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Made in Taiwan: Alternative Global Models for Marriage Equality

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MADE IN TAIWAN: ALTERNATIVE GLOBAL MODELS FOR MARRIAGE EQUALITY

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Abstract

This Article comparatively analyzes the judicial decisions that led to same-sex marriage equality in Taiwan, South Africa, and the United States. After first evaluating the structural mechanisms that led Taiwan to become the first Asian nation to legalize same-sex marriage through Interpretation No. 748 of the Taiwan Constitutional Court, this Article then draws comparisons to how marriage equality was similarly affected through a delayed imposition of the court order in South Africa to allow the legislature an opportunity to rectify the law in Minister of Home Affairs v. Fourie, and finally considers how these approaches provide equally viable and more inclusive alternatives to the incrementalist strategy employed by gay rights activists in the United States that resulted in Obergefell v. Hodges. In the United States, same-sex marriage equality was accomplished through an incrementalist approach that recommends a certain ordering for judicial lawmaking – that societal values must change and evolve first, and action by the Court follows after to reflect the change in societal morals. The Taiwanese and South African decisions, on the other hand, are more proactive and suggest a different ordering for judicial change – that it is the duty of the government to define and shape the evolution of societal values, which is best accomplished when the judiciary works in tandem with the legislature to spearhead that social change.

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INTRODUCTION

On May 24, 2017, the Taiwan Constitutional Court issued *Interpretation No. 748*,[1] which declared the portion of the Taiwan Civil Code that prohibits same-sex marriage as an unconstitutional violation of the freedom to marry and the right to equality. The decision contains a delayed application clause that allows the legislature a grace period of two years to amend the Civil Code before the decision would go into effect. Notwithstanding the remedial delay, international reaction to *Interpretation 748* has been overwhelmingly positive, as it has been praised for placing Taiwan in the position of becoming the first Asian country to legalize same-sex marriage. The fact that Taiwan is being regarded by the international community as the vanguard for Asia to catch up with the rest of the world, however, is slightly problematic as it buys into the myth that Asia is primitive and grossly underdeveloped in respect to gay rights when compared to the West. Recognition of the rights of sexual minorities has increasingly become the benchmark by which the Global North has differentiated itself from the Global South in terms of progress and modernity.[2] Yet as of the writing of this Article, only a small minority consisting of 24 countries around the world has legalized same-sex marriage. Many Western countries, including Australia and many parts of Europe, still do not recognize same-sex marriage. In fact, Germany and Malta legalized same-sex marriage after the decision in Taiwan.[3] This Article seeks to dispel the myth that Asia is necessarily behind Western countries in respect to gay rights, and looks at the Taiwan same-sex marriage equality case as a model not to be emulated only by Asia, but by the rest of the world, including the West.

Interpretation 748 has drawn comparisons to *Obergefell v. Hodges*,[4] the case that legalized same-sex marriage equality at the national level in the United States. This comparison suggests that Taiwan is behind the United States and follows the United States in respect to gay rights. Media reports indeed indicated that the

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[1] *Judicial Yuan Interpretation No. 748* (May 24, 2017, Taiwan), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748.

[2] *See* Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1, 5 (2012) ("Modern states are expected to recognize a sexual minority within the national body and grant that minority rights-based protections. Pre-modern states do not. Once recognized as modern, the state's treatment of homosexuals offers cover for other sorts of human rights shortcomings."). *See also* Keith Aoki, *Space Invaders: Critical Geography, the "Third World", in International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 925 (2000) (describing how the Third World has been popularly characterized by "irrational local fundamentalism...technological 'backwardness,' or simply lack of modernity"); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 248 (2003) (critiquing the way human rights in developing countries are constructed as playing "catch-up with the West").

[3] Allison Smale & David Shimer, *German Parliament Approves Same-Sex Marriage*, N.Y. TIMES, June 30, 2017, https://www.nytimes.com/2017/06/30/world/europe/germany-gay-marriage.html; Associated Press, *Malta Legalizes Same-Sex Marriage*, N.Y. TIMES, July 12, 2017, https://www.nytimes.com/2017/07/12/world/europe/malta-same-sex-marriage-legalized.html.

[4] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

release of the *Obergefell* decision was the temporal indicator that Taipei mayor Ko Wen-Je was looking for as a signal to finally make good on his campaign promise to push for same-sex marriage in Taiwan.[5] Subsequently in July 2015, scarcely a month following *Obergefell*, the City of Taipei became the primary petitioner to challenge the constitutionality of Taiwan's marriage law, which would lead to the landmark court decision by the Taiwan Constitutional Court with *Interpretation 748*.[6] Then, as a rare citation to foreign law, the Taiwan Constitutional Court specifically references *Obergefell* in the decision. Thus, at first blush it does appear as though Taiwan has been following in the footsteps of the United States, and specifically Justice Kennedy's jurisprudential lead in *Obergefell*.

However, even though *Interpretation 748* cites *Obergefell*, the case strongly departs from *Obergefell's* analytical framework. *Obergefell* is decided primarily as an issue of due process protection of the fundamental right to marry—it does not, nor does it seek to, recognize gay individuals as members of a constitutionally protected class. Interpretation 748, on the other hand, is at its core an equal protection case that is more expansive than *Obergefell* in deeming sexual orientation a protected classification. In this respect, Taiwan provides an alternative interpretive model for constitutional protection of gay rights that sharply diverges from the model espoused in the United States. Rather, *Interpretation 748* more closely resembles a case that it does not cite, and one that comes from another non-Western nation: *Minister of Home Affairs v. Fourie*[7] from post-Apartheid South Africa. Both *Fourie* and *Interpretation 748* are equal protection cases that engage in delayed remedial solutions as alternative strategies to minimize public backlash against perceived judicial activism, which was also a principal motivating factor, but led to a different way gay rights was litigated in the United States.

The incrementalist litigation strategy that was employed by activists in the United States influenced the way in which the gay rights jurisprudence evolved as primarily an issue of due process rather than equal protection. In this respect, gay rights and marriage equality cases in the United States fall more squarely within the tradition of Supreme Court cases dealing with the penumbral right of privacy in matters of family formation, which starts with *Griswold v. Connecticut*[8] and perhaps most famously culminates in *Roe v. Wade*.[9] Gay rights jurisprudence in the United States does not emerge from the competing framework of equal protection that was evolving around the same time as *Griswold* and actually

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[5] *Taiwan Close to Recognizing Gay Unions,* TAIPEI TIMES, June 28, 2015, http://www.taipeitimes.com/News/front/archives/2015/06/28/2003621747 ("Alliance secretary-general Chien Chih-chieh...said the US is a crucial indicator for the nation, as Taiwanese politicians look to Washington, even though same-sex unions have already been legalized in many European countries...[and in response to a question whether he would support marriage equality, mayor] Ko said he would wait until half of the US states recognized same-sex marriages.").

[6] Christie Chen, *Taipei City to Seek Constitutional Interpretation on Gay Marriage*, FOCUS TAIWAN (July 23, 2015, 9:10:28 PM), http://focustaiwan.tw/news/asoc/201507230024.aspx.

[7] Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC) (S. Afr.).

[8] Griswold v. Connecticut, 381 U.S. 479 (1965).

[9] Roe v. Wade, 410 U.S. 113 (1973)

applied in *Loving v. Virginia*,[10] which is closer akin to anti-discrimination cases like *Brown v. Board of Education*.[11] The primary pitfall of achieving same-sex marriage equality as a due process fundamental rights issue, however, is that it entrenches the institution of marriage as the normative goal for equality rather than dignify sexual orientation itself as a classification requiring broad constitutional protection.

In this respect, this Article also contends that contrary to popular perception, *Obergefell* is not the *Loving* of our time. Instead, *Interpretation 748* and *Fourie* pick up on the same line of inquiry that the United States abandons in respect to equal protection in marriage after *Loving*. This Article proposes that the equal protection analysis provided *in Interpretation 748* and *Fourie* is a preferable model for achieving gay rights because it does not narrow equality as a privilege to be enjoyed only within the context of privacy rights, but creates more robust protections for gay individuals against discrimination on all levels, including employment and other public spaces.

