> Legislative process tends to facilitate compromise, which allows the legislature to tackle the issue in a more comprehensive and nuanced manner; however, legislative processes often reach deadlock when legislators are unable to balance conflicting interests.<sup>316</sup>

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ground that even though the Act only stipulates the adoption of “the genetic child of the other party” (Article 20 of the Act), it does not explicitly prohibit the joint adoption of an unrelated child. In the same month, the plaintiff of the case completed the adoption paperwork, which made them the first same-sex couple in Taiwan to legally adopt a child neither of them are related to. Helen Davidson, *Same-Sex Couple Become First in Taiwan to Legally Adopt Child*, GUARDIAN (Jan. 13, 2022), [https://perma.cc/T4MS-CFCP]. However, this ruling is only binding to the parties in the case (as opposed to the TCC ruling, which is binding nationwide), the right to adopt for same-sex couples remains uncertain in general. *Id.*

311. There were two questions regarding gender equality education in schools in the 2018 referendum. Proposition 11 (“Do you agree that the Ministry of Education should not implement the Enforcement Rules for Gender Equity Education Act in elementary and middle schools?”), proposed by the opponents of marriage equality, was adopted with more than seven million votes approving it. Proposition 15 (“Do you agree in accordance with ‘Gender Equality Education Act’ that national education of all levels should educate students on the importance of gender equality, emotional education, sex education, same-sex education?”), proposed by the proponents of marriage equality, was vetoed by the majority. CENT. ELECTION COMM’N, *2018 Referendum Results*, [https://perma.cc/6VR8-HPC9]. The referendum has created a substantial hurdle for the Ministry of Education to implement a more inclusive educational program in schools. *Gender Equality in Schools Urged*, TAIPEI TIMES (Jun. 24, 2019), [https://perma.cc/KH7H-H4BY].
312. David Masci, Elizabeth Podrebarac & Michael Lipka, *Same-Sex Marriage Around the World*, PEW RSCH. CTR. (Oct. 28, 2019), [https://perma.cc/C42T-6L6C].
313. HRC Foundation, *Marriage Equality Around the World*, HRC.ORG, [https://perma.cc/K9YU-4XY8].
314. Eduardo Medina, *Cuba Approves Same-Sex Marriage in Historic Vote*, N.Y. TIMES (Sept. 26, 2022), [https://perma.cc/DTT4-PW4E].
315. See *supra* notes 255-87 and accompanying text.
316. See Doyle, *supra* note 29, at 41.

Referendum licenses the unchecked majority to suppress minority groups, yet it may help forge consensus if administered properly.<sup>317</sup> Besides the institutional characteristics of each mechanism, perhaps the political, social and legal background of each country plays a more critical role in determining which mechanism LGB rights activists would choose: countries with a strong leftist ruling party or coalition are more likely to introduce same-sex marriage by legislation,<sup>318</sup> while countries with comprehensive Bills of Rights are more likely to institutionalize same-sex marriage with court action.<sup>319</sup> Irrespective of which decision-making process they choose, LGB rights activists would have to strategically frame their narrative to muster public support and collective sympathy, so as to eventually institutionalize their demands.

Finally, in terms of the decision-making process for institutionalizing same-sex marriage, despite the fact that the issuance of *J.Y. Interpretation No. 748* had led to fierce conflicts that seemed to severely divide the country, this Article makes some normative arguments in favor of courts taking part in introducing same-sex marriage. In particular, the judgment of *J.Y. Interpretation No. 748*—in which the TCC juxtaposes a remedial period for the legislature and a supplemental judicial law-making—may be a workable middle course for other courts to adjudicate same-sex marriage cases. The remedial period, which grants the legislature discretion on the matter, opens the door for more democratic debates rather than blocking them. As illustrated by the experience in Taiwan, the remedial period motivated political actors, interest groups and citizens to engage in more deliberation and mobilization. Though dialogue often took place in the form of conflicts in this stage, they nonetheless improved the public's understanding of the issue, thus building consensus. The supplemental judicial law-making, on the other hand, guarantees the realization of same-sex marriage even if the legislative process comes to an impasse. As illustrated by the experience in Taiwan, supplemental judicial law-making urged interest groups and legislators to find a compromise point because they understood that inaction can no longer prevent social change from happening. From this standpoint, by combining a remedial period with supplemental judicial law-making, the court is able to sustain the supremacy of the constitution, facilitate substantive social change, and assert its authority as the guardian

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317. *Id.* at 45.

318. Glass et al., *supra* note 23, at 170.

319. Hamilton, *supra* note 19, at 140.

of fundamental rights, as well as incentivizing more democratic deliberation.