

Migrating Marriage Equality Without Feminism: *Obergefell v. Hodges* and the Legalization of Same-Sex Marriage in Taiwan

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In 2017, Taiwan’s Constitutional Court issued a decision ruling the same-sex marriage ban unconstitutional. Celebrated as a victory for marriage equality readying Taiwan to become “the first in Asia” to legalize same-sex marriage, the decision’s reasoning demonstrated a remarkable resemblance to *Obergefell v. Hodges* in that they both embrace formal equality, endorse marital supremacy, and render feminist critique of marriage irrelevant or insignificant. Through an investigation of social movement dynamics and constitutional politics, this Article explores the hidden histories of marriage equality and the rise of marital supremacy, revealing how marriage equality has served as a site of contestation where various visions of equality compete and where legal orientalism is enacted as well as resisted. It argues that Taiwan’s Constitutional Court decision and the marriage equality movement demonstrate a case of migrating marriage equality without feminism, presenting challenges for transnational feminism in terms of its absence.

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Introduction

Since 2001, when the Netherlands became the first country in the world to recognize same-sex marriage, more than two dozen countries have followed suit. Whether this was accomplished through the courts, legislature, or by referendum, it usually occurred after extensive and intense policy debates over the legal and social meanings of marriage and equality, in which one side argued for same-sex couples' access to marriage as a form of equality while the other defended marriage as a historical institution between a man and a woman irrelevant to or inconsistent with equality. Traveling across borders as an idea, marriage equality has become synonymous with the legalization of same-sex marriage, constituting the core of LGBTQ equality and dignity. Feminist challenges to discrimination against women in and through marriage seem like a movement of the past, and the struggle for same-sex couples' right to marry is today's equality fight of marriage.

Taiwan is one of many countries where the marriage equality movement has been progressing as its countermovement grows, and the Taiwan Constitutional Court (hereinafter "the TCC")¹ recently issued a decision

1. Taiwan's judicial institution to interpret the constitution was first named "dafaguan huiyi" (大法官會議) [the Council of Grand Justices] and later renamed "sifayuan dafaguan" (司法院大法官) [the Grand Justices of the Judicial Yuan]. To avoid confusion and to make it more accessible for international readers, I use the term "Constitutional Court," the official translation of this institution, although this term can be somewhat misleading because the TCC determines the constitutionality of a statute or a

that appears to be a case of judicial borrowing. In 2017, two years after the United States Supreme Court adopted the “equal dignity” approach to rule it unconstitutional for states to deny legal recognition of a marriage between two persons of the same sex in *Obergefell v. Hodges*,² the TCC ruled on the constitutionality of the same-sex marriage ban in *Judicial Yuan Interpretation No. 748* (hereinafter “the *Same-Sex Marriage Case*”),³ rendering it a violation of equal protection of the freedom of marriage and of the constitutional protection of human dignity, but granted the legislature a two-year grace period to choose the proper form of legislation. Like *Obergefell*, the *Same-Sex Marriage Case* is a decision widely celebrated by marriage equality proponents as a landmark victory of marriage equality but condemned by opponents for its denial of the history and tradition of marriage as an institution of opposite-sex union. Unlike *Obergefell*, which brought about nationwide legalization of same-sex marriage in the United States but has also been criticized for its conservatism, the *Same-Sex Marriage Case* has received enormous praise but has produced a legal limbo for same-sex relationships and has led to a referendum war in which both opponents and proponents of same-sex marriage utilized referendums to achieve their goals, ended with the proponents’ landslide defeat. The Legislative Yuan (hereinafter “the legislature”), which was ordered by the TCC to choose proper legislation by May 24, 2019, did not take any action until the administration submitted its bill in February 2019. “The Enforcement Act for Judicial Yuan Interpretation No. 748” (司法院釋字第748號解釋施行法), which legalizes same-sex marriage registration and provides certain access to the substantive legal consequences of marriage, was passed on May 17 and became effective on May 24, 2019.

The *Same-Sex Marriage Case* is understood as the Taiwanese version of *Obergefell*,⁴ despite the facts that the TCC did not formally cite *Obergefell*’s

regulation at issue but does not decide on the case itself. See MINGUO XIANFA art. 78 (1947) (Taiwan). It is also worth mentioning that a newly passed law—the Constitution Litigation Act (憲法訴訟法), which is set to take effect in 2022—renames and redefines the institution as a Constitutional Court.

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

3. SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017) (hereinafter “Judicial Yuan Interpretation No. 748”). The official English translation of the decision, which refers to this decision as a “Same-Sex Marriage Case,” is available at <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748> [<https://perma.cc/8CKP-HWBZ>]. Records of the Same-Sex Marriage Case, including official legal documents and social movement documents, are archived in *Taiwan Fashizheng Ziliaoku* (臺灣法實證資料庫) [Taiwan Database for Empirical Legal Studies] (TaDELS) and available at <http://itdels.digital.ntu.edu.tw> [<https://perma.cc/82HV-JXLV>].

4. From a law-and-politics and comparative perspective, Kuo & Chen discuss the view of the Same-Sex Marriage Case as Taiwan’s *Obergefell*, arguing that the Same-Sex Marriage Case, while mirroring *Obergefell* in terms of subject, doctrine, and argument, demonstrates more resemblance with *Brown v. Board of Education* considering its post-ruling politics and judicial style. See Kuo Ming-sung & Chen Hui-wen, *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 (2017). It is not the purpose of this study to compare the degree of the Same-Sex Marriage Case’s likeness with *Obergefell* to that with *Brown*; rather, the following discussion presents a somewhat dif-

legal arguments⁵ and that *Obergefell* did not explicitly consider sexual orientation a suspect classification requiring heightened scrutiny. Invoking the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, *Obergefell* identified the right to marry as a fundamental liberty, stressing its significance in protecting the most intimate decisions of an individual and between two people, in safeguarding children and families, and in constituting the keystone of social order.⁶ It was argued that the protection of such liberty applies to same-sex couples and opposite-sex couples alike because there is no difference between the two groups with respect to the principles of marriage and that the right to marry is not conditioned on the capacity or commitment to procreate.⁷ Praising homosexuals' respect and need for the privileges and responsibilities of marriage, the Court stated that "their immutable nature dictates that same-sex marriage is their only real path to this profound commitment."⁸ In its brief review of the history of marriage as an evolving institution, the Court also expressed the view that women's role and status have changed and that deep transformations in their structure have strengthened, rather than weakened, the institution of marriage.⁹

In the *Same-Sex Marriage Case*, the TCC argued that there is no difference between same-sex and opposite-sex couples with respect to their need, willingness, and ability to create a permanent union of an intimate and exclusive nature,¹⁰ and identified sexual orientation as an immutable characteristic and homosexuals as a discrete and insular minority in society.¹¹ Invoking the fundamental rights and equality clauses, the TCC considered that classifications based on sexual orientation should be subject to heightened scrutiny, and came to the conclusion that the same-sex marriage ban is an unreasonable classification and different treatment that constitutes a violation of the right to marry, which is a fundamental right, and that the ban cannot be justified by the incapability or unwillingness to procreate.¹² To assure the public that the institution of marriage will be strengthened rather than overthrown, the TCC emphasized that same-sex marriages, if legally recognized, will constitute the bedrock of society together with opposite-sex marriages, and that the basic ethical order of opposite-sex marriage will remain unaffected.¹³ Women's inferiority in marriage, either

ferent view of the politics of the Same-Sex Marriage Case as well as of its relationship with *Obergefell* and *Brown*.

5. *Obergefell* is cited in footnote 1 of the Same-Sex Marriage Case as one of several factual sources of scientific evidence supporting its argument that sexual orientation is an immutable characteristic. See Judicial Yuan Interpretation No. 748, *supra* note 3. See *infra* Part III for discussions on the TCC's choice not to cite *Obergefell* as a legal authority.

6. 135 S. Ct. at 2599-602.

7. *Id.* at 2601.

8. *Id.* at 2594.

9. *Id.* at 2595-96.

10. Judicial Yuan Interpretation No. 748, *supra* note 3, at ¶ 13.

11. *Id.* ¶ 15.

12. *Id.* ¶ 15-16.

13. *Id.* ¶ 13.

past or present, went completely ignored and unaddressed in this decision.

The resemblance between *Obergefell* and the *Same-Sex Marriage Case* is demonstrated by their anti-classification approach that grants homosexuals the same access to marriage due to their “immutable nature” and similarities to heterosexuals, their glorification of marriage as the building block of society, and their view that marriage is an institution of formal equality except for the exclusion of same-sex couples. That is to say, they both embrace formal equality (equality as sameness),¹⁴ endorse marital supremacy (the legal privileging of marriage),¹⁵ and consider the feminist critique of marriage as an institution of male dominance to be irrelevant or insignificant. Given the prior history of the TCC’s judicial borrowing from European and American jurisprudence, this is not a resemblance of accident and ignorance. The formality of citation is absent, but the substance of the arguments is apparently there. Does this suggest a case of non-feminist constitutional migration, in which American marriage-equality jurisprudence traveled to Taiwan while leaving the feminist critique of marriage behind? Does it reveal an asymmetrical transnational flow of constitutional ideas, in which the United States Supreme Court demonstrated American exceptionalism and the TCC confirmed Taiwan subordination by looking to foreign jurisdictions for guidance? What can this tell us about the relationship between feminism and the marriage equality controversies in the United States and Taiwan, as well as about the relationship between the two countries? And what are the implications for transnational feminism in an age of marriage equality when it remains the case that “marital supremacy is alive and well”?¹⁶

Locating *Obergefell* and the *Same-Sex Marriage Case* in the local-global contexts of movement politics (the dynamics of movement and

14. It might be argued that *Obergefell*, being the U.S. Supreme Court’s first decision that applies the Fourteenth Amendment to same-sex relationships, took a step toward substantive equality by identifying the structural and historical disadvantages of same-sex couples and combining liberty and equality into the doctrine of equal dignity. One might also argue that *Obergefell* is a step toward substantive liberty, rather than substantive equality. Kenji Yoshino, for instance, discusses the *Obergefell* Court’s emphasis on the intertwined nature of liberty and equality and its recognition of “antissubordination liberty,” and considers this decision “a game changer for substantive due process jurisprudence” that facilitated the “new birth of freedom” and also the “new birth of equality.” Kenji Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148, 174, 179 (2015). I argue instead that the concept of equal dignity is still obsessed with classification and with the Aristotelian “likes alike,” “unlikes unlike” formula. It demands that same-sex couples be treated like heterosexual couples by arguing their sameness. Under this approach, marriage equality is more an equivalence to the same treatment for same-sex and opposite-sex couples and less a radical challenge to the hierarchy of marriage.

15. Serena Mayeri defines the term “marital supremacy” as referring broadly to “the legal privileging of marriage over non-marriage, and marital over nonmarital families.” Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1279, n.2 (2015).

16. Serena Mayeri, *Intersectionality and Family Status Discrimination*, 32 CONST. COMMENT. 377, 380 (2017).

countermovement in particular)¹⁷ and constitutional politics,¹⁸ this Article takes a radical and postcolonial feminist look at the marriage equality controversies and pursues two lines of inquiry to revisit the marriage question and to explore the challenges of transnational feminism. The first line of inquiry, addressed in Parts I and II below, concerns the relationship of marriage and equality. It begins with questioning, rather than assuming, the position of equalizing the legalization of same-sex marriage to the realization of marriage equality. Discussions on marriage equality often situate it in the context of lesbian, gay, bisexual, and transsexual rights, evaluating its desirability and its opposition in accordance with its influences on the LGBTQ community. Marriage has come to provide, as Douglas NeJaime argues, “the framework through which to articulate both support and opposition to LGBT claims.”¹⁹ The conventional view that equates support of same-sex marriage to the endorsement of LGBTQ rights and opposition to same-sex marriage to an attack on them, however, has been challenged by a growing number of studies that shed light on the dark corners of the marriage equality movement, emphasizing the inequality of lives outside marriage (unmarried and non-marital relationships), arguing for the right to not marry, and criticizing the LGBTQ movement’s agenda of prioritizing marriage. This line of critique comprises positions including what Susanne Kim calls “marriage skepticism” (viewing the pursuit of the right to marry as an assimilationist and limiting position, and supporting pluralism) and “skeptical marriage equality” (being skeptical of marriage privilege but also favoring marriage equality for same-sex couples).²⁰ These positions rethink the relationship between marriage and equality, refusing to take the inclusion of same-sex couples within the insti-

17. I will, however, not discuss what Zald and Useem call “counter-counter-movements.” See Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement*, in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY: COLLECTED ESSAYS* 247-72 (Mayer N. Zald & John D. McCarthy eds., 2009).

18. In a comparative study of marriage equality in the U.S. and Ireland with respect to the legal mechanism (legislation, courts, or referendum) through which the marriage equality debate is resolved, Conor O’Mahony highlights the importance of considering the interaction between constitutional law and constitutional politics at play in a particular national setting. Conor O’Mahony, *Marriage Equality in the United States and Ireland: How History Shaped the Future*, 2017 U. ILL. L. REV. 681, 688-96 (2017). While this study does not aim to compare the legal mechanisms in Taiwan and the United States, the suggestion to pay attention to local constitutional politics remains helpful.

19. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 172 (2014).