Moreover, the incrementalist approach applied in the United States is based on the premise that in order to avoid backlash, societal views must first be shifted, and only then should the judiciary follow with rulings that reflects that shift. Incrementalists point to the conservative political backlash following *Brown* and *Roe* as instances where racial and gender rights experienced a period of regression following progressive Supreme Court decisions that were regarded by the public as judicial overreaching. Through their delayed application provisions, *Interpretation 748* and *Fourie* offer another means by which to soften backlash, which at the same time suggest the alternative outlook that the duty of the Court is not to wait for social attitudes to change before making socially progressing rulings, but to spearhead the evolution of social norms by leading the call for societal progress.

Part I offers a brief history of the same-sex marriage equality movement in Taiwan, and then evaluates *Interpretation 748* and the analytical strategy taken by the Taiwan Constitutional Court in granting broader protections to the gay population beyond marriage. Part II compares *Interpretation 748* to *Fourie*, and explains how the tumultuous histories of both countries set equal protection as a priority within their countries' constitutional jurisprudence. Part III considers the pitfalls in pigeonholing same-sex marriage equality as a due process rather than an equal protection issue, as has occurred in the United States, and argues that *Interpretation 748* and *Fourie* proffer better models for the remainder of the world to follow in the future of international gay rights jurisprudence.

I. MARRIAGE EQUALITY IN TAIWAN: FOLLOWING OR LEADING?

There has been a movement for same-sex marriage equality in Taiwan for some time. As early as 1986, while Taiwan was still under martial law, Chi Chia-Wei who would eventually become one of the petitioners in *Interpretation 748*, had been appealing to all branches of the Taiwanese government—the Executive

[10] Loving v. Virginia, 388 U.S. 1 (1967).
[11] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Yuan, the Legislative Yuan, and the Constitutional Court—for legal recognition of same-sex relationships. The government responses to his petitions were indifferent or negative over the course of two decades. In 2000, as the country was in the midst of reform under Chen Shui-Bian, the first President from the Democratic Progressive Party whose election signaled the end of the Kuomintang's continuous rule since martial law, the legislature considered a proposal allowing same-sex partners to "form a family" through marriage and adoption of children as part of the Human Rights Basic Law.[12] The law, however, encountered public opposition and was not introduced before the Legislature. In 2006, Representative Hsiao Bi-Khim attempted to introduce the Same Sex Marriage Act, but that bill was also rejected at its early stages.[13] Thus, for three decades the move to legalize same-sex marriage in Taiwan had gone nowhere.

Sensing the need to organize to effectively advocate for change, gay activists banded together to form the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR) in 2009. After conducting extensive research for three years, TAPCPR determined that the best way to advocate for same-sex marriage equality was to decenter marriage as the foundation for recognition of family rights. Thus, it published "Three Bills for Diverse Families" that advocated for protections of all non-traditional family structures, including civil partnerships, same-sex marriages, multiple-person families, and never-married individuals with adopted children. The Diverse Families Movement, as it was called, even included those whose relationships are not based on romantic associations. Based on these principles, TAPCPR proposed three bills for the Taiwan legislature to consider in 2013: same-sex marriage; a civil partnership system without restrictions as to the gender, gender identity, or sexual orientation of the partners; and groups of friends who choose to live together and take care of one another as a family. Earlier, Legislator Yu Mei-Nu had introduced a bill in December 2012 to amend the Civil Code to include same-sex marriages among legally recognized families. Then, taking one of the draft recommendations of TAPCPR, Legislator Yu introduced a separate bill to amend the Civil Code to allow for the recognition of same-sex marriages in October 2013. Unlike their predecessors, both bills advanced to the committee stage for deliberation.[14]

In the meantime, as a result of organizing, the issue of same-sex marriage equality was gaining particular attention during the 2014 and 2016 election cycles. In 2014, Dr. Ko Wen-je ran for Taipei mayor as an independent, which was quite unconventional. In order to garner the support of progressive constituents, he promised to support the legalization of same-sex marriage. After he won the election, however, he stated that he would wait to see how same-sex marriage equality unfolded in the United States before taking action. Tsai Ing-Wen also committed to same-sex marriage equality as a platform issue in her 2016

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[12] Victoria Hsiu-Wen Hsu, *Colors of Rainbow, Shades of Family*, 16 GEO. J. INT'L AFF. 154, 155 (2015).

[13] *Id.*; Taiwan Constitution Interpretation No. 748, 2017, Const. Ct. Interp. ¶ 9 (Constitutional Court, May 24, 2017), https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748 [hereinafter Interpretation 748].

[14] *Id.*

presidential election campaign.[15] Following her election as President in mid-January 2016 though, momentum for legislative action on same-sex marriage equality had stalled. By late January 2016 the legislative bills to amend the Civil Code were considered dead.[16] Though her party controlled the majority of the seats in legislature, President Tsai became hesitant to push through marriage equality legislation after the election due to conservative backlash.[17] Though a slim majority of Taiwanese citizens supported same-sex marriage,[18] moves to enact legislation sparked protests from the opposition.[19] Thus, it appeared as though the Executive branch of government was not going to lead the move toward same-sex marriage equality.

Support for same-sex marriage equality in Taiwan renewed in October 2016, following the suicide of a gay professor.[20] Jacques Picoux, a longtime resident of Taipei who taught French at National Taiwan University, became dejected when he lacked the legal recognition to participate in medical decisions on behalf of his partner of 35 years, Tseng Ching-chao, who was dying of cancer. Following Tseng's death, Picoux committed suicide by jumping from his high-rise apartment building. His story evoked massive public sympathy and resurrected efforts to pass same-sex marriage equality in the Legislature. Legislators Yu Mei-Nu, Hsu Yu-Jen, Tsai Yi-Yu, and the caucus for the New Power Party all proposed amendments to the Civil Code to allow for same-sex marriage.[21] In December 2016 the bills cleared the first reading after deliberation by the Judiciary and Organic Laws and Statutes Committee. However, further action on the bills again stalled and it did not appear that legal change on same-sex marriage was going to come from the Legislature either. Thus, the Constitutional Court stepped in with *Interpretation 748*, reasoning, "it is still uncertain when these bills will be reviewed on the floor of the [Legislative Yuan]. Evidently, after more than a

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[15] Chris Horton, *Court Ruling Could Make Taiwan First Place in Asia to Legalize Gay Marriage*, N.Y. TIMES, May 24, 2017, https://www.nytimes.com/2017/05/24/world/asia/taiwan-same-sex-marriage-court.html?mcubz=0.

[16] Interpretation 748, *supra* note 13.

[17] Emily Rauhala, *A Backlash Against Same-Sex Marriage Tests Taiwan's Reputation for Gay Rights*, WASH. POST, Apr. 20, 2017, https://www.washingtonpost.com/world/asia_pacific/a-backlash-against-same-sex-marriage-tests-taiwans-reputation-for-gay-rights/2017/04/19/f855c8b8-2004-11e7-bcd6-6d1286bc177d_story.html?utm_term=.cbc10960cbcc; Jeff Kingston, *Same-Sex Marriage Sparks a 'Culture War' in Taiwan*, JAPAN TIMES, Dec. 10, 2016, https://www.japantimes.co.jp/opinion/2016/12/10/commentary/sex-marriage-sparks-culture-war-taiwan/#.WaBkF63MxbU.

[18] Kingston, *supra* note 17 ("A recent poll suggests Taiwan is polarized on the issue of legalizing same-sex marriage — 46.3 percent support it, 45.4 percent oppose it").

[19] *Taiwan Debates Gay Marriage*, THE ECONOMIST, Dec. 3, 2016, https://www.economist.com/news/asia/21711096-it-would-be-first-country-asia-legalise-it-taiwan-debates-gay-marriage ("In mid-November, as the legislature was reviewing the draft gay-marriage laws, some 10,000 protesters converged outside; some broke through the gates to stage a sit-in in the courtyard."); Jermyn Chow, *Thousands Protest Against Gay Marriage Bill in Taiwan*, STRAITS TIMES (Nov. 18, 2016, 5:00AM), http://www.straitstimes.com/asia/thousands-protest-against-gay-marriage-bill-in-taiwan.