20. See Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 47, 53-54 (2011). I have argued for a three-route proposal for marriage equality, which can be termed a skeptical marriage-equality approach: (1) legalizing same-sex marriage while also eliminating marital privileges that have constituted and contributed to marital inequality; (2) legal recognition of non-marital intimate relationships (including non-sexual family) that provide alternatives to marriage while ensuring the equality of these relationships; and (3) taking affirmative action to end compulsory marriage by stopping the channeling of welfare through marriage and family. See Chen Chao-Ju, *Hunyin Zuowei Falushang de Yixinglien Fuquan yu Tequan* (婚姻作為法律上的異性戀父權與特權) [*Marriage as Heterosexual Patriarchy and Privilege*], 27 NUXUE XUEZH: FUNU YU XINGBIE YENJIU (女學學制: 婦女與性別研究) [J. WOMEN’S & GENDER STUD.] 113, 152-53 (2010).

tution of marriage as the sole solution to inequality. This view of marriage as itself an inequality is by no means unique to the LGBTQ context. It is deeply rooted in feminist scholarship, of which a critique of the institution of marriage as an arena of gender inequality is an essential part. Seen in this light, the marriage equality controversy is complicated by the tension between feminists, who refuse to set aside the agenda of challenging inequality within and through marriage, and same-sex marriage proponents, who prioritize inclusion of same-sex couples into the institution of marriage. This tension is further intensified by the countermovement, which targets not only LGBTQ claims but the feminist critique of marriage. Susan Boyd, for instance, has shown how the LGBTQ mainstream movement in some countries has silenced dissenting voices.²¹ Through cross-jurisdictional comparisons and theoretical inquiry, Nicola Baker has also discussed how second-wave feminist critiques are considered no longer relevant to contemporary marriage, while arguing for their continuing relevance and also examining the possibility of developing them into a transformative approach to relationship recognition.²²

Drawing on academic critique and historical investigation to challenge the conventional wisdom of marriage equality, I will show that, in both the United States and Taiwan, the prioritization of same-sex marriage in the LGBTQ rights movement is a recent phenomenon accompanied by the marginalization of feminist and queer voices that dispute the privileging of marriage, oppose the oppression of marriage, disapprove of the association of marriage and parenthood, and condemn the discrimination against non-marital relationships. In this light, the “marriage cure” for inequality is subject to contestation. The “separate but (un)equal” debate in both the United States and Taiwan—which questions whether legal recognition of non-marital same-sex unions (e.g., domestic partnerships) constitutes a form of “separate but (un)equal” discrimination and second-class status—also deserves re-examination. When marital supremacy and formal equality are put to the test, advocacy of alternative forms of relationship recognition becomes a pursuit for equality rather than an effort to perpetrate LGBTQ inferiority. Yet *Obergefell* did not address alternative views on marriage and equality, and neither did the *Same-Sex Marriage Case*, thus further exemplifying how marital supremacy can exist as the joint product of domestic constitutional politics as well as of movement and countermovement interaction.

The second line of inquiry, discussed in Part III, deals with the relationship between marriage and national status, an issue that has received relatively little attention in the United States. In Taiwan, however, the marriage equality controversy is entangled with its status as a former Japanese

21. See Susan Boyd, “*Marriage Is More than Just a Piece of Paper*”: *Feminist Critiques of Same Sex Marriage*, 8 NAT’L TAIWAN U. L. REV. 263, 283–85 (2013). See also Susan Boyd & Claire Young, *Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada*, 14 FEMINIST LEGAL STUD. 213, 214 (2006).

22. See NICOLA BARKER, *NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE* 4, 129–63 (2012).

colony (1895-1945) and as an unrecognized state²³ begging for international acknowledgment both of its nationhood and of its achievements in democracy and human rights. This context of local history and international politics is key to understanding Taiwan's judicial borrowing in the *Same-Sex Marriage Case* and constant references to the experiences of specific Western countries and international human rights on both sides of the marriage equality controversy. It is also relevant to Taiwan being internationally recognized as "the beacon for Asia's gays"²⁴ and "a leader on lesbian, gay, bisexual and transgender rights"²⁵ set to be the first nation in Asia to legalize same-sex marriage, while its anti-gay rights movement is portrayed as a backlash that undermines "Taiwan's reputation as a regional leader on gay rights."²⁶ Taiwan's pursuit of being a nation that is "first in Asia" was a driving force for the *Same-Sex Marriage Case*, contributing to its being a case of interest convergence. However, the phenomenon of gay pride becoming national pride has also encountered challenges from anti-marriage-equality camps, which emphasize the non-existence of same-sex marriage as a world trend and defend opposite-sex marriage and family as a traditional value—a view that is expressed in a dissenting opinion in the *Same-Sex Marriage Case*.

In what follows, Part I investigates the hidden histories of marriage equality, Part II explores the rise of marital supremacy and the separate but

23. Taiwan has been struggling with its nation status in the international community since 1971 when the United Nations General Assembly passed Resolution 2758 and recognized the People's Republic of China ("PRC") as the only legitimate representative of China to the United Nations. Claiming that Taiwan is part of its territory, the PRC government constantly and consistently employs diplomatic and economic tactics to exclude Taiwan from the international community, to deny its nationhood, and to increase its economic dependency on the PRC. See, e.g., Chris Horton, *As U.N. Gathers, Taiwan, Frozen Out, Struggles to Get Noticed*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/world/asia/taiwan-united-nations-joseph-wu.html> [https://perma.cc/9F2D-DALE].

24. Andrew Jacobs, *For Asia's Gays, Taiwan Stands Out as Beacon*, N.Y. TIMES (Oct. 29, 2014), <https://www.nytimes.com/2014/10/30/world/asia/taiwan-shines-as-beacon-for-gays-in-asia.html> [https://perma.cc/2D6G-HFDD].

25. Emily Rauhala, *In Historic Decision, Taiwanese Court Rules in Favor of Same-Sex Marriage*, WASH. POST (May 24, 2017), https://www.washingtonpost.com/amphtml/world/in-milestone-decision-taiwan-court-rules-in-favor-of-same-sex-marriage/2017/05/24/bf7aa370-405b-11e7-9851-b95c40075207_story.html [https://perma.cc/A7TU-ANNF]. The same "first in Asia" rhetoric repeated itself in international media coverage of Taiwan government's draft bill to recognize same-sex union. See, e.g., Yimou Lee, *Taiwan Proposes Asia's First Draft Law on Marriage Equality*, REUTERS (Feb. 21, 2019), <https://www.reuters.com/article/us-taiwan-lgbt/taiwan-unveils-asias-first-draft-law-on-same-sex-marriage-idUSKCN1QA0I2> [https://perma.cc/6TCM-UHCE].

26. 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=.89694229be15 [https://perma.cc/WF7R-LY2U]. International media also described Taiwanese voters' overwhelming rejection of legalizing same-sex marriage in the referendum as a blow to Taiwan's reputation as one of Asia's most progressive countries. See, e.g., Chris Horton, *Taiwan Asked Voters 10 Questions. It Got Some Unexpected Answers*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/world/asia/taiwan-election.html> [https://perma.cc/2YEK-HBRN].

(un)equal discourses, and Part III discusses the entanglement of intimate relationship recognition and national status recognition, followed by concluding thoughts on the challenges of transnational feminism.

I. More than Same-Sex Marriage: The Hidden Histories of Marriage Equality

Advocated and understood as being equivalent to the legalization of same-sex marriage, marriage equality is mainly discussed, debated, and examined within the context of the LGBTQ rights movement. The *Same-Sex Marriage Case* itself is an illustration of this view. It provides an account of legislative failures and delays in considering the legalization of same-sex marriage, from the 1986 petition by the renowned gay activist and one of the petitioners in this case, Chi Chia-Wei (祁家威), to legislator Hsiao Bi-Khim (蕭美琴)'s 2006 same-sex marriage bill and several same-sex marriage bills introduced in 2016.²⁷ It mentions neither the TCC's previous decisions on gender equality in marriage and family nor the history of family law reform as a result of feminist legal mobilization. Although this omission can be interpreted as a judicial choice to manage its judicial legitimacy and lay the groundwork for its "timely" intervention in the same-sex marriage controversy,²⁸ it can also be understood as an indication of the TCC's view on same-sex marriage as an issue of gay and lesbian²⁹ rights, and on marriage as an institution unrelated to gender inequality except with respect to the legal exclusion of same-sex couples.

Obergefell has been criticized for acknowledging only the legacy of second-wave feminist legal advocacy but not the feminist opposition to discrimination against women living outside marriage.³⁰ In contrast, the fact that the TCC completely ignored the legal history of marriage inequality and of feminist legal mobilization has received little attention. Discussions of the *Same-Sex Marriage Case* and the legalization of same-sex marriage in Taiwan often repeat, rather than criticize, the TCC's view. Kuo Ming-sung and Chen Hui-wen's study of this case, for instance, describes the path toward this decision as one that is situated in the gay rights movement, having no internal movement conflicts and unconnected to feminist legal reform.³¹ Likewise, Elaine Jeffreys and Pan Wang describe the background and advocacy of the legalization of same-sex marriage in Taiwan as part of

27. Judicial Yuan Interpretation No. 748, *supra* note 3, ¶¶ 8-9.

28. See *infra* discussions Part II.

29. In Taiwan, *tong-zhi* (同志), a gender-neutral term, has been a popular term for homosexuals since 1992. It is now a common practice for gay and lesbian individuals to be referred to and self-identify as *tong-chi*, while some prefer the term "ku-er" (酷兒) (a phonetic translation of "queer"). See Chen Li-fen, *Queering Taiwan: In Search of Nationalism's Other*, 37 *MODERN CHINA* 384, 387-88, n.5 (2011).

30. E.g., Serena Mayeri, *Marriage (In)Equality and the Historical Legacies of Feminism*, 6 *CAL. L. REV. CIR.* 126, 126-27 (2015).

31. Kuo & Chen, *supra* note 4, at 78-91.

the LGBTQ movement.³² The following discussion shows that this picture of marriage equality as pertaining solely to the legalization of same-sex marriage and being connected only to LGBTQ history is an incomplete and flawed one.

A. Challenging the Dominant History of the *Same-Sex Marriage Case*

The term “marriage equality” has served as a synonym for same-sex marriage ever since 2012, when the annual gay pride parade held in Taipei—the largest gay pride parade in Asia—adopted “marriage equality” as one of its slogans for its tenth anniversary. In the same year, Legislator Yu Mei-nu (尤美女), a prominent leader of the Taiwanese women’s movement and a feminist lawyer, submitted a marriage equality bill to legalize same-sex marriage for legislative review by amending the Civil Code of the Republic of China (中華民國民法) (hereinafter “the Civil Code”).³³ In 2013, the Taiwan Alliance to Promote Civil Partnership Rights (台灣伴侶權益推動聯盟) (TAPCPR) proposed a draft for diverse families composed of three bills, including a bill for equal marriage rights.³⁴ The TAPCPR’s Equal Marriage Rights Bill, also known as the Marriage Equality Bill, is also an amendment to the Civil Code. It permits any two people to marry, regardless of sex, sexual orientation, or gender identity, and provides an anti-discrimination clause that forbids discrimination based on sex, sexual orientation, gender identity, or gender expression with respect to adoption of children. These marriage equality bills mainly targeted exclusion and demanded inclusion.

The narrow definition of marriage equality in its common use suggests an equally narrow definition of marriage inequality as the exclusion of same-sex couples from the institution of marriage. As a result, it fails to take into account other forms of marriage inequality, such as the subordination of wives, mothers, and people who live outside of marriage. This failure to define marriage equality in broader terms further constrains the possibility of locating marriage equality within the history of family law reform, in which the legal institution of marriage has been transformed from an institution that prescribes women’s subordination through sex-based status rules into one that features gender-neutral rules—a transformation that has been advanced by the feminist legal reform movement

32. Elaine Jeffreys & Pan Wang, *Pathways to Legalize Same-Sex Marriage in China and Taiwan: Globalization and “Chinese Values,”* in GLOBAL PERSPECTIVES ON SAME-SEX MARRIAGE 207–10 (Bronwyn Winter, Maxime Forest, & Rejane Senac eds., 2018).

33. See Johan Nylander, *Could Taiwan Be First in Asia with Same-Sex Marriage?*, CNN (July 3, 2016), <https://www.cnn.com/2016/07/03/asia/taiwan-same-sex-marriage/index.html> [https://perma.cc/C8P5-3APT]. The bill was revised and re-proposed in 2016 after Legislator Yu was re-elected. Jeffreys & Wang, *supra* note 32, at 210.

34. The other two bills are discussed in Part II. For the text of the TAPCPR draft, see <https://tapcpr.files.wordpress.com/2013/10/e5a99ae5a7bbe5b9b3e6ac8a1003.pdf> [https://perma.cc/A9SB-9EMG]. For the TAPCPR leader Victoria Hsu’s introduction to the draft and its movement, see Victoria Hsu, *Colors of Rainbows, Shades of Family: The Road to Marriage Equality and Democratization of Intimacy in Taiwan*, 16 GEO. J. INT’L AFF. 154 (2015).

through legal mechanisms of the legislature and the TCC since the mid-1990s.³⁵ Notably, the TCC's very first decision that applied constitutional review to issues of gender equality was a decision that ruled on the constitutionality of a family law provision concerning child custody, in which the TCC responded to feminist constitutional mobilization and rendered it a violation of constitutional gender equality to grant the father superiority over the mother in custody rights.³⁶ Feminist family law reform has paved the way for same-sex marriage advocacy by gender-neutralizing the law, making it easier to include same-sex couples and making legal marriage a somewhat more equal institution, albeit not yet a fully equal one.³⁷ It is therefore crucial to situate marriage equality within the contexts of both the LGBTQ and the women's movements. When the TCC ignored the history of family law reform in the *Same-Sex Marriage Case*, it disregarded its own participation in the development of marriage as a legal institution. For scholarly as well as public discussions, ignoring the relationship between feminist family law reform and legalizing same-sex marriage falsely disconnects LGBTQ and feminist concerns while also demonstrating historical amnesia about feminist legal mobilization.