[20] Nicola Smith, *Professor's Death Could See Taiwan Become First Asian Country to Allow Same-Sex Marriage*, THE GUARDIAN (Oct. 28, 2017, 12:00AM), https://www.theguardian.com/world/2016/oct/28/professors-death-could-see-taiwan-become-first-asian-country-to-allow-same-sex-marriage.

[21] Interpretation 748, *supra* note 13.

decade, the LY is still unable to pass the legislation regarding same-sex marriage."[22]

In *Interpretation 748*, the Taiwan Constitutional Court considered whether the gender restriction under the Marriage Chapter of the Taiwan Civil Code violated the equal protection and fundamental rights provisions in the Taiwan Constitution. Marriage is controlled under Chapter 2 of Part IV of the Taiwan Civil Code. Article 972 of Chapter 2 provides the specific gendered language: "A betrothal agreement shall be made by the male and the female parties in their own concord." Holding to this strict interpretation of marriage, government officials denied marriage registrations to same-sex couples. The issue before the Court came about as a consolidated case that combined two separate challenges to the law. The first petitioner was the Taipei government. Mayor Ko Wen-je, in fulfillment of his campaign pledge to advocate for same-sex marriage equality, finally began taking action soon after the *Obergefell* decision was released. In July 2015, the Taiwan Municipal Government, at the direction of Mayor Ko, requested that the Ministry of the Interior, as its supervising authority, grant the city leave to seek a constitutional interpretation of the law from the Taiwan Constitutional Court. As the statutory municipality responsible for the registration of marriages under the Household Registration Act, the Taiwan Municipal Government was prohibited from registering marriages by same-sex couples, which the city deemed to be an unconstitutional violation of equal protection under Article 7 of the Taiwan Constitution and of a fundamental freedom under Articles 22 and 23.

The second petitioner was Chi Chia-Wei, the prominent gay activist in Taiwan who had repeatedly been fighting for same-sex marriage equality in Taiwan for nearly three decades. Originally in 1986, while Taiwan was still under martial law, Chi petitioned Parliament to legalize same-sex marriage.[23] Not only was he denied, but he was subsequently detained as a political prisoner without charge for five months.[24] In 1988, Chi and his partner held a marriage ceremony in Taipei and were again unsuccessful in gaining legal recognition of their marriage from the government.[25] In 1994, Chi petitioned the Ministry of Justice and the Ministry of the Interior, divisions of the Executive Branch, for recognition of his marriage. In response, the Ministry of Justice issued *Letter of 1994-Fa-Lu-Jue-17359*, which instituted the official position on the definition of marriage under the Civil Code as between one man and one woman.[26] In 1998 and 2000, Chi made unsuccessful applications to the Taiwan Taipei District Court for its approval to have a marriage ceremony performed by the notary public. In 2001, the Taiwan Constitutional Court denied his appeal and dismissed his claim. Thus,

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[22] *Id.*

[23] *Id.* at ¶ 8.

[24] *Victory at Last for Taiwan's Veteran Gay Rights Champion Chi Chia-wei*, STRAITS TIMES (May 25, 2017, 1:18PM), http://www.straitstimes.com/asia/east-asia/victory-at-last-for-taiwans-veteran-gay-rights-champion-chi-chia-wei.

[25] Central News Agency, *Man to Seek Constitutional Interpretation on Gay Marriage*, TAIWAN NEWS (Dec. 24, 2014, 9:54PM), https://www.taiwannews.com.tw/en/news/2652956.

[26] Interpretation 748, *supra* note 13, at ¶ 8. (citing Letter of 1994-Fa-Lu-Jue-17359: "Therefore, the so-called "marriage" under our current Civil Code must be a union between a man and a woman, and does not include any same-sex union.").

Chi had been unsuccessful with all three branches of government in his advocacy for same-sex marriage equality.

In 2013, Chi and his partner renewed their attempt to register their marriage at the Wanhua District household registration office in Taipei. Their application was denied, and so they made an administrative appeal with the Taipei City Government; but that appeal was also denied. Chi subsequently filed a complaint with the Taipei High Administrative Court, which ruled in March 2014 that the Wanhua office did not violate the law when it refused to register Chi's marriage. His subsequent appeal to the Supreme Administrative Court was also rejected in September 2014, which finally led to his appeal to the Taiwan Constitutional Court that became the subject of *Interpretation 748*. Like the Taipei Municipal Government, Chi also claimed that the law was unconstitutional as a violation of his Article 7 right to equal protection and his Article 22 and 23 rights. In addition, he claimed that the law also violated his Article 10 right to freedom of movement.

In *Interpretation 748*, the Taiwan Constitutional Court declares the Marriage Chapter of the Civil Code to be unconstitutional. The Court first rules that the "decisional autonomy" to determine "whether to marry" and "whom to marry" were rights protected under Article 22 the Constitution. Article 22, which functions as an Unenumerated Rights Clause, guarantees the rights of individuals so long as they are not detrimental to social order or public welfare. Previously, the Taiwan Court had applied Article 22 to delineate the right to autonomy in family formation as fundamentally protected right.[27] Typically in Article 22 cases, the Court applies the balancing test contained in Article 23 of the Taiwan Constitution, which reads: "All the freedoms and rights enumerated in the preceding articles shall not be restricted by law except such as may be necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare." Though the petitioners in the *Interpretation 748* case had requested a review under Article 23, the Court does not apply the test for determining whether the government is permitted to infringe upon the universal right to marriage. Instead, the Taiwan Court immediately shifts its line of inquiry to determine whether the restrictions on same-sex marriage violate equal protection under Article 7 of the Constitution.

In coming to this finding, the Taiwan Constitutional Court engages in an expansive reading of Article 7. Although only "sex, religion, race, class, or party affiliation," are enumerated in Article 7, the Court determines that the "five classifications of impermissible discrimination set forth in the said Article are only exemplified, neither enumerated nor exhausted. Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the right to equality under the said Article." This move by the Taiwan Court was significant, first in interpreting the Constitution

[27] *See* Interpretation No. 712, 2013, Const. Ct. Interp. (Constitutional Court Apr. 10, 2013) (finding that it was unconstitutional for the government to restrict Taiwanese parents from adopting children from Mainland China: "Marriage and family serve as the foundation by which society develops and shapes itself, and are thus institutionally protected by the Constitution (see Judicial Yuan Interpretations Nos. 362, 552, 554, and 696). The family system is based on the free development of personality and is essential for ensuring the functions of inheritance, education, the economy and culture. It is vital for an individual's growth in society and is the foundation of the creation and development of our society.") (Taiwan) [hereinafter Interpretation 712].

expansively as to infer protections for groups not specifically enumerated, and secondly in making sexual orientation into a constitutionally protected category. In this respect, its earlier application of Article 22 functions to illustrate the ways in which the denial of marriage debases the human dignity of same-sex couples as a protected class. The Taiwan Constitutional Court finds specifically: "homosexuals, because of the demographic structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic process. Accordingly, in determining the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied."[28] The heightened standard becomes applicable not because the law restricts a fundamental right, but because the law engages in in discriminatory behavior.

In *Interpretation 748*, the Taiwan Constitutional Court engages in an expansive reading of equal protection that is more progressive than in the United States. In the United States, sexual orientation, if it is protected at all, is treated as a subcategory of sex. In *Hively v. Ivy Tech Community College of Indiana*,[29] for instance, the Seventh Circuit held that discrimination based on sexual orientation is a form of sex discrimination prohibited under Title VI of the Civil Rights Act of 1964. In so doing, however, the Seventh Circuit recognized that it did not have the power to expand Title VII to include sexual orientation as a separately protected class. As a subcategory of sex, sexual orientation discrimination is typically presented as inequitable treatment due to gender nonconformity. As such, sexual orientation is not protected in and of itself under United States federal law, and separate protection for sexual orientation as a classification has been left to individual states.