B. Why Marriage? What Kind of Marriage? Intermovement and Intramovement Dynamics

The relatively homogenous picture of the story of marriage equality as one of consistent pursuit of same-sex marriage reduces its historical complexities. The "Why marriage?" question has been explored by scholarship, revealing how the U.S. history of marriage equality is complicated by intramovement differences within the LGBTQ movement as well as intermovement dynamics between the LGBTQ and women's movements. The classic Stoddard-Ettelbrick debate over whether marriage equality is the path for LGBTQ equality exemplifies how marriage's relation to equality was subject to contestation within the LGBTQ community: Thomas Stoddard argued that expanding the marriage right to same-sex couples would transform the institution of marriage and advance the full equality for gay people,³⁸ and Paula Ettelbrick claimed that pursuing marriage would undermine gay identity and force the assimilation of lesbians and

35. See, e.g., Lee Li-Ju (李立如), *Hunyin Jiating yu Xingbie Pingding: Chinshufa Bianqian de Guancha yu Fansi* (婚姻家庭與性別平等——親屬法變遷的觀察與反思) [*Family and Gender Equality: A Critical Assessment on Family Law Reform*], 95 ZHENGDA FAXUE PINGLUN (政大法學評論) [CHENGCHI L. REV.] 175 (2007); Chen Chao-ju (陳昭如), *Haishi Bupingdeng: Fuyun Xiufa Gaizao Fuquan Jiating de Kunjing yu Weijingzhiye* (還是不平等——婦運修法改造父權家庭的困境與未竟之業) [*Still Unequal: The Difficulties and Unfinished Business of Feminist Legal Reform of the Patriarchal Family*], 33 NUXUE XUEZH: FUNV YU XINGBIE YENJIU (女學學誌：婦女與性別研究) [J. WOMEN'S & GENDER STUD.] 119 (2013).

36. SHIZI NO. 365 JIESHI (釋字第365號解釋) [Judicial Yuan Interpretation No. 365] (1994).

37. Chen, *supra* note 35, at 142-44.

38. 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).

gay men into the mainstream.³⁹ Scholarship on the history of marriage resistance has also presented conflicting views on how marriage resistance relates to same-sex marriage advocacy. The dominant history demonstrates how same-sex marriage has come to occupy the most prominent place within the LGBTQ movement, and how it marginalized calls to resist marriage in the 1990s,⁴⁰ whereas the dissenting view presents the dialogical and interactive relationship between marriage and non-marital advocacy.⁴¹ In addition, there have been tensions between the women's movement and same-sex marriage advocacy; a classic example is how some Equal Rights Amendment (ERA) proponents distanced themselves from the issue of same-sex marriage due to fear of jeopardizing the ERA movement.⁴²

The historical dynamics of marriage resistance, marriage advocacy, and women's equality are no less complicated in Taiwan. In the 1990s, when the women's movement prioritized family law reform on its agenda, a controversy arose: should marriage reform include same-sex couples' right to marry, or should it concentrate on overturning men's privileges as husbands and fathers without expanding the institution of marriage? Mobilized by married and divorced women's suffering and facing strong public opposition, women's movement focused not on the entry to but on the exit from marriage, as well as on rights and obligations during marriage. The family law amendment bill, proposed by several women's groups with the Awakening Foundation (婦女新知基金會)⁴³ playing a key role, sought to equalize marriage by abolishing sex-specific provisions that privilege husbands and fathers, reshaping the marital property regime so as to reduce women's economic disadvantages during marriage and after divorce, and enhancing the exit so that women would not be trapped in oppressive mar-

39. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *WE ARE EVERYWHERE*, *supra* note 38, at 757-60. According to Nathaniel Frank, Ettelbrick softened her view before her death in 2011 and came to understand the enormous power of the freedom to choose to marry for gay people. NATHANIEL FRANK, *AWAKENING: HOW GAY AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* 357 (2017).

40. See, e.g., GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* (2004); FRANK, *supra* note 39; MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2014).

41. See, e.g., Mayeri, *supra* note 30; NeJaime, *Before Marriage*, *supra* note 19.

42. One strategy of ERA opponents was to tie ERA to legalization of same-sex marriage so as to increase public opposition against ERA. Some ERA proponents responded by differentiating ERA and same-sex marriage advocacy. See Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1390-95, 1400-03 (2006).

43. Established in 1982 first as a magazine publishing house, the Awakening Foundation is one of the few women's organizations devoted to feminist legal reform and one of the main women's organizations that pioneered and led the family law reform in Taiwan. A disclosure statement: I was a long-term board member of the Awakening Foundation, serving as its chairperson from 2012 to 2014, but have distanced myself from the marriage equality movement since 2016. In this Article I avoid addressing any of my knowledge of movement decisions, interactions, and conflicts that might possibly raise ethical concerns.

riages.⁴⁴ It can be argued that the feminist family law reform advocacy in the 1990s was based on the view of existing marriage as the source of women's oppression: a birdcage that constrained women's autonomy and inscribed women's inferiority. As indicated in the main title of a series of feminist legal literacy books, *Handbook for Women's Full Escape from the Family* (Nüren Wanquan Taojia Shouce, 女人完全逃家手冊),⁴⁵ the central feminist issue was to escape from the cage, not to gain entry to it.

For the women's movement, marriage was part of the problem, not part of the solution, which was exactly the position that the American gay and lesbian liberation movement in the 1960s and 1970s embraced.⁴⁶ For the lesbian and gay movement in Taiwan, however, marriage could be part of both. In two issues of the lesbian journal *Girl Friends* (*Nupengyou*, 女朋友) (published in 1995 and 2000) devoted to exploring diverse views on and experiences with marriage, the discussion sees marriage as a source of both oppression and privilege.⁴⁷ Rather than going as far as Paula Ettelbrick did in questioning marriage as the path to liberation, these lesbians explored how marriage could offer the potential to move beyond the norm of heterosexual marriage, while also reflecting on the compulsoriness of marriage. Some gay men also expressed the desirability of "the right to marry," a view that argues for legal recognition of same-sex marriage as a form of same-sex equality without endorsing the normativity of marriage and heterosexual norms,⁴⁸ and one that is similar to Thomas Stoddard's.

The women's movement's family law reform proposal in Taiwan was therefore challenged and accused of ignoring lesbian and gay rights.⁴⁹ Lesbians, in particular, openly demanded that the right to marry, as well as legal protection for non-marital relationship, be included in the reform agenda. In the 1996 women's march, lesbian groups spoke out for legal recognition of (1) homosexuals' right to marry and to parenthood, (2)

44. See *Xinqingban Minfa Qinshubian Xiuzheng Caoan Zongshuoming* (新晴版民法親屬編修正草案總說明) [Introduction to the Hsin-Ching Amendment Bill of the Chapter on Family of the Civil Code], TAIWAN FASHIZHENG ZILIAOKU (臺灣法實證資料庫) [TAIWAN DATABASE FOR EMPIRICAL LEGAL STUDIES] (TaDELS), (March 8, 1995), http://itdels.digital.ntu.edu.tw/Item.php?ID=C_0008_0004_0006 [https://perma.cc/K76N-KR6X].

45. Issued by the Awakening Foundation, this series of handbooks was divided into three topics: divorce, marital property, and domestic violence.

46. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 11 (2008).

47. No. 5, *NUPENGYOU* (女朋友) [GIRL FRIENDS] (1995); No. 32, *NUPENGYOU* (女朋友) [GIRL FRIENDS] (2000).

48. See, e.g., Chi Ta-wei (紀大偉), *Mali Xiongdi Kan Hunyin: Tan Hunyin yu Tongxinglian* (馬力兄弟看婚姻：談婚姻與同性戀) [*Super Mario Bros Considering Marriage: On Marriage and Homosexuality*] 149 FUNU XINZHI (婦女新知) [AWAKENING] 7-9 (1994).

49. For instance, renowned lesbian feminist Chang Chun-fen (張娟芬) provided a critique of family law arguing the invisibility of gay and lesbian individuals in both the law and the family law reform agenda in 1998. Chang Chuan-fen (張娟芬), *Kanbujian de Tongzhi: Jianshi Minfa de Tongxinglianqishi* (看不見的同志—檢視民法的同性戀歧視) [*The Invisible Tong-zhi: Examining Discrimination against Homosexuality in the Civil Code*], <http://taiwan.yam.org.tw/nwc/nwc3/papers/forum413.htm> [https://perma.cc/NB2W-9L24].

same-sex couples' right to insurance, medical care, and spousal stipends, and (3) welfare policy that abolished the heterosexual family model and provided equal resources for single, homosexual, and other non-marital families.⁵⁰ Disappointed at the under-inclusiveness of the women's movement's legal reform agenda, some lesbians openly charged the women's movement with being "mainstream heterosexual women pleasing and begging for compassion from the institution of heterosexuality."⁵¹

In 1990s Taiwan, the differences between those who wished to prioritize the reform of inequality within opposite-sex marriage and those who wished to include the legalization of same-sex marriage and other forms of non-marital relationship are best understood as being more strategic than ideological. Whereas the former cherry-picked a restricted but still difficult fight against male supremacy in marriage, the latter preferred a total war against heterosexual patriarchy. Unlike the movement-and-counter-movement dynamic in the U.S., in which ERA proponents distanced themselves from same-sex marriage due to organized opponents' use of the specter of same-sex marriage as an argument against the ERA, Taiwan's women's movement did not face a strong and highly organized anti-feminist counter-movement that deliberately associated family law reform with the possibility of legalizing same-sex marriage so as to attack and undermine the movement. It was a time when social movements were on the rise but not so threatening to the conservatives as to invite counter-movement.⁵² Against this background, the women's movement's failure to include same-sex marriage in its family reform proposal was neither opposition to same-sex marriage and LGBTQ rights nor an endorsement of heterosexual marriage normativity. Rather, it was the result of prioritizing the most winnable fight, which generated inter-movement tensions and a painful conflict within the sisterhood.

A special issue of the Awakening Foundation newsletter,⁵³ entitled "Women-Identified Women" (*Nuren rentong nuren*, 女人認同女人) and including a selective translation of the Radicalesbians' 1970 manifesto "The Woman-Identified Woman,"⁵⁴ was a showcase of this debate between and

50. Ku Ming-jun (古明君), *Nuren Yibai, Tongzhi Feiteng* (女人一百·同志沸騰) [*Women 100, Tongzhi on Fire*], 10 NUPENGYOU (女朋友) 34 (1996). THE LESBIAN DEMANDS CONCERN NOT ONLY MARRIAGE AND FAMILY BUT ALSO OTHER SOCIAL AREAS, INCLUDING THE WORKPLACE.

51. Yuxuan Aji (魚玄阿璣), *Jiehunquan yu Bujiehunquan* (結婚權與不結婚權) [*The Right to Marry and to Not Marry*], 3 NUPENGYOU (女朋友) 16, 16-17 (1995).

52. David S. Meyer and Suzanne Staggenborg argue that three conditions promote the rise of counter-movements: (1) movement success; (2) movement threats to existing interests; and (3) elite allies and sponsors. See David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1635-43 (1996).

53. No. 158, FUNU XINZHI (婦女新知) [AWAKENING] (1995). Further deliberation on the debate can also be found in Nos. 1 and 2 of the feminist journal SAODONG (騷動) [STIR].

54. Written by the New York feminist group Radicalesbians, "The Woman-Identified Woman" (1970) was one of the earliest lesbian-feminist documents, available at <https://repository.duke.edu/dc/wlmpc/wlms01011> [<https://perma.cc/R8CQ-PGRP>].

among feminists and LGBTQ advocates. It presented a critique of the entangled relationship between the lesbian and women's movements, which echoed the radical lesbian manifesto and called for radical reflections on women's differences. In doing so, the special issue showed how the Taiwanese lesbian community had benefitted from and connected to feminist lesbianism in the English world,⁵⁵ while also deliberating on the difference between Taiwan and the West by arguing that the lesbian movement in Taiwan was nurtured by and intertwined with the women's movement, whereas the Euro-American lesbian movement had become an independent movement.⁵⁶ The critique was followed by a response from the organization's feminist activists, which explained that there was no choice but to advocate for a compromised version of family law reform bill, and which highlighted women's oppression in marriage as well as the commonality of challenging heterosexual marriage normativity and patriarchy.⁵⁷ In this light, the differences between the women's movement and its lesbian critics were for the most part about the degree of compromise in terms of legislative lobbying strategy.

Nevertheless, this feminist-lesbian controversy is not unrelated to homophobic responses to family law reform. When the women's movement targeted the exit from marriage and sought to broaden that exit, early drafts of the family law amendment listed having a homosexual or bisexual relationship (the first draft) or committing opposite- or same-sex adultery (the second draft) as one of the grounds for divorce. A legislative proposal then borrowed the language from the first draft and considered the practice of homosexuality an abnormal act. This view was further exaggerated by the media, resulting in the women's movement being charged with discriminating against homosexuality and in public attention being drawn to the relationship between family law and homosexuality. This "negative presence of homosexuality"—in my definition, the recognition of homosexuality as a form of intimacy and sexuality in divorce, intimate violence, and sexual violence⁵⁸—was a two-edged sword. It recognized the existence of homosexuality and extended the grounds for divorce but at the risk of stigmatizing homosexuality and driving a wedge between the women's move-

55. Adrienne Rich's theory of a "lesbian continuum," which extended the notion of the woman-identified woman, and her critique of compulsory heterosexuality, are also a constant reference point for feminist lesbians in Taiwan. For Rich's theory and critique, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980).

56. The difference between Taiwan and the Euro-American world was discussed in Chang Hsiao-hung (張小虹), *Zai Zhangli zhong Huxiang Kanjian: Nutongzhi Yundong yu Funu Yundong Zhi Jiuge* (在張力中相互看見M—女同志運動與婦女運動之糾葛) [*Seeing Each Other in Tensions: The Entanglement of the Lesbian Movement and Women's Movement*], 158 *FUNU XINZHI* (婦女新知) [AWAKENING] 5 (1995).

57. Xinzhi Gongzuoshi (新知工作室), *Chaijie Hunyin Shenhua, Youzhi "Yi" "Tong": Minfa Yundong yu Tongzhi Yundong de Duihua* (拆解婚姻神話, 有志「異」「同」: 民法運動與同志運動的對話) [*Heterosexuals and Homosexuals Share the Same Goal of Unpacking the Marriage Myth: A Dialogue between the Civil Code Reform Movement and the Gay and Lesbian Movement*], 158 *FUNU XINZHI* (婦女新知) 10 [AWAKENING] (1995).

58. Chen, *supra* note 35, at 135–39.

ment and the LGBTQ community. It invited public attention to homosexuality in a way that combined homophobia and misogyny, leading some women's rights activists to distance themselves from the issue of homosexuality, and consequently to lesbian condemnation of "homophobia within the feminist camp."⁵⁹ The issue of extramarital sex further demonstrated the difference between the women's movement and the LGBTQ community. The women's movement's family law reform bill did not challenge the marital duty of sexual loyalty; rather, it extended it to include extramarital homosexuality as a violation of marital duty. The marital duty of sexual loyalty was, however, both challenged and supported by gay and lesbian individuals.⁶⁰ The women's movement was also divided on the issue of the crime of adultery—a disagreement that would surface in later debates.

The hidden histories of marriage equality described above present a picture of controversy, rather than consensus, on the issue of marriage and equality. In fact, the term "marriage equality" did not even appear in the 1990s debate in Taiwan. Marriage inequality was not defined as a ban on same-sex marriage alone, nor was marriage equality equated with the recognition of same-sex marriage. Marriage inequality and marriage equality were equally subject to contestation. Both the women's movement and the LGBTQ community disapproved of marital supremacy and endorsed singlehood as well as diverse forms of intimate relationship, despite their differences in agenda-setting and in the extent of the plurality of family. Yet the tensions between the two continued for years, and intensified with the rise of the marriage equality movement in the twenty-first century.

II. The Rise of Marital Supremacy Discourses: From Embracing Family Pluralism to Rejecting Partnership Recognition as Separate but (Un)equal

With a majority opinion that "reads like a love letter to marriage," *Obergefell v. Hodges* has been described as a victory for marriage equality at the expense of the unmarried and of non-marriage.⁶¹ Considering its glorified statement that "no union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and fam-

59. Ku Ming-jun (古明君), *Nuxingzhuyizhenying chong de Tongxinglian Kongjuzheng* (女性主義陣營中的同性戀恐懼症) [*Homophobia in the Feminist Camp*], 161 FUNU XINZHI (婦女新知) [AWAKENING] 18 (1995).

60. Some gay men supported the marital duty of sexual loyalty, whereas others considered it an issue to be decided by each couple. See Chi, *supra* note 48, at 8-9. Some lesbians argued that adultery should remain a crime after the legalization of same-sex marriage, whereas others demanded the abolishment of the crime of adultery. *Wohun Haishi Nihun: Guanyu Tongzhi Hunyin de Xianchang Call In* (我婚還是妳昏：關於同志婚姻的現場 Call in) [*I Am Getting Married or You Are Getting Dizzy: Call In at the Same-Sex Marriage Site*], 32 NUPENGYOU (女朋友) [GIRL FRIENDS] 20 (2000).

61. See Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1212, 1258 (2016). *But cf.* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017).

ily,”⁶² the “love letter” analogy is not an exaggeration. While not going as far, the *Same-Sex Marriage Case* also explicitly demonstrated its pro-marriage impulse, echoing the advocacy of the marriage equality movement. The following discussion shows how, following a somewhat different path from that of the American LGBTQ movement, Taiwan’s diverse family movement has also collapsed into a marriage equality movement for same-sex marriage that prioritizes marriage, leaving out and marginalizing people subordinated in or living outside of marriage.

A. A Pluralist Beginning and the Rise of a Countermovement:
Interaction between Movement and Countermovement

As the Taiwanese family law reform proposal advocated by the women’s movement since the 1990s gradually achieved limited success and most of the sex-based rules were abolished in the 2000s, it was time for family pluralism to become a legal reform agenda. In 2006, the Awakening Foundation initiated a dual strategy to recognize diverse families: (1) legalizing same-sex marriage, and (2) recognizing non-marital partnership for both opposite- and same-sex couples. It gathered a group of concerned activists, including members of organizations for divorced women and the LGBTQ community, to explore the proper legal approach to respond to different experiences of marriage and views on intimate relationships. In 2009 a coalition for the advocacy of partnership and diverse families was established, which became an independent organization, the TAPCPR, in 2012.⁶³ In 2013, the TAPCPR announced its three-bill package for diverse families: (a) equal marriage rights, (b) partnership rights, and (c) multiple-person household rights. The Equal Marriage Rights Bill is an amendment of the Civil Code that de-genders the two parties of a marriage and forbids sex/gender discrimination in the adoption of children. As an alternative to marriage for same- and opposite-sex couples in a monogamous relationship, the Partnership Rights Bill recognizes partnership as a contract by requiring a pre-nuptial agreement, ensuring caretaker equality by requiring household labor be compensated, and protecting freedom by excluding the obligation of sexual loyalty and allowing termination of the relationship by either party on a non-fault basis. And as an alternative to monogamy, the Multiple-Person Household Bill contains the idea of a chosen family, which allows two or more persons who cohabit and support each other to register as a household and as equal partners, regardless of their sexual intimacy. Yet as radical as it may seem, this three-bill package is not a “valuing

62. *Obergefell*, 135 S. Ct. at 2608.

63. The TAPCPR does not include members from the organization for divorced women. The Taiwan LGBT Family Rights Advocacy (台灣同志家庭權益促進會), one of the founding members of the alliance, declined to join the TAPCPR and publicized its decision in an announcement in 2012. See *About Us*, TAIWAN LGBT FAM. RTS ADVOC., http://www.lgbtfamily.org.tw/index_en.php [<https://perma.cc/G2GB-KZ8G>]. The Awakening Foundation, another founding member of the alliance, also gradually withdrew from the TAPCPR. This is one of the movement conflicts unaddressed in Hsu’s narratives of the movement. See Hsu, *supra* note 34.

all families” approach⁶⁴ but a “marriage-plus” proposal that does little to undermine the privileges of conventional marriage and the inequalities within marriage. In its search for the justice of both recognition and distribution (to use Nancy Fraser’s conception of justice⁶⁵), TAPCPR’s proposal has chosen to endorse a contractual model of relationship recognition without simultaneously challenging the channeling of entitlements through marriage or partnership that might enforce the privatization of care and support the neo-liberal state.

Presenting a diverse vision of marriage and family, the three-in-one advocacy nevertheless encountered massive opposition and harsh criticism from right to left on strategic and ideological grounds. As a movement strategy, the advocacy was an invitation to various enemies and was vulnerable to attacks and false allegations. As a vision, the three-in-one package was indeed an eye-opener for the public. Responding to the criticisms of the three-in-one advocacy as increasing the complexity of legislative lobbying and hindering public understanding, the TAPCPR argued that the advocacy brought to light the issues of heterosexual supremacy and marital hegemony, and advanced further discussion on the meanings and functions of a family.⁶⁶ The vision was, however, advocated at the price of facilitating its opponents’ mobilization. In 2013, the same year that the TAPCPR announced the three-in-one package, the League of Taiwan Guardians of Family (臺灣守護家庭聯盟) (hereinafter “the LTGF”) was established and effectively launched a countermovement against the diverse family movement.⁶⁷ Sponsored by a group of Christian religious entrepreneurs and under the impact of a globalized religious conservative movement through its local brokers, the LTGF has successfully triggered social moral panic against same-sex marriage and LGBTQ rights.⁶⁸

Although Christian conservatives are the core of the LTGF, they have had to deal with the inconvenient fact that Christians constitute a tiny religious minority in Taiwan (only 5 percent of the population). Concerned about the Christians’ legitimacy in leading the movement to “defend the traditional family,” the LTGF has managed to bridge religious differences and include Buddhist, Daoist, and other religious groups as well as the Chinese Confucian-Mencius Association (中華孔孟協會), and therefore

64. For the “valuing all families” approach, see POLIKOFF, *supra* note 46, at 123-45.

65. Nancy Fraser herself has argued that redressing the injustice (as misrecognition) of the exclusion of gays and lesbians from marriage can be done in various ways, including granting the same access to marriage or de-institutionalizing heterosexual marriage and decoupling entitlements such as health insurance from marital status. See Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 115 (2000).

66. See Hsu, *supra* note 34, at 158-59.

67. The LTGF is not the first anti-LGBTQ association in Taiwan. In 2011, the True-Love League (真愛聯盟), also Christian-based and linked to a global religious conservative movement, was established to protest sex education and education on LGBTQ rights in elementary and middle schools. See Huang Ke-hsien, “Culture Wars” in a *Globalized East: How Taiwanese Conservative Christianity Turned Public during the Same-Sex Marriage Controversy and a Secularist Backlash*, 4 REV. RELIGION & CHINESE SOC’Y 108, 121-22 (2017).

68. See *id.* at 109-110, 115-24.

presents itself as a cross-religion alliance.⁶⁹ It preaches “family values” on both religious and cultural grounds and links the legalization of same-sex marriage to sexual liberation so as to increase public panic and maximize its influence. It has mounted campaign attacks against the Partnership Rights Bill and the Multiple-Person Household Bill, claiming that these are an endorsement and encouragement of adultery, incest, polygamy, and bestiality, and criticizing the legalization of same-sex marriage as the destruction of “traditional family values.”

The three-in-one advocacy therefore encountered a foreseeable three-in-one counter advocacy, which blocked the introduction of the Partnership Rights Bill and the Multiple-Person Household Bill in the legislature and significantly increased the controversy over the Marriage Equality Bills, one sponsored by Legislator Yu Mei-nu (尤美女) and her colleagues in 2012 and the other by Legislator Cheng Li-chiun (鄭麗君) and her colleagues in 2013. Both Yu and Cheng are members of the Democratic Progressive Party (DPP), the opposition and minority party at that time. In October 2013, both bills advanced to committee deliberation, and several public hearings were held to seek public opinion. In response to the advance of the Marriage Equality Bills, the LTGF gathered tens of thousands of people in the streets to protest the legalization of same-sex marriage. Facing profound public opposition and the LTGF’s intensive lobbying against the Marriage Equality Bills, the legislature, dominated by the Nationalist Party (Kuomintang, or the KMT),⁷⁰ delayed further consideration of the bills after formal discussion in 2014, and both bills were deemed dead when the eighth Legislative Yuan term ended in January 2016. This was also when Taiwan’s first female president, Tsai Ing-wen (蔡英文), was elected, and when her party, the DPP, won the majority in the legislature for the first time in Taiwan’s history.

Encouraged by the newly elected President Tsai’s campaign promise to support marriage equality but discouraged by the countermovement’s attack on the Partnership Rights Bill and the Multiple-Person Household Bill, the diverse-family movement limited its cause to the legalization of same-sex marriage and emphasized the right to marry for those who love each other regardless of gender, as well as the significance of same-sex marriage for LGBTQ equality and identity. “Love” and “the right to love each other” became the movement’s popular slogans, and “the right to marry” was elevated to “the right to have rights.” Responding to the countermovement’s emphasis on the “disastrous effects” of same-sex marriage and family, advocates of same-sex marriage also came to stress the value of marriage and same-sex couples’ willingness as well as capability to build a stable marriage and care for children.

69. *Id.* at 123–24.

70. The KMT had been the majority ruling party in Taiwan since 1945, remained in power for more than a decade after Taiwan’s transition to democracy in the late 1980s, and recently became the minority party in 2016. See *Taiwan Profile-Timeline*, BBC News (Feb. 1, 2019), <https://www.bbc.com/news/world-asia-16178545> [<https://perma.cc/QCR4-GLVC>].

Both the LTGF's lobbying and the TAPCPR's response prioritized marriage, so that partnership and other forms of non-marital relationship were no longer on the table, excluding the possibility of legalizing both marriage for same-sex unions and partnership for heterosexual couples and therefore ensuring that there is no competition with marriage. The TAPCPR pursued a litigation strategy,⁷¹ and in 2015 two cases challenging the constitutionality of the same-sex marriage ban were filed separately by the renowned gay activist Chi Chia-wei (祁家威) and the Taipei City Government.⁷² A new alliance, the Marriage Equality Coalition (婚姻平權大平台),⁷³ was established in 2016 and cooperated with Legislator Yu Mei-nu (尤美女) to relaunch the legislative effort to legalize same-sex marriage. Legislator Yu later reintroduced the Marriage Equality Bill. Legislator Hsu Yu-jen (許毓仁) of the KMT and the caucus of the New Power Party (a new minority party) also introduced similar bills, making marriage equality a legislative proposal across party lines. However, opposition to same-sex marriage also received cross-party support, so that President Tsai's campaign promise turned out to be mere lip service. At the end of 2016, Legislator Yu worked with her cross-party allies in the Legislative Yuan to have the Marriage Equality Bill pass the first reading and the committee review and be referred to all party caucuses for compulsory negotiation. They were unable to proceed further due to strong social resistance and opposition from majority members of both the DPP and KMT, showing how the marriage equality controversy goes beyond party divisions.

In struggling to maintain a middle position, President Tsai and the DPP's management of the same-sex marriage controversy pleased neither side. While marriage equality proponents condemned Tsai and the DPP for failing to fulfill their campaign promise and provide enough support to pass the bill, its opponents, including the Presbyterian church—a long-term active participant in Taiwan's democracy movement and close ally of the DPP—blamed them for permitting the advance of the same-sex marriage advocacy. As the legislature and Tsai administration were trapped in the same-sex marriage controversy and Tsai's poll numbers continued to decline, the TCC came to their rescue and announced its “timely” admission of two same-sex marriage cases (filed in 2015) in February 2017. Grabbing the ball in its court only three months after the newly elected legislature began processing the marriage equality bills, the TCC's move was undeniably a case of judicial activism that made it an active player in

71. See Hsu, *supra* note 34, at 160–61.

72. Chi Chia-wei's petition was filed on August 20, 2015; the Taipei City Government's petition was filed on November 4, 2015.