By including sexual orientation among the statuses protected under Article 7 of the Taiwan Constitution, the Taiwan Constitutional Court is able to apply the heightened scrutiny test where different treatment must be aimed at furthering an important public interest by a means that is substantially related to that interest. The Court did find that reproduction and maintaining ethical order in society were important state interests. However, in applying the test, the Court finds that restrictions against same-sex marriage bear no rational basis to the alleged government purposes of reproduction and safeguarding basic ethical orders. The ability to procreate is not a prerequisite to marriage for heterosexual couples, and the inability to procreate does not create grounds for voiding or dissolving a heterosexual marriage. Thus, the interest in procreation does not create a valid reason to treat gay couples differently.

The Taiwan Constitutional Court further recognizes that marriage also advances certain ethical orders in society, such as "the minimum age of marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other." The Court additionally finds, however, that these ethical orders that are advanced in opposite-sex marriages can identically be advanced in same-sex marriages as well. Rather than evaluate whether public morality justifies restrictions on marriage, the Taiwan Court asks

[28] Interpretation 748, *supra* note 13, at ¶ 15.
[29] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).

whether heterosexual couples are in a better position than same-sex couples to advance the morals contained in marriage. Because same-sex marriages could equally advance the principles of "the minimum age of marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other," there is no reason to treat them differently from opposite-sex marriages. As a result, the Taiwan Constitutional Court rules that the gender specific language in the Marriage Chapter of the Civil Code violates the right of gay individuals to have equal protection under the law.

The case, predictably, was quite controversial prior to the ruling. One argument that had been lodged against the judiciary hearing the case at all was the fact that the legislature had already considered the issue several times over the years, and had considered multiple legislative drafts, but had never reached the point where there was critical consensus to change the law. The legislative process, as the argument goes, functions as a more accurate measure of democratic accountability in respect to the issue of same-sex marriage, and the judiciary should not override the representative role of the legislature. Even though same-sex marriage equality had come before the legislature repeated times, the legislature found no public mandate to act. Furthermore, President Tsai Ing-wen had emphasized marriage equality as a significant promise during her election campaign, and on top of that, her party controlled the majority of seats in the legislature after she was elected.[30] The fact that progress on marriage equality still vacillated despite this favorable political environment suggests that there was still resistance among significant constituencies within the population that the elected officials were still beholden to, and that there was not yet critical mass of support for marriage equality to push forward immediate change to the law. As such, any action by the judiciary could be seen as subverting the democratic process. Recognizing that the issue was controversial and seeking to avoid the perception of judicial activism, the Taiwan Constitutional Court issued the legislature a two-year grace period to correct the Marriage Law to conform to the decision in *Interpretation 748*.

Public perception of judicial overreach and the legitimacy of the judicial process were also significant concerns among proponents of same-sex marriage equality in the United States, as those were the very arguments that fueled conservative backlash.[31] For opponents, gay rights were framed as a culture war where core American family values were at stake. Gay rights activists responded in kind with an incrementalist approach that focused on how gay families are not opposed to but actually align with core American family values. The incremental approach to gay rights sought to effect change by incrementally swaying public opinion through a strategy of assimilation. They presented their equal protection

[30] Elaine Jeffreys and Pan Wang, *Pathways to Legalizing Same-Sex Marriage in China and Taiwan: Globalization and "Chinese Values"*, *in* BROWYN WINTER, MAXINE FOREST, & REJANE SENAC, GLOBAL PERSPECTIVES ON SAME-SEX MARRIAGE: A NEO-INSTITUTIONAL APPROACH 212 (2018). *See also* Fiona Keating, *Tsai Ing-wen: Who is Taiwan's First Female President, Leader of the Democratic Progressive Party?*, INTERNATIONAL BUSINESS TIMES, Jan. 17, 2016, https://www.ibtimes.co.uk/tsai-ing-wen-who-taiwans-first-female-president-leader-democratic-progressive-party-1538440.

[31] *See, e.g.*, Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 WASHBURN L.J. 79 (2010).

argument not on the right to be treated equally despite being different, but that they should be treated the same because they are the same as other families. In the campaign for same-sex marriage equality, incrementalist activists showcased gay families and their similarities to other normative families. Gay individuals were presented as equal citizens through their assimilation into American norms of family,[32] and their differences from the norm were underplayed. Thus, incrementalism in the United States focused first on eliminating the strongly negative stereotypes associated with the gay population that was perpetuated by the criminalization of same-sex activity, which would then set the framework for normalizing gay relationships through marriage equality. The strategy for litigating *Lawrence v. Texas*[33] underplayed the sex and overplayed the relational aspects of sexual orientation, and this remained the strategy through *United States v. Windsor*[34] and *Obergefell v. Hodges*.

II. MARRIAGE EQUALITY IN SOUTH AFRICA: AVOIDING THE PITFALLS OF INCREMENTALISM

In citing *Obergefell*, the Taiwan Court implicitly credits the United States as the inspiring source for reform and change. However, in actuality *Interpretation 748* appears to be more closely modeled after the South African same-sex marriage equality case, *Minister of Home Affairs v. Fourie*. David S. Law and Wen-Chen Chang have discussed the ways in which the Taiwan Court imports foreign law into its decisions, though often tacitly.[35] Though it never mentions *Fourie*, *Interpretation 748* closely follows *Fourie* in both its analytical framework and its remedy. Fourie was also decided as a matter of equal protection, and also instituted a grace period for the legislature to act before the order would take effect. The remedial delay is a particularly distinctive feature in both cases, which may have been a product of the politically tumultuous histories that both countries share; as Law and Chang have pointed out, the Apartheid and martial law regimes of the two countries' pasts may have created increased sensitivity and appreciation for more protective legal processes and safeguards.[36]

Taiwan was under Japanese colonial rule from 1895 to 1945. Unlike their European counterparts, Japan did not criminalize sodomy in its colonial laws. As a result, Taiwan has never had an anti-sodomy statute. Thus, Taiwan was already

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[32] Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002).
[33] Lawrence v. Texas, 539 U.S. 558 (2003).
[34] United States v. Windsor, 570 U.S. 744 (2013).
[35] David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 557 (2011) ("The published opinions of the TCC give the superficial appearance of a court that makes relatively little use of foreign law. Actual citation of foreign law is rare, especially in majority opinions.").
[36] *Id.* at 538 ("Although the two countries may be oceans apart, the country that still formally styles itself the Republic of China shares a number of key historical and political characteristics with South Africa, the darling of constitutional comparativists. Both are recent democratic success stories. Like South Africa, Taiwan endured years of both internal and external legitimacy crises, only to rapidly establish itself over the last two decades as one of the most vibrant and robust constitutional democracies in its region of the world. And like South Africa, Taiwan possesses an independent and active constitutional court with an outstanding intellectual pedigree, a large policy footprint, and a penchant for comparative analysis.").

at a different starting point in respect to the advancement of gay rights than most other countries, including the United States, as it did not have to first contend with the issue of decriminalization. Though being gay was not necessarily seen in a positive light in Taiwan, there were not the same associations of gay behavior with criminality as in the United States and other countries with anti-sodomy laws. As a result, the same model of incrementalism that worked in the United States, which assumes decriminalization as the starting point, does not automatically apply in Taiwan. Furthermore, the resulting history of Taiwan after de-colonization sets the stage where much of public discourse on rights and liberties was already focused on equal protection.

Following Japan's defeat in World War II, the United States handed over control over Taiwan to the Kuomintang (KMT)-led government of the Republic of China. China had been in the midst of civil war between the KMT and the Communist Party of China, but during World War II the two sides temporary suspended hostilities and formed the Second United Front to stop the Japanese Imperial Army from conquering further portions of China. However, hostilities resumed soon after the end of World War II. As the KMT gradually lost ground to the Communists, the government imposed martial law on Taiwan in May 1949, where they would eventually retreat later that year. Under martial law, the exiled KMT government barred the formation of new political parties in Taiwan, ostensibly to suppress Communist insurgence. Martial law also allowed civilians to be tried in military rather than civil courts for sedition and other charges.