73. The Marriage Equality Coalition Taiwan consists of five groups: the Taiwan Tongzhi (LGBT) Hotline Association (台灣同志諮詢熱線協會), Taiwan LGBT Family Rights Advocacy (台灣同志家庭權益促進會), Awakening Foundation (婦女新知基金會), Pridewatch Taiwan (同志人權法案遊說聯盟), and the Queermosa Award. TAIWAN TONGZHI (LGBT) HOTLINE ASS'N, 2017 TAIWAN LGBTI RIGHTS POLICY REVIEW n.5 (2017).

the political game.⁷⁴

The context for the TCC's announcement was that seven newly appointed justices, nominated by President Tsai and approved by the DPP majority Legislative Yuan, including Chief Justice Hsu Tzong-li (許宗力)—a moderate liberal constitutional professor and an experienced justice⁷⁵—had joined the TCC (composed of 15 members) on November 1, 2016, a week before the legislature began to review the Marriage Equality Bill. These newly appointed justices added new strength to the TCC's minority liberal wing, and all of them, including the chief justice, joined the majority opinion in the *Same-Sex Marriage Case*, despite the fact that one of them (the only female nominee) explicitly expressed her preference for the German model of same-sex partnership during her confirmation hearing.⁷⁶ This new composition of the TCC, however, should not be mistaken as President Tsai's deliberate attempt to endorse marriage equality by reorganizing the TCC. Essential evidence of this is that the new chief justice/president and justice/vice president of the Judicial Yuan were the replacements for President Tsai's initial nomination of conservative candidates for these two key positions. The other five new justices were also nominated as the embarrassed president, having been criticized for supporting judicial conservatism and failing to ensure transitional justice, was struggling to re-establish her reputation.⁷⁷

For same-sex marriage proponents, the result of the judicial nomination controversy improved the chance of winning through the TCC, leading to the landmark victory of the *Same-Sex Marriage Case*. For its opponents, the controversy undermined President Tsai and the TCC's authority, and the *Same-Sex Marriage Case* was considered unconstitutional judicial interference in legislative power. The TCC's glorification of marriage can be considered an attempt to satisfy both sides of the marriage equality contro-

74. Kuo & Chen also argued that "The TCC's announcement was a godsend not only to the deadlocked Parliament but also to President Tsai's oscillating government." Kuo & Chen, *supra* note 4, at 91. The issue of timing is the reason that the TCC provided an account of the uncertainty of the legislature's passage of the same-sex marriage legislation, and the legislature's failure to pass the legislation of same-sex marriage for more than a decade. See Judicial Yuan Interpretation No. 748, *supra* note 3, ¶¶ 9-10.

75. Professor Hsu served as a justice of the TCC from 2003 to 2011. His re-appointment has invited criticism alleging the unconstitutionality of the re-appointment. See Jason Pan, Possible Judicial Pick Challenged, *TAIPEI TIMES* (Aug. 27, 2016), <http://www.taipetimes.com/News/front/archives/2016/08/27/2003653947> [<https://perma.cc/FP8J-S945>].

76. 150 LIFAYUAN GONGBAO (立法院公報) [LEGIS. YUAN GAZ.], no. 74 (1995), at 300 (Taiwan). The issue of women opposing same-sex marriage deserves further discussion, but its scope goes beyond the limit of this Article.

77. President Tsai defended her initial nominations for chief justice/president and justice/vice president of the Judicial Yuan by expressing empathy for them after the former nominee's involvement in political persecution as a prosecutor under the KMT's authoritarian rule was exposed and the latter nominee was accused of plagiarism. Tsai was eventually compelled to withdraw her nomination of the two candidates under escalating social and political pressure. Kuo & Chen's discussion of the TCC and the *Same-Sex Marriage Case* provides a detailed description of the re-organization of the TCC after President Tsai assumed office but omits this crucial fact. See Kuo & Chen, *supra* note 4, at 87-89.

versy—an attempt that was well received by only one side. Irritated by the legislative review of the marriage bill, the judicial nominations, and the TCC’s “timely” intervention, the countermovement redoubled its attack, bringing tens of thousands people into the streets to protest, denying the legitimacy of the legislature and the TCC to decide the issue of same-sex marriage, launching a well-mobilized but unsuccessful campaign to recall a star legislator for his support of same-sex marriage,⁷⁸ and demanding a referendum as the preferred solution. When the Referendum Act (公民投票法) was revised at the end of 2017 to lower the threshold to initiate and pass a referendum, the League for the Happiness of the Next Generation (下一代幸福聯盟), another active Christian-based coalition of the countermovement, immediately proceeded with its plan in accordance with the new law, and successfully won a referendum on the Civil Code’s definition of marriage as a union of a man and a woman as well as a referendum on the special legislation of same-sex union on November 24, 2018. In response, the marriage equality movement fought fiercely against the special legislation of same-sex partnership, including a failed attempt to pass a referendum on the legalization of same-sex marriage by amending the Civil Code, which was held on the same day. Having wrestled with possible legal strategies to balance between competing interests for months, the administration finally submitted its bill, “the Enforcement Act for Judicial Yuan Interpretation No. 748,” to the legislature in late February, 2019. As a form of special legislation, the bill creates a semi-marriage relationship for same-sex couples, but deliberately gives no name to the same-sex union to dodge the thorny issue of naming (same-sex marriage, partnership, or cohabiting relationship). It is at once celebrated and condemned for its marriage-likeness: marriage equality advocates demand more resemblance to marriage, and opponents urge for further distinctions from marriage.

Seen in this light, the marriage equality movement in the 2000s began as a movement for diverse families, advocating the recognition of both same-sex marriage and non-marital relationships, but was narrowed down to a same-sex marriage advocacy, arguing for the similarity of same-sex couples and heterosexual couples, after a series of interactions between the movement and its countermovement intertwined with constitutional politics. This split perception of the *Same-Sex Marriage Case*, which represents a society divided on the issue of same-sex marriage, is not only a difference in public opinion but is inseparable from the dynamics of the judiciary, legislature and the people. An investigation into the intermovement and intramovement dynamics involved will further our understanding of the prioritization of marriage in Taiwan.

78. The chairperson of the New Power Party, Huang Kuo-chang (黃國昌), a freshman legislator, survived this recall attempt. See Brian Hioe, *Huang Kuo-Chang Survives Recall Vote, But What Now?*, NEW BLOOM (Dec. 16, 2017), <https://newbloommag.net/2017/12/16/huang-recall-survives/> [<https://perma.cc/7E2S-EAES>].

B. Marginalizing Different Voices: Silenced Feminists and Outspoken Queers in Inter- and Intramovement Dynamics

After the preparation and introduction of the TAPCPR's three-in-one package, the movement for diverse families found itself in multi-front debates with conservatives and radicals. The Equal Marriage Rights Bill was too moderate for feminists and radicals, whereas the Partnership Rights Bill and the Multiple-Person Household Rights Bill were too radical for conservatives or too libertarian for feminist equality advocates. Skeptical and critical of marriage being the solution for women's equality, the women's movement did initially not endorse same-sex marriage by celebrating the value and centrality of the institution of marriage. As mentioned before, movement and countermovement interactions led to a change in the rhetoric of the marriage equality movement, and this change did not encounter public feminist criticism. Given the painful history of the 1990s, this feminist silence can be understood as a strategic and inconvenient choice than as an endorsement of this rhetoric. The feminist discontent with the three-in-one package can be further examined by exploring differences regarding two issues that the *Same-Sex Marriage Case* did not deal with: the crime of adultery⁷⁹ and the marital presumption of parentage.⁸⁰

As late as the 1990s, both the women's movement and the LGBTQ movement were divided on the issue of the legal treatment of extramarital sex. Advocates of abolishing the crime of adultery have long encountered objections both inside and outside the women's movement. The Awakening Foundation, which considers the criminalization of adultery to be a form of sexual control and gender inequality, remains the leading force advocating its abolishment, despite some women's organizations' objection or hesitation to support this position due to their endorsement of marital loyalty and the instrumental value of the crime of adultery for a divorce bargain. After years of advocacy without a single amendment proposal ever being submitted in the legislature, the Awakening Foundation's collaboration with other organizations gathered hundreds of signatures, including those of more than two hundred lawyers and law professors,⁸¹ and worked with Legislator Yu Mei-nu (尤美女) to submit a first-time legislative proposal to abolish the crime of adultery in 2013. Since Legislator Yu—a main

79. However, the TCC, which confirmed the constitutionality of the crime of adultery in Judicial Yuan Interpretation No. 554, did express its endorsement of the obligation of fidelity “[a]ssuming that marriage is expected to safeguard the basic ethical orders.” (2002) (Taiwan Const. Ct. Interp.), <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=554> [<https://perma.cc/DKG6-U5BH>]. Judicial Yuan Interpretation No. 748, *supra* note 3, ¶ 16. The issue of applying the crime of adultery to same-sex couples has been discussed in the U.S. context. See Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97 (2011).

80. The right to use assisted reproductive technologies is also an issue of concern frequently associated with the legalization of same-sex marriage but is not addressed in this Article due to the complexity of the issue.

81. The signature petition can be found at <https://www.awakening.org.tw/topic/2273> [<https://perma.cc/PWR6-353P>].

leader of the family law reform movement before joining the legislature—became a leading lawmaker pursuing both the abolishment of the crime of adultery and the legalization of same-sex marriage, and given the fact that Taiwanese society is more tolerant toward homosexuality than it is toward extramarital sex,⁸² it was to be expected that the countermovement would link the two issues and attack the marriage equality movement for approving and encouraging adultery, resulting in greater social objection to same-sex marriage and the three-in-one package. The TAPCPR's Equal Marriage Rights Bill did not include an amendment of the Criminal Code to abolish the crime of adultery, and, as an amendment of the Civil Code, maintained the marital duty of sexual loyalty. The Partnership Rights Bill, in contrast, excluded it.

Feminists' doubts about the TAPCPR's strategy to satisfy two types of needs—marriage for those who prefer a sexually exclusive relationship enforced by law, and partnership for those who don't—and their concerns about the Multiple-Person Household Bill's potential to endorse male sexual privileges were rarely raised in public after the countermovement arose and expanded. The countermovement's tactic of linking the objection to abolishing the crime of adultery and the opposition to same-sex marriage has stimulated fears of jeopardizing the legalization of same-sex marriage by advocating the abolishment of adultery. Although this linking is disapproved of by marriage equality advocates,⁸³ it nevertheless forces a difficult feminist choice of temporary silence or distance by distinction.

The marital presumption of parentage, which constructs voluntary fatherhood and compulsory motherhood and contributes to marital supremacy, is also an issue on which same-sex marriage proponents find differences. The same-sex marriage bills that passed the committee review precluded the application of marital presumption for same-sex couples. Considering it an effective and proper legal mechanism to recognize and protect same-sex parenthood, the TAPCPR's Equal Marriage Rights Bill endorses marital presumption. Test cases of lesbian mothers who have children through the assistance of reproductive technologies were also filed with the hope of extending stepparent adoption to same-sex parents but

82. Wang Wei-pang (王維邦) & Chen Mei-hua (陳美華), *Feichanggui Xingshijian de Xingbiehua Taidu: Nan"Xin" Tequan, Xinbiefengong he Hunjiazhizhi de Jiaose* (非常規性實踐的性別化態度：男「性」特權、性別分工和婚家體制的角色) [*Gendered Attitudes toward Non-Conforming Sexual Practices in Taiwan: The Impacts of Male Sexual Privileges, Sexual Division of Labor, and Familism*], 40; NUXUE XUEZHI: FUNU YU XINGBIE YENJIU (女學學誌：婦女與性別研究) [J. WOMEN'S & GENDER STUD.], 53, 89 (2017).

83. Marriage Equality Coalition (婚姻平權大平台), for instance, distinguishes the legalization of same-sex marriage from the abolishment of the crime of adultery, explaining that these are two different issues regulated by different laws. See Q2: *Tongzhi hunyin tongguo hou, jiuhui jinyibu rang xingfa 239 tiao tongjian chuzuihua, feichu xingfa di 227 tiao "liangxiao wucai" tiaokuan hefahua ma?* (Q2: 同志婚姻通過後，就會進一步讓《刑法》239條通姦除罪化、廢除《刑法》第227條「兩小無猜」條款合法化嗎?) [Q2: *After the legalization of same-sex marriage, will Article 239 of the Penal Code be revoked to abolish the crime of adultery and Article 227 of the Penal Code be revoke to legalize the "Romeo and Julia" clause?*], EQUAL LOVE (婚姻平權大平台), <http://equallove.tw/questions/7> [<https://perma.cc/CU7B-CH25>].

have been rejected by courts.⁸⁴ For same-sex parents who desire marriage and yearn for legal recognition of their parenthood, marital presumption seems to be a natural and secure way to acknowledge same-sex parenthood, and the right to marry is incomplete without the right to apply marital presumption. The TAPCPR openly expressed its discontent with the exclusion of marital presumption in the bills, but the Marriage Equality Coalition disagreed, preferring the recognition of same-sex parenthood through the route of adoption so as to avoid the unnecessary and unpractical association of parentage with marriage.⁸⁵ For feminist equality advocates and marriage supremacy critics, marital presumption is part of marriage inequality and hence the subject of reform. The argument for excluding the application of marital assumption to same-sex couples in the debate, however, did not go so far as to advocate the abolishment of marital presumption for opposite-sex couples, which can be understood as a strategy to avoid further attack from the countermovement. The debate about marital presumption within the same-sex marriage camp therefore demonstrates the silence or marginalization of feminist concerns, including how privileging the marital relationship over the non-marital relationship can signify and materialize the inferiority of non-marital parenthood. Indeed, as Nancy Polikoff warns, the focus on marriage equality as the way to recognize a child's two parents, and of marriage as better for children than non-marriage, can be misguided.⁸⁶ The *Same-Sex Marriage Case* explicitly refused to rule on the issue of same-sex parenthood,⁸⁷ leaving the plaintiff's request and the marriage equality movement's plea unanswered. Although this refusal reflected the overlapping consensus of the majority rather than an intention to express a critical view that disapproved of the conflation of marriage and parenthood, the result was that it accidentally avoided such conflation.

Compared to feminist silence on disagreements, a strand of queer criticism presents itself in a blunt and aggressive manner, fearless of undermining the legalization of same-sex marriage or of facilitating the countermovement. In response to same-sex marriage advocacy, these queer critics, who also hold a sex-positive view on sexuality, launched a campaign to "destroy family, abolish marriage." It exists mainly in the form of discursive exchanges, street demonstrations, and other resistance

84. This litigation strategy is quite different from the American marriage equality movement, in which white male adoptive fathers have been over-represented as parent-plaintiffs. See Nancy D. Polikoff, *Marriage as Blindspot: What Children with LGBT Parents Need Now*, in *AFTER MARRIAGE EQUALITY: THE FUTURES OF LGBT RIGHTS* 138-39 (Carlos A. Ball ed., 2016).