During this period of martial law, Taiwan became an authoritarian state. For fear of being undermined by Communists, the KMT established strict regulations to secure its rule in Taiwan. The KMT disallowed opposition parties and arrested individuals they perceived as potentially sympathetic to Communists on the mainland. During this era, the KMT government also engaged in a re-Sinification of Taiwan, believing that the traditional "family values" contained in Chinese Confucian principles would help stabilize the nation. Confucianism promoted devotion to filial piety and respect for social authority. Governments of other Asian countries utilized a similar resurgence of Asian values in order to stabilize their nations following de-colonization. In the 1993 Bangkok Declaration, developing post-colonial Asian countries such as Singapore and Malaysia suggested that international human rights standards that sought to crack down on authoritarian policies possessed a historical bias.[37] Western democracies could afford to grant their populations robust civil rights and civil liberty protections because they did not need to contend with the instabilities caused by recent histories of colonialism. Singapore, in particular, justified authoritarian rule as a necessary component of ensuring stability for a fledgling economy. It also touted conservative Asian values as a legitimate alternative to overly liberal Western values.

Following the lifting of martial law in 1987, Taiwan underwent a period of rapid democratization and the Constitutional Court and the Constitution, which had remained largely dormant and underutilized during martial law, played a significant role. The development of constitutional law in Taiwan following the

[37] Report of the Regional Meeting for Asia of the World Conference on Human Rights, para. 8, U.N. Doc. A/Conf.157/PC/59 (1993).

end of marital law has been particularly sensitive to safeguarding civil liberties, given the severe infringements on individual freedom that occurred during martial law. Constitutional interpretation has erred on the side of respecting human rights and civil liberties typically associated with Western democracies. Whereas Confucianization and Asian values have created resistance to the import of foreign human rights ideals in other parts of Asia,[38] the same did not occur in Taiwan. Rather, the Taiwanese population connected Confucian Asian values with the tumultuous four decades of martial law. As Joel Fetzer and Christopher Soper note, "Specifically, pro-democracy elites identified Confucianism with the political authoritarianism and cultural imperialism of the pre-democratic KMT."[39] Rather than view Western democratic values as antithetical to Confucianism as a way to justify authoritarian rule, Taiwanese Confucianism adapted in a way that was consistent with democratization.[40] Thus, post-martial law Taiwan developed a constitutional theory that embraced rather than rejected liberal individualism. Due to the severe restrictions placed on personal liberties during martial law, the population was much more receptive to creating robust protections of personal rights and freedoms. For example, even before *Interpretation 748*, Taiwan had enacted laws prohibiting sexual orientation discrimination in the workplace with the Gender Equality in Employment Act of 2002 and amendments to the Employment Service Act in 2007.[41]

The government of post-martial law Taiwan has also been sensitive to public perceptions on the legitimacy of power. As a result of the strict controls that the KMT established to ensure its continuing rule, many of the legislators present at the time martial law formally ended had occupied their seats since 1948.[42] In 1990, the Constitutional Court issued a decision ordering that these incumbents vacate their positions and new elections be held.[43] Since the lifting of martial law, the government in Taiwan has been proactively promoting increased transparency and accountability in government. In fulfillment of another one of her other campaign promises, President Tsai Ing-wen continues to work on providing transitional justice for the victims by opening archives so that they are free to research the atrocities that occurred during the martial law period and promising to write a comprehensive report on government oppression during the martial law era.[44] The desire to legitimize the Court's decision and to add an extra layer of process may have been another motivating factor for the remedial delay used by the Constitutional Court in *Interpretation 748*.

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[38] *See, e.g.*, Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT'L L.J. 309, 354 (2014) (Singapore engaged in re-Sinification and neo-Confucianism that focused on Asian values in response to decades of Western colonial domination that had created loss of cultural identity).

[39] JOEL S. FETZER & J. CHRISTOPHER SOPER, CONFUCIANISM, DEMOCRATIZATION, AND HUMAN RIGHTS IN TAIWAN 33 (2013).

[40] *Id.* at 69-77; *see also* WILLIAM THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 4 (1998) ("Taiwan, rather than pitting Confucian values against democracy and human rights, was moving in the other direction—away from one-party tutelage by the Kuomintang and toward a more representative electoral democracy").

[41] Cing-Kae Chiao, *Employment Discrimination in Taiwan*, *in* NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW (Roger Blanpain et al. eds., 2008).

[42] Law and Chang, *supra* note 35, at 543.

[43] Interpretation No. 261, 1990, Const. Ct. Interp. (Constitutional Court June 6, 1990).

[44] Lee Hsin-fang, *Tsai Recommits to Transitional Justice*, TAIPEI TIMES, June 25, 2017, http://www.taipeitimes.com/News/taiwan/archives/2017/06/25/2003673259.

Around the same time that Taiwan was under martial law, South Africa existed as an Apartheid state. South Africa exited World War II as a Union still technically within the British Commonwealth, but with a government that implemented a formal system of segregation and racial discrimination. After the National Party, which ran on an Apartheid platform, took power with the election of 1948, its government passed a series of laws that disenfranchised the majority black population in order to maintain power and dominance. The National Party also saw Communism as a threat to South Africa. Thus, the National Party implemented tactics similar to those employed by the Kuomintang to solidify its rule during martial law in Taiwan. For example, anti-Apartheid political parties and advocacy groups, such as the African National Congress, the South African Communist Party, and the United Democratic Front were all banned.

During this time, the South African government also implemented police power by declaring States of Emergency in order to neutralize political dissent and resistance. Furthermore, the National Party instituted a movement of conservative family values that condemned sex and sexuality. Thus, the post-World War II histories of both Taiwan and South Africa involved regimes that severely restricted the civil liberties of their populations. Apartheid continued in South Africa even after it achieved complete independence from the British as a Republic in 1961. Despite increasing pressure from the international community to cease Apartheid, the system persisted until the 1990s when F. W. de Klerk became State President and opened negotiations to end Apartheid. This was about the same time that martial law was finally lifted in Taiwan. Thus, the two countries became fully democratized at roughly the same time, and the restructurings of their respective government systems were extremely sensitive to the restrictions put in place by the authoritarian regimes before them.

In South Africa, reform began as De Klerk ordered the release of Nelson Mandela from prison and lifted the ban on alternative political parties, which led to extensive negotiations between the National Party and the African National Congress to end Apartheid and fully democratize the nation. The defining steps of the new reformed government would be free elections and crafting of a new Constitution. Due to the history of structural racism and discrimination, the central underlying tenet of the new democratic political structure was equality. This led to the passage of a particularly robust equal protection clause in the post-Apartheid Constitution. Section 9(3) of the South African Constitution provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." Notably, the post-Apartheid South African Constitution is the first of its kind to recognize sexual orientation as a protected classification. Along with the new Constitution, a new Constitutional Court of South Africa was established to enforce these protections.

The first test for the new Constitution and the Constitutional Court in respect to the rights of gay individuals was a challenge to the anti-sodomy laws. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court of South Africa found that the anti-sodomy statute, Section 20A of the Sexual Offences Act, which had been inherited from Dutch colonial rule and survived through British rule, was incompatible with the new

Constitution of post-Apartheid South Africa. Section 9(3) specifically lists sexual orientation as a protected class.[45] Because the anti-sodomy laws only applied to gay men, they discriminated based on gender and sexual orientation. Furthermore, the Court retroactively applied the decision to the date that the Interim Constitution was adopted, April 27, 1994. The lifting of anti-sodomy restrictions would pave the path to increased rights for the gay community, including protections from workplace discrimination and adoption rights, and finally culminating in the recognition of same-sex marriage equality in *Minister of Home Affairs v. Fourie*.

Fourie , like *Loving*, is fundamentally an equal protection case. Though the Constitutional Court of South Africa mentions to the right of privacy and the right to marry and procreate, the case is not premised on the fundamental rights to privacy as construed in the United States. Justice Albie Sachs, the author of the decision, even explicitly states: "I do not find it necessary to consider whether it in addition constitutes a violation of their right to privacy in terms of section 14 of the Constitution."[46] Rather, the fundamental right of privacy and the right to marry are invoked insofar as they constitute the method by which gay individuals are being treated differently from heterosexual individuals. Thus, the South African Court does not tie the dignity of individuals so much to the fundamental right to marry, but to the right to be treated equally. In *Fourie*, the Court concludes: "the rights of dignity and equality are closely related. The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society."[47] Though the South African Court does venerate marriage in *Fourie*, Justice Sachs does not present marriage as the necessary ends to achieving dignity. The autonomy and choice to enter marriage or not is the indicator of dignity, and denial of the right to choose becomes the crux of the unequal treatment. Sachs reasons that, "[]f heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples."[48]

Unlike in the United States and Taiwan, sexual orientation is specifically enumerated as a protected class under the South African Constitution. Section 9(3) of the South African Constitution reads: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." Justice Sachs particularly notes that in the post-Apartheid era, South Africa sought to break with its past by implementing robust equal protection within its Constitution; he writes: "Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the

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[45] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC).

[46] *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at fn. 110 (S. Afr.) [hereinafter *Fourie]*.

[47] *Id.* at ¶ 114.

[48] *Id.* at ¶ 72.

movement forward to the acceptance of the need to develop a society based on equality and respect by all for all."[49]

However, Justice Sachs was also sensitive to the possible perception of judicial activism and backlash.[50] In order to reinforce public trust that the judiciary was not acting contrary to the public will, Sachs issued a one-year grace period for the legislature to correct the law before the decision would come into effect. Justice Sachs justified the delay by maintaining that "[i]t needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect."[51] Holning Lau suggests that the remedial delay mirrors the strategy taken by *Brown v. Board of Education II*, where "the U.S. Supreme Court stated that the integration of racially segregated schools should proceed with "all deliberate speed," thereby creating a flexible grace period for desegregation."[52] Whereas the remedial delay in *Brown II* drew sharp criticism for slowing integration in the United States, Lau considers the potentially positive opportunities that a remedial delay can afford.

By involving the legislature in the process, a remedial delay placates the potential for legislative backlash in response to any public perception of judicial overreaching. Judicial action against standing statutes can be perceived as overriding the will of the people, which may undermine the authority of the Court in popular opinion. Lau concludes in the case of *Fourie*, "that the grace period enhanced the perceived legitimacy of both the court and same-sex marriage."[53] Furthermore, the one-year grace period opened the opportunity for opposing sides on the issue to dialogue, which reaped a more collaborative process that also helped mitigate backlash. The legislature responded and passed the Civil Union Act in 2006 to comply with the *Fourie* order with minimal resistance and backlash. In this way, the *Fourie* Court was able to spur the legislature into a leadership role to guide the public to a more tolerant and equitable position.

The incrementalist approach taken in the United States, in contrast, believes it is best to wait for societal values to change and evolve, and then let the court order reflect the change in societal morals. Two years prior to *Obergefell*, the United States Supreme Court was presented with nearly the identical issue in *Hollingsworth v. Perry*, which dealt with California's same-sex marriage equality ban. Proposition 8 amended the California Constitution so that "only marriage between a man and a woman is valid or recognized by California."[54] At the district court level, in *Perry v. Schwarzenegger*, the Court found that Proposition 8 violated the equal protection and due process clauses of the Fourteenth Amendment.[55] California Governor Arnold Schwarzenegger and his successor Jerry Brown had previously declined to defend the law. Thus, the State of California elected not to appeal, and interveners entered to take the place of the

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[49] *Id.* at ¶ 59.
[50] Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TUL. L. REV. 259, 286 (2016).
[51] *Fourie*, *supra* note 46, at ¶ 138.
[52] Lau, *supra* note 50, at 263.
[53] *Id.* at 286.
[54] California Marriage Act, Proposition 8 (2008) (codified at Cal. Const. Art. I, §7.5).
[55] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

government on appeal. The Ninth Circuit, recognizing the standing of the interveners to appeal, affirmed the district court decision, and subsequently the interveners continued the appeal to the Supreme Court.

In *Hollingsworth v. Perry*, announced the same day as *Windsor*, the Supreme Court declined to revisit the Ninth Circuit decision because the interveners lacked standing. At the time the Court decided *Hollingsworth*, only eleven states and the District of Columbia had legalized same-sex marriage. The Court avoided reviewing the substantive merits of the case by basing its ruling on standing, which is consistent with the incrementalist position that perhaps the nation as a whole was not ready for the change and therefore the Court should not yet act. Though Windsor had struck down a portion of the Defense of Marriage Act that prohibited same-sex marriage at the federal level, legalization of same-sex marriage was left to individual states. By the time *Obergefell* came before the Court, thirty-seven states and the District of Columbia had legalized same-sex marriage, signaling that the time was right to nationalize same-sex marriage equality.

As an alternative, *Interpretation 748* and *Fourie* stand for the notion that rather than simply reflect the values of society, lawmakers should provide direction for where the values of the society should proactively evolve. Indeed, Justice Sachs has in mind the leadership role of lawmakers as he reasons, "I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse."[56] The role of the government is not only to represent the will of the people, but also to lead the people.

III. MARRIAGE EQUALITY IN THE UNITED STATES AND THE ROAD NOT TAKEN: WAS LOVING EVER REALLY ABOUT LOVING?

Same-sex marriage equality jurisprudence in the United States takes the more expedient path of due process rather than equal protection largely due to a misreading of *Loving v. Virginia*. Indeed, *Loving* has developed a mythos within American culture as the case that illustrates how "love conquers hate."[57] Though *Loving* is popularly conceived of as the precursor for *Obergefell*,[58] it actually comes from a much different analytical tradition. *Obergefell* is a due process case that only mentions equal protection. *Loving* is an equal protection case that only mentions due process. Constitutional challenges based on the equal protection and due process clauses of the Fourteenth Amendment ask fundamentally

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[56] *Fourie*, *supra* note 46, at ¶ 138

[57] Osagie K. Obasogie, *Was Loving v. Virginia Really About Love?*, THE ATLANTIC, June 12, 2017, https://www.theatlantic.com/politics/archive/2017/06/loving-v-virginia-marks-its-fiftieth-anniversary/529929/ ("*Loving* is widely praised as a case about law ceding to the power of love in the face of astonishing harassment and bigotry endured by interracial couples.").

[58] *Id.* ("The redemptive trope coming out of the *Loving* decision that love conquers all has also influenced other social movements, such as those leading to *Obergefell v. Hodges*—the 2015 Supreme Court decision recognizing same-sex marriage.").

different questions. Equal protection challenges ask whether there is a compelling state interest in treating individuals differently, whereas due process challenges ask whether there is a compelling state interest in placing limitations on a fundamental liberty interest.

Although *Obergefell* and its predecessor *United States v. Windsor* treat marriage equality as a matter of due process, at one point in time, marriage and procreation rights were treated primarily as issues of equal protection. *Skinner v. Oklahoma*, which is widely cited for first recognizing "[m]arriage and procreation [as] fundamental to the very existence and survival of the race,"[59] was actually an equal protection case. In *Skinner*, the Court applied strict scrutiny in respect to differentiating criminals from non-criminals under a mandatory sterilization statute. Subsequently, in *Loving* the Court applied strict scrutiny to the government justification for differential treatment of individuals based on race. The vast majority of the *Loving* decision is devoted to equal protection analysis. Citing the equal protection cases *Hirabayashi v. United States*[60] and *Korematsu v. United States*,[61] the *Loving* Court asserts, as its central premise for striking down the law, that discrimination based on racial classifications are "odious to a free people whose institutions are founded upon the doctrine of equality" and subject to strict scrutiny.[62] In applying strict scrutiny, the Court finds that the only state purpose for the law was to maintain white supremacy, which the Court condemns as illegitimate. The *Loving* Court only mentions marriage as a fundamental liberty interest briefly in closing, but the reasoning for the decision is almost entirely based on equal protection. Thus, *Loving* is more in line to *Brown v. Board of Education* as an anti-discrimination, anti-subordination case than a due process case. In fact, though *Griswold v. Connecticut*, which prominently applied due process protections within the context of marriage, had been decided two years prior, *Loving* does not engage in the same line of analysis or even mention *Griswold*. The only precedential authority that Loving cites in respect to its short due process section is *Skinner v. Oklahoma* and *Maynard v. Hill*.[63] Yet *Skinner*, again, was also an equal protection case.