85. Huang Yiyuan (黃驛淵), *Haizi Zuijialiyi Shei Shuo le Suan? Tonghun Pai Xien "Hunshentuiding" Lunzhan* (孩子最佳利益誰說了算? 同婚派掀「婚生推定」論戰) [*Who Has the Final Say on the Child's Best Interest? The Debate on Marital Presumption in the Same-Sex Marriage Camp*], SHANGBAO (上報) [UP MEDIA] (Dec. 30, 2016), http://www.upmedia.mg/news_info.php?SerialNo=9903 [<https://perma.cc/3ZFP-5WVG>].

86. Polikoff, *supra* note 84, at 131-49.

87. Judicial Yuan Interpretation No. 748, *supra* note 3, ¶ 18.

actions,⁸⁸ and does not seek legal mobilization through lobbying or litigation. Highlighting its resistance to marriage normativity, the “destroy family, abolish marriage” advocacy disapproves of the legalization of same-sex marriage and criticizes the marriage equality movement for prioritizing marriage and expanding heterosexual marital norms to same-sex couples. In this light, the marriage equality movement shares a common ground with its countermovement: endorsing marital supremacy. As the marriage equality movement responded to countermovement attacks by softening its rhetoric and stressing the distinction between legalizing same-sex marriage and abolishing the crime of adultery, it further proved the queer critique’s point.

The “destroy family, abolish marriage” advocacy also condemns the marriage equality movement for supporting the channeling of welfare through marriage and family, and argues against the neo-liberal policy of family-based care. From this point of view, legalizing same-sex marriage will compel same-sex couples to enter marriage so as to receive welfare benefits, but will not help LGBTQ people at the bottom under the current residual welfare model. It will enforce compulsory marriage on the one hand and will exacerbate class inequality on the other. This line of anti-neo-liberalism argument is far from unfamiliar to Canadian feminists⁸⁹ as well as to the women’s movement in Taiwan, which has long committed to fighting against the privatization of care and neo-liberalist policies by demanding a feminist welfare state. While the women’s movement finds it possible to argue for same-sex marriage and concurrently battle the neo-liberal state, the “destroy family, abolish marriage” advocacy considers it a contradiction to oppose class inequality and neo-liberalism while prioritizing marriage and family.

Lisa Vanhala argued that intramovement differences can sometimes provide a “dialogic opportunity” that facilitates deliberation, debate, and collective identity.⁹⁰ In the case of the same-sex marriage controversy in Taiwan, the opportunity is taken in a way that has unfortunately further divided the movement. The intramovement debate demonstrates how feminists and “destroy family, abolish marriage” queers respond differently to the countermovement. Feminists, including pro-marriage equality advocates and skeptical marriage-equality advocates, choose strategic silence and even compromise, both to minimize opposition to the legalization of

88. Josephine Ho, *Localized Trajectories of Queerness and Activism under Global Governance*, in *The Global Trajectories of Queerness: Re-thinking Same-Sex Politics in the Global South* 121, 135 n.7 (Ashley Tellis & Sruti Bala eds., 2015). For discourses on the “destroy family, abolish marriage” proposition, see XIANGXIANG BUJIATING ZHENXI (想像不家庭陣線) [Imagining Nonfamily Alliance], XIANGXIANG BUJIATING: MAIXIANG YIGE PIPAN DE YITUOBANG (想像不家庭：邁向一個批判的異托邦) [AGAINST FAMILY-MARRIAGE CONTINUUM: A COLLECTIVE SPECULATIVE EXTRAPOLATION INTO THE FAMILIAL AND RECALCITRANT MODES OF WORLD-BUILDINGS] (2019).

89. See BRENDA COSSMAN & JUDY FUDGE, *PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM* (2002).

90. Lisa Vanhala, *Social Movements Lashing Back: Law, Social Change and Intra-Social Movement Backlash in Canada*, in *SPECIAL ISSUE: SOCIAL MOVEMENTS/LEGAL POSSIBILITIES*, 121 (Austin Sarat ed., 2011).

same-sex marriage and to avoid endangering its already vulnerable relationship with the LGBTQ community. “Destroy family, abolish marriage” queers, in contrast, as marriage skeptics, prioritize the ideological war on marriage and discursive resistance over realistic fighting against the countermovement on the legal battleground. This also shows how the claims for and against marriage equality are intertwined with the regulations on extra-marital sex, on parenthood, and on the neo-liberal state, and why it is problematic to characterize all claims against same-sex marriage as anti-LGBTQ claims.

C. Taiwan’s Version of the Separate but (Un)equal Debate

The debate on partnership legislation provides another window into how equality’s meaning has been contested by both the marriage equality movement and its countermovement. As the marriage equality controversy arose in 2012 and reached its first peak in 2013, the idea of legislating a same-sex partnership act was proposed as a middle-ground solution to the controversy, and the Ministry of Justice has since demonstrated its preference for this approach by commissioning reports that provide such a recommendation.⁹¹ Neither the Awakening Foundation’s advocacy for partnership legislation since 2006 nor the TAPCPR’s Partnership Rights Bill in 2013 limited protection of partnership rights to same-sex couples, because partnership was considered an alternative to, not a substitute for, marriage. Based on this view of same-sex partnership legislation as an indication of LGBTQ inferiority—a view that is shared by marriage equality advocates in many countries, including the United States, but also contested by dissenters of marriage supremacy⁹²—the TAPCPR immediately rejected the proposal of special legislation for same-sex partnership.⁹³ Opposing the legal recognition of same-sex couples as a union, the countermovement was initially not interested in and even disapproved of the idea of same-sex partnership legislation.

The scenario gradually changed as both the marriage equality movement and its countermovement grew. While the same-sex marriage legisla-

91. See, e.g., TAI YU-ZU (戴瑀如) ET AL., FAWUBU (法務部) [MINISTRY OF JUSTICE], DEGUO, FAGUO JI JIANADA TONGXING BANLV ZHIDU ZHI YANJIU (德國、法國及加拿大同性伴侶制度之研究) [A STUDY ON THE SAME-SEX PARTNERSHIP SYSTEM IN GERMANY, FRANCE, AND CANADA] (2012), <https://www.moj.gov.tw/dl-20934-8d9ff12ecb844abc9ff9cad7ae9659cb.html> [<https://perma.cc/9BX4-BYM4>]; TENG SHYUE-REN (鄧學仁), FAWUBU (法務部) [Ministry of Justice], TAIWAN TONGXING HUNYIN FAZHUIHUA ZHI DIAOCHA YANJIU (臺灣同性婚姻法制化之調查研究) [INVESTIGATION REPORT ON THE LEGALIZATION OF SAME-SEX MARRIAGE IN TAIWAN], 144-48 (2013), <https://www.moj.gov.tw/dl-28577-c5f2ec05a66c41bd8e8cf893a4a6dca4.html> [<https://perma.cc/8ZMV-T528>]; LIN YUN-HSIEN (林昀嫻) ET AL., FAWUBU (法務部) [MINISTRY OF JUSTICE], TONGXING BANLV FAZHI SHISHI ZHI SHEHUI YINGXIANG YU LIFAJIANYI (同性伴侶法制實施之社會影響與立法建議) [THE SOCIAL IMPACT AND RECOMMENDATION FOR THE LEGISLATION OF THE SAME-SEX PARTNERSHIP ACT], 88-95 (2017), <https://www.moj.gov.tw/dl-28510-496169661ef74c49886d4184072d8794.html> [<https://perma.cc/P8ZR-U4HZ>].

92. See BARKER, *supra* note 22, at 41-66.

93. For the TAPCPR’s objection to a special legislation of same-sex partnership, see Hsu, *supra* note 34, at 159.

tion advanced in the legislature and social support for LGBTQ rights demonstrated itself through street demonstrations, public opinion forums, and survey polls, the countermovement found that its total war against any legal recognition of same-sex couples became less persuasive. Concerned with the marriage equality movement's accusation of discrimination and violation of human rights, countermovement organizations have adopted a new strategy that acknowledges the rights of homosexuals without destroying the heterosexual marriage and family. In 2016, the countermovement openly endorsed the idea of special legislation to protect gay and lesbian rights. A group of religious leaders, including Buddhists, Daoists, Catholics, Christians, members of I-Kuan Tao (一貫道), and so forth, held a press conference and issued a joint announcement opposing the amendment of the Civil Code to legalize same-sex marriage but supporting the legislation of a special law to protect the rights of homosexuals,⁹⁴ demonstrating the amazing solidarity of religious groups concerning the issue of same-sex marriage. The LTGF also issued a statement repudiating the claim that special legislation constituted discrimination against homosexuals, in which it employed the second part of the Aristotelian equality formula, "Likes alike," "unlikes unlike," to argue that those who were different should be treated differently.⁹⁵ Since then, the countermovement has maintained a position against same-sex marriage but supporting the legal recognition of same-sex partnership or same-sex cohabitation relationship. The administration has never explicitly objected to this position and has even expressed support for it before an absolute majority of voters exhibited their support for a special law for same-sex couples and backed the definition of marriage as the union of a man and a woman in the 2018 referendum.⁹⁶ Some scholars also argue that the right to marry is not a human right, that marriage equality is not an equivalence to same-sex mar-

94. See Press Release, *Taiwan Zongjiaojie Lianhe shengming* (台灣宗教界聯合聲明) [Joint Announcement by the Taiwan Region's Circles], TAIWAN FASHIZHENG ZILIAOKU (臺灣法實證資料庫) [TAIWAN DATABASE FOR EMPIRICAL LEGAL STUDIES] (TaDELS), (Nov. 30, 2016), http://itdels.digital.ntu.edu.tw/Item.php?ID=A_0002_0006_0007_0034 [https://perma.cc/U7KJ-255G].

95. See Press Release, *Zhendui tongxing banlu zhuanfa bei chengwei qishi huiying* (針對同性伴侶專法被稱為歧視回應) [Response to the claim that a special legislation for same-sex couples is discrimination], Taiwan Fashizheng Ziliaoku (臺灣法實證資料庫) [Taiwan Database for Empirical Legal Studies] (TaDELS), (Nov. 27, 2016) http://itdels.digital.ntu.edu.tw/Item.php?ID=A_0002_0006_0007_0033 [https://perma.cc/3GMR-6Q9L].

96. The Ministry of Justice under both the Ma Ying-jeou (馬英九) Administration (2008-2016) and the Tsai Administration (2016-2020) has expressed its preference for the special legislation on same-sex partnership. While both Presidents Ma and Tsai pledged to protect same-sex equality, they never explicitly specified the legalization of same-sex marriage as the only possibility for same-sex equality. See Linda Van der Horst, *When Will Asia Finally Have Same-Sex Marriage?*, FOREIGN POLICY (Nov. 30, 2016 11:26 AM), <https://foreignpolicy.com/2016/11/30/marriage-equality-in-taiwan-isnt-a-done-deal-tsai-ing-wen-legislation-lgbt-taipei/> [https://perma.cc/B56R-4U4F]; Emily de la Bruyere, *Taiwan Activists Push for Same-Sex Marriage Bill*, NEW YORK TIMES (May 22, 2014, 6:00 PM), <https://sinosphere.blogs.nytimes.com/2014/05/22/taiwan-activists-push-for-same-sex-marriage-bill/> [https://perma.cc/526X-AUJT]; Alexis Lai, *Two Buddhist brides wed in Taiwan*, CNN (August 13, 2012), <https://www.cnn.com/2012/08/13/>

riage, and that providing same-sex couples with legal recognition other than marriage is a form of equality (different treatment for different people) and an embracement of diversity.⁹⁷

This “different but equal” argument was countered by marriage equality advocates’ sameness argument, which went as far as to reason that special legislation, whatever the format and the content, constituted a kind of different treatment and hence discrimination. The more the countermovement supported special legislation for same-sex couples, the more the marriage equality movement opposed it. As part of the religious conservative movement’s “secular backlash,” that is, the LGBTQ supporters’ portrait of the religious movement as an anti-human-civilization movement led by “evil” religious leaders who utilize various strategies to deceive their ignorant believers,⁹⁸ the marriage equality movement responded to the countermovement’s compromise by dismissing it as a completely unacceptable proposal worthless of consideration. Considering the countermovement’s argument to resemble “separate but equal,” marriage equality advocates characterized the special legislation of same-sex partnership as a form of apartheid and segregation that reinforces heterosexual normativity and prescribes LGBTQ’s second-class citizenship,⁹⁹ and in 2016 they gathered tens of thousands of people to protest in the streets against the proposal of special legislation. They argued that special legislation is “fake equality” and “real discrimination,” and that gay and lesbian individuals, like heterosexual people, are entitled to the right to marry under the same law. Using the first part of the Aristotelian equality formula, “Likes alike,” to dispute the countermovement’s argument based on the second part,

world/asia/taiwan-buddhist-same-sex-wedding/index.html [https://perma.cc/M6AA-GMCL].

97. See, e.g., Wu Yuzong (吳煜宗), *Tongxing Hunyin Hefahua Lunbianzheng* (同性婚姻合法化論辨正) [On the Debate on the Legalization of Same-Sex Marriage], 224 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 5 (2014); Kwan Kai Man (關啟文), “Hunyin Pingquan” de Fansi (“婚姻平權”的反思) [Reflection on “Marriage Equality”], 58 YINGYONG LUNLI PINGLUN (應用倫理評論) [APPLIED ETHICS REV.] 13 (2015).