Apart from *Skinner* and *Loving*, the protection of marriage rights has shifted away from being one of equal protection into one of due process liberty that is geared at protecting autonomy of the nuclear family unit. Decided two years prior to *Loving*, *Griswold* interprets *Skinner* in a way that creates a path for the due process analysis. *Griswold* cites *Skinner* in its application of strict scrutiny, but not as an issue of equal protection, but instead in respect to the fundamental liberty interests in marriage and childrearing. *Griswold* evokes *Skinner* in developing the penumbral right of privacy into a fundamental liberty interest, which then triggers strict scrutiny. In this way, the question before the Court started to move away from the equal protection question, whether there is a compelling state interest in treating people differently in respect to the right to marry and procreate,

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[59] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[60] Hirabayashi v. United States, 320 U.S. 81 (1943).
[61] Korematsu v. United States, 323 U.S. 214 (1944).
[62] Loving v. Virginia, 388 U.S. 1, 8 (1967).
[63] Maynard v. Hill, 125 U.S. 190 (1888).

to the due process question, whether there is a compelling government interest in restricting the right of everyone universally to marry and procreate.

Griswold is the first in a line of privacy cases that become the foundation for *Lawrence v. Texas*,[64] which then serves as the direct precursor for the same-sex marriage equality cases *Windsor* and *Obergefell*. The Constitutional question in that line of cases shifts away from scrutinizing why individuals are being treated differently, to asking whether the government can abrogate fundamental rights relating to family formation. By the time of the *Obergefell* decision, the equal protection elements of *Skinner* and *Loving* had been largely lost and folded into the lineage of the due process privacy cases. In *Obergefell*, Kennedy shifts the attention away from the protected classifications, and onto the universal right to marry. He writes, "*Loving* did not ask about a 'right to interracial marriage'; Turner did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right."[65] The "comprehensive" right to marry, rather than the right of each individual class to be treated equally, becomes the driving issue before the Court in *Obergefell*.

Notably, Justice Kennedy lists Loving alongside *Turner v. Safley*[66] and *Zablocki v. Redhail*,[67] which are both due process cases. *Zablocki* is problematic because it peculiarly elides equal protection with fundamental liberty interests, which ultimately allows the occlusion of equal protection in favor of due process in right to marriage and procreation cases that follow. *Zablocki* applies strict scrutiny to strike down a Wisconsin statute that allowed the state to deny the right to marry to any noncustodial parent who failed to pay child support. The Court appears to rule that the statute was unconstitutional as a violation of equal protection; however, in coming to that conclusion, the Court identifies marriage as a fundamental right that cannot be abrogated absent an important state interest. As such, the scrutiny applied did not question whether there was a state purpose for discrimination against different types of individuals, but rather whether there was a state interest in limiting a fundamental freedom that is available to all. As Justice Stewart notes in his concurrence, the decision of the Court "misconceive[s] the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications."[68] By folding equal protection into due process analysis, *Zablocki* appeals to a universalist conception of equal protection. Rather, than focusing on the reason for differential treatment, the Court focuses on the reason for limiting a universal right. This shift in the analytic framework away from the straight equal protection strategy employed in *Loving* has allowed

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[64] Lawrence v. Texas, 539 U.S. 558, 564 (2003) ("There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including Pierce v. Society of Sisters...and Meyer v. Nebraska...but the most pertinent beginning point is our decision in Griswold v. Connecticut.").

[65] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

[66] Korematsu v. United States, 323 U.S. 214 (1944).

[67] Zablocki v. Redhail, 434 U.S. 374 (1978).

[68] Zablocki v. Redhail, 434 U.S. 374, 391 (1978) (Stewart, J. concurring).

the privileging of due process over equal protection as the preferred analytical method by which the Court deals with restrictions on sex and marriage. However, this has had the collateral consequence of mingling the two issues in a way that ultimately gives favored status to the institution of marriage.

Furthermore, due process privacy rights are often at odds with equal protection. *Pierce v. Society of Sisters*, which is cited as a central precedent that leads to the penumbral right of privacy, was fundamentally a case about parental autonomy in childrearing.[69] These privacy interests in education would come to a head with equal protection following *Brown v. Board*, which ordered desegregation at a time when private attitudes of many Americans towards integrated race relations had not yet shifted. In *Milliken v. Bradley*,[70] the Court indirectly suggested that as long as the government does not proactively promote segregation, individual privacy rights of parents to raise their children in school districts of their own choosing would allow them to engage in de-facto segregation, which directly subverts the objective of equal protection envisioned by *Brown*.[71] The right to autonomy and privacy, which evolved directly from fundamental rights associated with the nuclear family, has come to supersede and obscure the interests of equal protection.

This occlusion becomes particularly problematic in respect to how the Court approaches sexual orientation. Rather than consider sexual orientation as a potentially protected class, the Court avoids the issue by considering sexual orientation within the broader penumbra of sexual privacy. *Lawrence v. Texas* was a case that should have centrally raised a question of equal protection, as Justice O'Connor notes in her concurrence;[72] the exact same conduct which was completely legal when engaged in by heterosexual couples, was considered criminal when engaged in by gay couples. However, Justice Kennedy does not engage in an equal protection analysis, but bases the majority decision primarily on due process privacy interest grounds. In the process, Justice Kennedy imagines the litigants, John Lawrence and Tyron Garner, as a normative monogamous couple even though there was no factual basis for that assumption.[73] Kennedy did not present gay individuals as a protected class who should be treated the same as heterosexuals as a matter of equal protection, but rather his decision appealed to the ways gay couples were similar to committed heterosexual couples insofar as their universal due process right in forming a "personal bond that is more enduring."[74] Though Kennedy speaks of restoring dignity to gay individuals that

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[69] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[70] Milliken v. Bradley, 418 U.S. 717 (1974).

[71] Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 290 (2005).

[72] Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J. concurring).

[73] Melissa Murray, *The New "Illegitimacy": Revisiting Why Parent Age Should Not Depend on Marriage: What's So New About the New Illegitimacy?*, 20 AM. U.J. GENDER SOC. POL'Y & L. 387, 398 (2012); Dale Carpenter, *The Boundaries of Liberty After* Lawrence v. Texas*: The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1507 (2004).

[74] Lawrence v. Texas, 539 U.S. 558, 567 (2003); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 314 (2005) ("They do so by addressing homosexuality in terms of 'coupled' behavior, rather than specific acts of sodomy, thereby constructing a homosexual identity more parallel to incentivized heterosexual family norms.").

was robbed from them in *Bowers v. Hardwick*,[75] he dignifies them within the framework of a committed relationship. Indeed, Kennedy avoids the central issue of sex. For a case about sodomy, the decision is strangely sanitized. Kennedy constructs Lawrence and Garner not as two men wanting to have sex with each other, but as two men wanting to enter a "more enduring" committed relationship with one another.[76]

Kennedy further venerates monogamous commitments in his subsequent decisions on marriage equality in *United States v. Windsor* and *Obergefell v. Hodges*, which are similarly based on due process liberty rather than equal protection. In Windsor, Kennedy directly associates marriage as the next logical step in the pursuit of "a personal bond that is more enduring" that he sets in *Lawrence*.[77] Again, rather than engage in equal protection analysis and question whether gay individuals should be treated the same as heterosexual individuals, the Court employs a universalist argument that marriage is a fundamental right that should be enjoyed by all individuals.[78] Yet by facilitating equality through the protected space of marriage, the Court now sets marriage as the condition for equality. In other words, the Court limits protection to a discreet group of citizens who concede to conventional norms of sexuality, namely through marriage. Moreover, Kennedy appears to suggest that gay individuals achieve dignity only through marriage, which debases and marginalizes those who remain outside of marriage as "condemned to live in loneliness."[79] Thus, rather than protect the autonomy of individuals to decide whether to enter marriage or not, *Obergefell* sets marriage as the necessary context to enjoy dignity.[80]

In *Obergefell*, Justice Kennedy presents marriage as the natural choice for those who desire to publicly affirm their love and commitment. Marriage becomes not only the right choice, but the *only* choice for gay Americans to be treated like everyone else. The elevation of marriage, rather than equality, into the principle value in *Obergefell* skirts the question of whether married and unmarried people should be treated differently, which further obscures the more important question of whether married people should be granted beneficial treatment from the state in the first place. When access to marriage becomes the

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[75] Bowers v. Hardwick, 478 U.S. 186 (1986).