98. Huang, *supra* note 67, at 124-31.

99. See, e.g., Press Release, Marriage Equality Advocacy Groups, Fan zhuanfa, yao pingquan, xiu minfa, zheng pingdeng (反專法、要平權、修法、爭平等) [Oppose special legislation, demand equal rights; amend the civil code, demand equality], Taiwan Fashizheng Ziliaoku (臺灣法實證資料庫) [Taiwan Database for Empirical Legal Studies] (TaDELS), (Nov. 28, 2016), http://itdels.digital.ntu.edu.tw/Item.php?ID=CA_0002_0006_0007_0035 [https://perma.cc/62DU-BRSR]; Zhendui Liyuan jijiang bingyan shencha de sigе banben minfa xiuzhengan de huyu (針對立院即將併案審查的四個版本法修正案的呼籲) [Response to the Legislative Yuan’s combined review of four civil code amendment proposals], TAIWAN FASHIZHENG ZILIAOKU (臺灣法實證資料庫) [TAIWAN DATABASE FOR EMPIRICAL LEGAL STUDIES] (TaDELS) (Dec. 20, 2016), http://itdels.digital.ntu.edu.tw/Item.php?ID=A_0002_0006_0007_0036 [https://perma.cc/KJ8K-J7GY]; Awakening Foundation, Tsai Ing-wen zongtong duixian zhengcheng, tongxing banlufa bushi hunyin pingquan (婦女節記者會：請蔡英文總統兌現政見承諾，同性伴侶法不是婚姻平權) [President Tsai Ingwen should fulfill campaign promise, same-sex partnership act is not marriage equality], TAIWAN FASHIZHENG ZILIAOKU (臺灣法實證資料庫) [TAIWAN DATABASE FOR EMPIRICAL LEGAL STUDIES] (TaDELS) (Mar. 7, 2017), http://itdels.digital.ntu.edu.tw/Item.php?ID=A_0002_0006_0007_0037 [https://perma.cc/S5QY-M7C6].

“Unlikes unlike,” the marriage equality movement ironically shares the same equality principle as its countermovement, rendering the debate one resembling the feminist sameness and difference debate, though without referring to it.

Unsurprisingly, the *Same-Sex Marriage Case* adopted the formal equality doctrine to recognize same-sex couples’ freedom to marry and demanded that same-sex couples be treated like heterosexual couples by arguing their sameness—that is, their correspondence to the standard of heterosexual marriage. Its immutability requirement (homosexuals being a group of an immutable nature) further suggests that social hierarchy is biologically based and risks essentializing dominance. Moreover, the *Same-Sex Marriage Case* failed to settle the controversy over special legislation for same-sex couples, despite ruling it unconstitutional to deny same-sex couples the right to marry. The TCC specifically noted that it is within the discretion of the legislature and the administration to determine the formality of the law,¹⁰⁰ suggesting the possible permissibility of legislating a same-sex partnership act or same-sex marriage act. Worried about the possibility of the legislative choice of special legislation, the marriage equality movement continued the onslaught on it until the countermovement’s triumph in the 2018 referendum forced the movement’s retreat from this position.

Similar to the United States, where social conservatives opposing same-sex marriage are sometimes identified as “strange bedfellows” of the LGBTQ movement for its bringing same-sex marriage into the public arena,¹⁰¹ the debate over whether special legislation for same-sex couples is discrimination or equality in Taiwan is one that contributes to marital supremacy on both sides. By claiming that same-sex couples are “different but equal,” same-sex marriage opponents borrow the language of difference to uphold the sanctity and exclusiveness of marriage.¹⁰² By arguing against “separate but equal,” same-sex marriage proponents emphasize the centrality of marriage and rank marriage over partnership. The *Same-Sex Marriage Case* represented the success of marital supremacy, despite the fact that the gay petitioner Chi Chia-wei (祁家威) finally and publicly revealed his lack of intention to marry his long-term partner after the deci-

100. “It is within the discretion of the authorities concerned 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 for two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life.” Judicial Yuan Interpretation No. 748, *supra* note 3, ¶ 17.

101. Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQ. 449, 450 (2014).

102. This turn of the countermovement in Taiwan indicates a difference from the countermovement in the United States. Blaming women for the failure of marriage, some LGBTQ opponents turned to support same-sex marriage “precisely because it was marriage.” See Nancy D. Polikoff, *Concord with Which Other Families? Marriage Equality, Family Demographics, and Race*, 164 U. PA. L. REV. ONLINE 99, 100 (2016).

sion was announced.¹⁰³ The debate also demonstrates how the countermovement has responded to the marriage equality movement's rights, equality, and discrimination arguments by increasingly using the very same language to make their arguments based on public reason—rather than on emotion, morality, and religion—in their public statements, so as to refute accusations of homophobia and bigotry. Moreover, both sides of the debate employ analogies with racial segregation and miscegenation in the United States and frequently refer to international human rights law, German law, American law, and laws of other “progressive Western countries.” Indeed, marriage equality has served as a site of contestation where the competition among different views of equality is entangled with their deployment of international human rights and comparative law.

III. From Gay Pride to National Pride: Intimate Relationship Recognition and National Status Recognition Intertwined

Neither the majority opinion in *Obergefell* nor that in the *Same-Sex Marriage Case* referred to foreign legal authorities. In *Obergefell* the majority opinion exhibits the U.S. Supreme Court's common practice of America exceptionalism, proving Breda Cossman's point that same-sex marriage is produced as “not a foreign import but rather a made in the United States product,” showing how the United States “has not been a net importer of constitutional ideas.”¹⁰⁴ In the *Same-Sex Marriage Case*, the majority opinion appears to be an extraordinary exception to the TCC's usual record of explicit judicial borrowing. However, this lack of formal citation requires a deeper look that takes into account the substance of the ruling and the historical, political, and legal context of Taiwan, leading to the conclusion that there is indeed evidence of the migration of marriage equality jurisprudence. The thought-provoking fact that the dissenting opinions in *Obergefell* and the *Same-Sex Marriage Case* heavily cited foreign and international legal authorities further invites a second look at this migration.

A. Internalization and Resistance of Legal Orientalism: The Role of International Human Rights and Comparative Law

Haunted by its colonial past but ironically also suffering from historical amnesia, Taiwan is a country that looks up to the progressive West and that is eager to climb the ladder of civilization. It has suffered the ideologi-

103. Liu Tzu-wei (劉子維), *Taiwan Tonghun Tuishou Qijiawei*: “Wo Bushi Ziji Yao Jiehun” (台灣同婚推手祁家威：「我不是自己要結婚」) [*Chi Chia-wei, the Driving Force of Same-Sex Marriage in Taiwan*: “I myself do not intend to marry”], BBC NEWS (May 25, 2017), <http://www.bbc.com/zhongwen/trad/chinese-news-40048682> [<https://perma.cc/KF2N-CAEJ>].

104. Criticizing American courts' lack of reference to Canadian same-sex marriage jurisprudence, Brenda Cossman provided this comment in a pre-*Obergefell* work. Brenda Cossman, *Migrating Marriages*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 214, 220 (Sujit Choudhry ed., 2007). Her comment is re-confirmed by *Obergefell*'s lack of judicial borrowing.

cal harms—or what Patricia Williams terms the “spirit murder”¹⁰⁵—of “lack as tradition,” that is, the perception of its own history and tradition as a “lack of rights and the rule of law” and as “lagging behind the West.”¹⁰⁶ A symptom of this self-perception is to consider the reception of Western law a necessary step toward modernization and civilization, whether by force (Japanese colonialism) or by choice (democratization),¹⁰⁷ without questioning Western superiority. Another symptom is historical amnesia, that is, the lack of knowledge of or interest in learning about its own past and connecting it to the present, as demonstrated by the judicial style of the TCC’s decisions.¹⁰⁸ The combined symptom is an overemphasis on the comparative law of the “progressive West,” which finds its expression in the fact that the overwhelming majority of Taiwanese legal scholarship on marriage equality is devoted to the study of comparative law, in particular European and American Law. As a result, views of marriage equality legislation are debated in search of either the best foreign model to follow or which foreign model to distinguish local law from.

Since its transition to democratization in the late 1980s and under the “building a nation based on human rights” policy of the first DPP President Chen Shui-bian (陳水扁)’s administration (2000-2008), Taiwan has come to label itself as a democratic country of human rights so as to distinguish itself from the People’s Republic of China (PRC) and obtain international recognition. The recent rise of international human rights movements and legal studies has further mingled internalized legal orientalism with the pursuit of Taiwan’s sovereign status as a nation independent of and different from the PRC, and international human rights law has become an essential point of reference. As a common term and goal, “connecting to the international community” demonstrates a collective national mentality of rejecting Taiwan’s lack of recognition and lag in civilization and of endeavoring to join the club of progressive nations.

105. Patricia Williams names the psychic injuries that black people have suffered as a kind of “spirit murder.” PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A MAD LAW PROFESSOR* 78 (1995).

106. See Chen Chao-ju, *Producing “Lack as Tradition”: A Feminist Critique of Legal Orientalism in Colonial Taiwan*, 1 *COMP. LEGAL HISTORIES* 154, 177-78 (2015).

107. Laura Nader and Ugo Mattei’s theory of the three models of the imposition of Western laws is helpful in understanding the reception of law in Taiwan. They are: (1) the “imperialistic/colonial rule” or “imposition of law by military force” model; (2) the “imposition by bargaining” model, in the sense that the acceptance of law is part of subtle extortion; and (3) the consensual model, in which law is exported through a deliberate process of institutionalised admiration. LAURA NADER & UGO MATTEI, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 19-20 (2008). All three models can be found in Taiwan: (1) the legal development under Japanese colonialism fits the model; (2) the legislation of intellectual property law in which Taiwan amended its law in exchange for the United States dropping trade sanctions fits the model; and (3) the “choice” of borrowing from Western laws after democratization is an example of the model.

108. Chen Chao-ju (陳昭如), *Dafaguan Jieshi zhong de Lishi yu Chuantong: Nvxingzhuyi Lichanglun de Guandian* (大法官解釋中的歷史與傳統——女性主義觀點的批判) [A Feminist Critique of History and Traditions in Judicial Review], 7 *ZHONGYANYUAN FAXUE QIKAN* (中研院法學期刊) [ACADEMIA SINICA L.J.] 81 (2010).

The women's movement as well as other social movements, originally committed to constitutional mobilization in the 1990s, turned to international human rights law to pursue their goals in the 21st century. After 2009, when the United Nations rejected the deposition of Taiwan's ratification of international human rights conventions, a "self-compliance" approach was proposed and adopted. The legislature has passed laws to enforce several international human rights conventions,¹⁰⁹ and the administration has worked with human rights NGOs to invite international human rights experts to Taiwan to conduct national report reviews. A convergence model of national law and international and transnational law—that is, national law's consistency with international law or transnational law¹¹⁰—has become the dominant model. Although Sally E. Merry has painted a rather positive picture of how international human rights laws were appropriated and translated in several local contexts,¹¹¹ the "localization" of international norms in Taiwan is practiced under the shadow of Western legal hegemony, which has distracted attention from the potential of local norms.¹¹² Besides, as Sara L. Friedman has argued, human rights claims as "aspirational sovereignty" claims—that is, human rights acting as a mode of sovereignty assertions—can and do involve different versions of Taiwan's very own sovereignty and its aspired-to international belonging.¹¹³

In this context, transnational law of the progressive West and international law serve as privileged legal resources (or "legal stock")¹¹⁴ for both the marriage equality movement and its countermovement. Both sides take for granted, therefore, the need to establish their arguments by referring to foreign legislation to their advantage, and the direction of "international trends" has become a point of dispute. Naturally, American and French laws are favorable for the marriage equality movement.¹¹⁵ Since 2014, Evan Wolfson—founder of Freedom to Marry and firm opponent of

109. They include: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

110. Vicki Jackson has distinguished three postures of a national constitutional court toward transnational law: (1) resistance, meaning to distinguish or neglect; (2) convergence, meaning to identify and uniformize; and (3) engagement, characterized by openness and deliberation. See VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA*, 17-70 (2010).

111. See SALLY ENGLE MERRY, *HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

112. Chen, *supra* note 108, at 76-78. *But cf.* Chang Wen-cheng, *An Isolated Nation with Global-Minded Citizens: Bottom-Up Transnational Constitutionalism in Taiwan*, 4 NAT'L TAIWAN U. L. REV. 203 (2009).

113. Sara L. Friedman, *Aspirational Sovereignty and Human Rights Advocacy: Audience, Recognition and the Reach of the Taiwan State* (on file with author).

114. The availability of legal stock is one of the four dimensions of a legal opportunity structure in Ellen Ann Andersen's definition. ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 9-14 (2004).

115. The French model of partnership for both same-sex and opposite-sex couples is a crucial reference for the diverse family movement.

partnership legislation, who argued that anything other than marriage is inherently unequal¹¹⁶—has visited Taiwan several times at the invitation of marriage equality advocacy groups, where, ironically, he was introduced as “the father of marriage equality in the United States” and spoke on the global movement for the right to marry.¹¹⁷ Sex discrimination arguments for same-sex marriage, as what Suzanne Goldberg called a “risky argument” that “not only seeks a desirable outcome but also aims to shift a court’s conceptualization of the problem at issue,”¹¹⁸ were scarcely mentioned¹¹⁹ and persistently overlooked, probably because most American judges have ignored or even rejected them.¹²⁰ International and regional human rights documents do not explicitly require the legalization of same-sex marriage, but marriage equality activists, who advocate marriage equality as a universal value, have argued that these documents, including the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, shall be interpreted as protecting the right to marry and as prohibiting discrimination based on sexual orientation and gender identity. Marriage equality activists have submitted shadow reports,¹²¹ attending national report review panels to persuade international experts and have then utilized the international human rights experts’ national report review, which suggests that the legalization of same-sex marriage be considered so as to make Taiwan a pioneer in the Asia-Pacific region,¹²² to their advantage.

Marriage equality opponents have also taken the opportunity to appeal to international human rights experts and have argued that gay rights as well as the right to marry are not covered by international human

116. See EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 131 (2007).

117. *The Global Movement for the Freedom to Marry: Why Marriage Matters*, TAPCPR (Dec. 30, 2013), <https://goo.gl/dZxhYM> [<https://perma.cc/P9YR-ABSJ>].

118. Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2089 (2014).