[76] DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS 193 (2012) (discussing how the legal team for Lawrence and Garner "carefully focused on sex as normatively desirable in connection with stability, commitment, and family—not in connection with a broader sexual liberation"); *see also* Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of* Lawrence v. Texas, NEW YORKER, Mar. 12, 2012, http://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick ("The litigation strategy, as the case made its way up through the trial courts and appeals courts, was deliberately framed to highlight the need to decriminalize homosexual conduct as a means of recognizing and legitimatizing same-sex 'relationships' and 'families.' In short, the legal issue was not that free societies must let drunken gay Texans have sex; it was that gay families around the country, in the words of one of the lawyers in the case, 'are essentially just like everybody else.'").

[77] United States v. Windsor, 570 U.S. 744, 769 (2013).

[78] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) ("Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.").

[79] *Id.* at 2608.

[80] *See* Stewart Chang, *Is Gay the New Asian?: Marriage Equality and the Dawn of A New Model Minority*, 23 ASIAN AM. L.J. 5, 25 (2016).

measure of equality, the right to marry becomes a mandate to marry. State recognition and protection of individuals become matters of personal responsibility and choice: those who opt into the system avail themselves of those rights and those who do not opt in can be said to have purposely chosen to be left out, which then can justify rather than diminish further discriminatory conduct.

CONCLUSION

The strategy employed to achieve same-sex marriage equality in the United States, and which led to the *Obergefell* decision, was motivated by avoiding backlash.[81] As Bill Eskridge proposed: "A process that is incremental and persuades people or their representatives of the acceptability or even desirability of minority rights is much more likely to stick. The incremental process will take a lot longer, but it will be more lasting."[82] By framing the issue within a universally valued principle like marriage, which the general population can relate to, granting some rights and protections to the gay population is made more palpable to the public at large.[83] The danger of reaching this result in this manner, however, is that marriage equality becomes an illusion of complete equality for the gay community. Indeed, public attention and discourse on gay and lesbian issues has largely moved on since *Obergefell*. The accomplishment of marriage equality suggests that the work of gay rights has reached completion in the United States, at least defined by incrementalists who mark legalization of sexual relations as the beginning of gay rights and marriage as the end.[84] If, as the incrementalists had suggested, marriage equality indeed signified the "end" of gay rights, then the fight was over. For example, Empire State Pride Agenda, a leading gay rights advocacy group in New York, announced that it was ceasing operations in 2016, citing the fulfillment of its campaign for equality.[85] Without a driving cause, activists and donors moved on to different projects. According

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[81] Roberta A. Kaplan, *"It's All About Edie, Stupid": Lessons From Litigating United States v. Windsor*, 29 COLUM. J. GENDER & L. 85, 87 (2015) (discussing the litigation strategy for *United States v. Windsor:* "Our goal, however, wasn't to write a 'Harlequin romance.' Rather, what we hoped to do was to show that Edie and Thea, who spent forty-four years together in sickness and in health 'til death did them part, lived their lives with the same decency and dignity as anyone else. By showing that truth, we demonstrated that Edie and Thea had the kind of marriage that any single one of us--straight or gay--would be so lucky to have.").

[82] WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 148 (2002).

[83] Chang, *supra* note 80, at 23 ("incrementalist activists showcased gay families and their similarities to other normative families, and avoided the negative stereotypes of gays as sensual and promiscuous").

[84] Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After U.S. v. Windsor*, 62 CLEV. ST. L. REV. 1, 7 (2014) ("By consensus, [William] Eskridge, [Yuval] Merin, and [Kees] Waaldijk all prescribe those steps in the following sequence: (1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized. Once a state has crossed these three steps, the conditions for marriage equality will then be most evident.").

[85] Jesse McKinley, *Empire State Pride Agenda to Disband, Citing Fulfillment of Its Mission*, N.Y. TIMES, Dec. 12, 2015, https://www.nytimes.com/2015/12/13/nyregion/empire-state-pride-agenda-to-disband-citing-fulfillment-of-its-mission.html?mcubz=0.

to one of the leaders of the Empire State Pride Agenda, "We ran out of causes, and donors."[86]

However, even with marriage equality as an actualized reality in present-day America, the gay community remains the target of hate crimes [87] and discrimination in the workplace.[88] In his dissent in *Obergefell*, Chief Justice Roberts portends a coming backlash, saying "Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."[89] Indeed, there was a rise in discriminatory acts targeting the gay individuals immediately following *Obergefell*; for example, gay employees who got married following the decision were fired when they returned to work.[90] Yet these same individuals who could now enjoy same-sex marriage equality were left without recourse because sexual orientation was not a protected class in the jurisdictions in which they lived. As Linda Bell suggests, backlash is often hidden and more insidious than patent discrimination.[91] The minority group is seen as receiving special treatment and privileges, and the public begins to focus their attention on those privileges rather than recognizing and addressing surrounding inequities and biases that persist. In order to address these and other continuing inequalities, it is necessary to reexamine the legacy of privacy that leads to this result, and to revisit Justice Stewart's concurrence in *Zablocki* and Justice O'Connor's concurrence in *Lawrence*.

The better path to accomplishing full and complete rights for gay individuals, rather, is through equal protection. Whereas gay rights jurisprudence in the United States may have painted itself into a due process corner that cannot likely be undone, Taiwan and South Africa offer alternative models for gay rights that has ramifications beyond marriage equality, but which also avoid backlash. *Interpretation 748* and *Fourie* take the bold step of recognizing sexual orientation as a protected class. They also provide a jurisprudential model that can aligns with laws that more broadly protect gay individuals in other areas of life outside of the private realm of marriage, such as against discrimination in the workplace and in education. By issuing mandates to their legislatures to enact change within a specific context of equal protection, the Taiwanese and South African Constitutional Courts provide a larger framework to legislate laws that can offer equal protection beyond the confines of marriage. *Interpretation 748* and *Fourie* also assert that the legitimacy of the government does not necessarily depend on whether judicial decisions or legislation reflect values that the public is

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[86] Richard Socarides, *North Carolina and Gay Rights Backlash*, NEW YORKER, Mar. 28, 2016, http://www.newyorker.com/news/news-desk/north-carolina-and-the-gay-rights-backlash.

[87] Steven Maize, *How the Orlando Massacre Affects the Fight for LGBT Rights*, THE ECONOMIST, June 23, 2016, http://www.economist.com/blogs/democracyinamerica/2016/06/gay-rights-and-wrongs.

[88] Katherine Franke, *Giving Obergefell the "Roe-Treatment"*, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (July 13, 2015), http://blogs.law.columbia.edu/publicrightsprivateconscience/2015/07/13/giving-obergefell-the-roe-treatment/.

[89] Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, J., dissenting).

[90] Franke, *supra* note 88.

[91] Linda Bell, *Women in Philosophy: A Forty Year Perspective on Academic Backlash*, *in* THEORIZING BACKLASH: PHILOSOPHICAL REFLECTIONS ON THE RESISTANCE TO FEMINISM (Anita M. Supreson & Ann E. Cudd, eds., 2002).

comfortable with. Rather, the Taiwanese and South African Constitutional Courts offer decisions that view their governments as leaders and not followers. By working in tandem, the judiciary and the legislature can guide the public in directions of deeper tolerance and equity, which are applicable not only for countries in the Global South, but in the Global North as well.


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