119. In Taiwan, equality arguments for same-sex marriage usually claim that the exclusion of same-sex couples from marriage constitutes a form of different treatment based on sexual orientation and gender identity and without reasonable basis. My concurring opinion for a moot constitutional court held in 2014 on the constitutionality of the same-sex marriage ban is one of the few legal opinions that invoke sex discrimination and substantive equality arguments for same-sex marriage. See *Moni xianfa fating Chen Chao-ju dafaquan xietong yijianshu* (模擬憲法法庭 陳昭如大法官 協同意見書) [Justice Chen Chao-ju’s concurring opinion, Moot Constitutional Court], TAIWAN FASHIZHENG ZILIAOKU (臺灣法實證資料庫) [TAIWAN DATABASE FOR EMPIRICAL LEGAL STUDIES] (TaDELS), http://itdels.digital.ntu.edu.tw/Item.php?ID=A_0002_0006_0008_0001_0005 <https://perma.cc/FW29-EX2K>. The decision and opinions of the moot constitutional court were sent to the TCC as *amici curiae*.

120. See Goldberg, *supra* note 118, at 2113-29.

121. These shadow reports are available through TaDels at TAIWAN FASHIZHENG ZILIAOKU (臺灣法實證資料庫) [TAIWAN DATABASE FOR EMPIRICAL LEGAL STUDIES] (TaDELS), <http://itdels.digital.ntu.edu.tw/> [<https://perma.cc/QD2F-4K2T>].

122. REVIEW OF THE SECOND REPORTS OF THE GOVERNMENT OF TAIWAN ON THE IMPLEMENTATION OF THE INTERNATIONAL HUMAN RIGHTS COVENANTS, CONCLUDING OBSERVATIONS AND RECOMMENDATIONS, INT’L REV. COMMITTEE 15 (2017), <http://www.humanrights.moj.gov.tw/dl-17575-9cd8bee3f22049f8b90aaa6430022a1c.html> [<https://perma.cc/F6B3-FFPC>].

rights law in their shadow reports.¹²³ Their appeal to international laws and experts can be considered a response to the LGBTQ community's "secular backlash" and an attempt to confirm that they are on the right track of conforming to international norms.¹²⁴ Given the enormously prestigious status of German law in Taiwan, the German dual-track model of registered life partnership for same-sex couples and marriage for opposite-sex couples has become the countermovement's most persuasive example. It may have lost its edge since Germany amended its law and legalized same-sex marriage in 2017, after the announcement of the *Same-Sex Marriage Case*, but it can still be used as a desirable case of incrementalism by arguing that, to move one step at a time, legal recognition of same-sex partnership must precede same-sex marriage.¹²⁵ Besides, German Constitutional Court Justice Susanne Baer, who had visited Taiwan in 2014, expressed her views on the German experience during her visit and in an interview with officers of the Ministry of Justice in 2016, in which she explained the background of the German legislation as well as the social costs of the litigation that followed, and suggested that the legalization of same-sex marriage be considered in Taiwan.¹²⁶ Marriage equality activists often cite her opinion to undermine the influence of the German model, which they consider to be an undesirable model of "separate and unequal."

The "separate but (un)equal" rhetoric, which prevails in the debate over special legislation for same-sex couples, is no doubt borrowed from *Plessy v. Ferguson*, *Brown v. Board of Education*, and the United States' history of racial segregation. Like American marriage-equality advocates,¹²⁷ marriage equality activists in Taiwan also use *Loving v. Virginia* as a frequently cited precedent to argue for the unconstitutionality of a marriage ban and marriage segregation. The race analogy in same-sex marriage debates can also be seen in other national settings, such as Canada and South Africa. Yet what is distinct, if not unique, in the exercise of this

123. TAIWAN HUMAN RIGHTS REPORT, PARALLEL REPORT ON THE CORE DOCUMENT FORMING PART OF THE REPORTS, TAIWAN MOTHERS SHIELD ALLIANCE ET AL. (2016); 2016 TAIWAN HUMAN RIGHTS REPORT, PARALLEL REPORT ON THE IMPLEMENTATION OF THE ICCPR AND ICESCR, TAIWAN MOTHERS SHIELD ALLIANCE ET AL. (2016), http://itdels.digital.ntu.edu.tw/Item.php?ID=A_0002_0006_0006_0013 [<https://perma.cc/DD8R-58MD>].

124. Huang, *supra* note 67, at 129-31.

125. The incrementalism rationale is often invoked to support the legal recognition of same-sex unions in non-marital forms in Taiwan and in the United States. For a critique of using the rationale of incrementalism to legitimate the distinction between marriage and civil union in the U.S., see Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1416-23 (2009).

126. See FAWUBU (法務部) [MINISTRY OF JUSTICE], KAOCHA FAGUO, DEGUO TONGXING BANLV/TONGXING HUNYIN FAZHI FAZHAN JI SHIWU YUNZUO QINGXING (考察法國、德國同性伴侶/同性婚姻法制發展及實務運作情形) [INVESTIGATIVE REPORT OF THE LAW AND PRACTICE OF SAME-SEX PARTNERSHIP AND SAME-SEX MARRIAGE IN FRANCE AND GERMANY] 31-39 (2016).

127. The miscegenation analogy formed the basis of the first victory of the same-sex marriage movement in Hawai'i in 1996, but was first elaborated by Andrew Koppelman in the 1980s. See KATHARINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 7, 237 n.5 (2015).

analogy in Taiwan is that this rhetoric and constant reference to racial segregation and anti-miscegenation laws reflect a loss of the historical memory of the ban on intermarriage between the Taiwanese and Japanese under Japanese colonialism—a ban that was implemented to enforce Japanese superiority by segregation, and then lifted to facilitate assimilation.¹²⁸ This analogy also neglects the colonial experience of special legislation for the Taiwanese under Japanese colonialism, which perpetrated colonial inferiority. In contrast, marriage equality opponents do distinguish marriage from racial segregation, arguing that these are two different matters and that special legislation for same-sex couples does not resemble the racial segregation of “separate but equal.”

Reasoning on the basis of Aristotle’s “likes alike” and noting the argument against “black inferiority” in *Brown*,¹²⁹ marriage equality proponents, however, rarely notice the *Loving Court*’s argument against “white supremacy,”¹³⁰ and widely celebrate *United States v. Windsor* and *Obergefell v. Hodges* without noticing the neglect of gender inequality and applause for marital supremacy in these two decisions. Since Confucius exists as an icon of feudalist conservatism and gender inequality for liberal-minded people in Taiwan, it is astonishing that *Obergefell*’s citing of Confucius to establish the historical and universal recognition of marriage in human society¹³¹ received little criticism from the liberal camp, showing how the passion for same-sex marriage trumped the concern for gender equality.

The *Same-Sex Marriage Case* also provides an opportunity to examine the conflicting roles of international human rights law in the marriage equality controversy. Unusually, the majority opinion did not refer to any foreign legislation or constitutional court decisions, not even its favorite German jurisprudence, which can be considered an intentional attempt to dodge dealing with the TCC’s previous decisions in which it upheld the principle of institutional protection for opposite-sex-only marriage under German law.¹³² Interestingly, one of the decision’s two dissenting opin-

128. See Chen Chao-ju, *Gendered Borders: The Historical Formation of Women’s Nationality under Law in Taiwan*, 17 POSITIONS: E. ASIA CULTURES CRITIQUE 289, 297–98 (2009). In the American context, Katharine Franke also criticized the miscegenation analogy, arguing for an alternative lesson of the American past which suggests that marriage rights can come at the price of stigmatizing other groups and ways of life outside of marriage. See FRANKE, *supra* note 127.

129. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

130. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

131. 135 S. Ct. at 2594 (2015).

132. See Kuo & Chen, *supra* note 4, at 138–39. The TCC provided poor reasoning to distinguish the issue of same-sex marriage from its previous decision regarding the institutional protection (in German law, Institutsgarantie) of marriage and family, arguing that the purpose of those decisions was not to define marriage. Judicial Yuan Interpretation No. 748, *supra* note 3, ¶ 11. It has been noted that the principle of institutional protection of marriage and family can be interpreted to cover same-sex marriage. Huang Shu-Peng (黃舒萍), *Geli dan Pingdeng?: Cong “Shouyang Tongxing Banlv Yangzinv” Yian Jiantao Deguo Lianbang Xianfafayuan dui Tongxing Banlv Fazhi zhi Lilun (隔離但平等? ——從「收養同性伴侶養子女」一案檢討德國聯邦憲法法院對同性伴侶法制之立論)* [*Separate but Equal? The Institution of Civil Partnership Reexamined in Con-*

ions, authored by conservative Justice Wu Chen-huan (吳陳鑽), cited in detail international and regional human rights documents and decisions that he deemed not supportive of same-sex marriage¹³³ and explicitly noted that only a few countries have legalized same-sex marriage, arguing that the right to marry is not a universally recognized human right and that local particularities should be considered, including the traditional ethical order, the function of the family to generate the next generation, the aging of a society, and low fertility rates.¹³⁴ Moreover, in *Obergefell*, the four conservative justices, each of whom had previously expressed opposition to judicial borrowing in constitutional cases, nevertheless cited foreign sources in oral arguments and their written dissents.¹³⁵ The similarity of the *Obergefell* dissents and Justice Wu's dissent shows how, for same-sex marriage opponents, foreign authorities can be cherry-picked to serve their goals.

Justice Wu's denial of the universal value of same-sex marriage, demand for respect of local culture and tradition, and support for incrementalism are shared by same-sex marriage opponents, including the justice minister, who argued as a representative of the government in the TCC's oral argument that the legalization of same-sex marriage would destroy historical tradition, culture, and ethical order. Same-sex marriage proponents, in contrast, argued that there is no Taiwanese tradition of marriage as the union of one man and one woman because concubinage was part of the tradition, and that a discriminatory tradition does not deserve respect and has been abolished in law.

In this light, marriage equality proponents and opponents have internalized as well as resisted legal orientalism. By utilizing international human rights law and certain Western laws as privileged resources and by appealing to international experts, both sides demonstrate the aspiration—or compulsion—to situate their claims under the authority of international human rights law or to seek supporting Western legislation or court decisions. The fact that the decision of the South African Constitutional Court

text of the Reasoning of Federal Constitutional Court of Germany], 16 XINGDA FAXUE (興大法學) [CHUNG-HSING U. L. REV.] 85 (2014). The legalization of same-sex marriage in Germany proved this view.

133. Judicial Yuan Interpretation No. 748 (Wu Chen-huan, dissenting), available at <http://www.judicial.gov.tw/constitutionalcourt/FYDownload.asp?fileguid=000361-9UOT3> [https://perma.cc/Z5MK-9D8W]. They are: the Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; Convention for the Protection of Human Rights and Fundamental Freedoms; American Convention on Human Rights; and European Court of Human Rights decisions: *Schalk and Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. (2010), *Hämäläinen v. Finland*, App. No. 37359/09, Eur. Ct. H.R. (2014), *Oliari and Others v. Italy*, App. Nos. 18766/11 and 36030/11, Eur. Ct. H.R. (2015), and *Chapin and Charpentier v. France*, App. No. 40183/07, Eur. Ct. H.R. (2016).

134. Judicial Yuan Interpretation No. 748 (Wu Chen-huan, dissenting), *supra*, note 133. Justice Wu also argued that the issue of same-sex marriage should be decided by the legislature rather than by the TCC.

135. Zachary D. Kaufman, *From the Aztecs to the Kalahari Bushmen—Conservative Justices' Citation of Foreign Sources: Consistency, Inconsistency, or Evolution?*, 41 YALE J. INT'L L. ONLINE 1 (2015).

on same-sex marriage, which recognized the “the right to be different” and celebrated difference rather than sameness, received much less attention¹³⁶ than *United States v. Windsor* and *Obergefell v. Hodges* is an indication of how both sides subscribed to Western hegemony, and how an alternative argument for same-sex marriage adopted by a constitutional court in the global south has been neglected as a result.¹³⁷ However, legal orientalism has also been resisted. Marriage equality opponents refuse to consider local legal and culture tradition to be inferior to the West, and its proponents endeavor to demonstrate the changing and contested nature of tradition.

B. “First in Asia” Discourses and the Case of Interest Convergence

The “First in Asia” discourses provide another window into the entangled relationship between intimate relationship recognition and national status recognition. While the desire to burnish a country’s international reputation, in particular as a regional human rights pioneer, has facilitated some countries’ recognition of same-sex marriage (e.g., the Netherlands, Belgium, Canada, Spain, and South Africa),¹³⁸ Taiwan is a somewhat different case due to its status as an unrecognized state. Numerous international and local media outlets have presented Taiwan as a leader of marriage equality in Asia, quoting pro-same-sex marriage legislators and activists who express their passionate hope and aspiration for Taiwan to be a pioneering example for other Asian countries, which will facilitate Taiwan’s international recognition as a nation of democracy and freedom distinct from the PRC:

If we’re the first in Asia, that will definitely raise Taiwan’s international profile. The world will see that we emphasize democracy, the rule of law, and freedom.

Yu Mei-nu (尤美女)
DPP legislator¹³⁹

136. In the *Same-Sex Marriage Case*, petitioner Chi Chia-wei (祁家威) briefly mentioned the South African Constitutional Court’s decision merely as an example of foreign court decisions endorsing same-sex marriage and did not address its reasoning. In public discourses, *Minister of Home Affairs and Another v. Fourie and Another* was sometimes cited as a case supporting same-sex marriage, but its legal reasoning of the right to be different remains largely unnoticed. See 2006 (1) SA 524 (CC) (S. Afr.).

137. It has also been suggested that *Minister of Home Affairs and Another v. Fourie* is a better approach and that *Obergefell* should have referred to *Fourie*. See Holning Lau, *Marriage Equality and Family Diversity: Comparative Perspectives from the United States and South Africa*, 85 *FORDHAM L. REV.* 2615, 2619 (2017).

138. See Kelly Kollman, *Pioneering Marriage for Same-Sex Couples in the Netherlands*, 24 *J. EUROPEAN PUB. POL’Y* 100, 108 (2017). See also KELLY KOLLMAN, *THE SAME-SEX UNIONS REVOLUTION IN WESTERN DEMOCRACIES: INTERNATIONAL NORMS AND DOMESTIC POLICY CHANGE* 69 (2013).

139. Casey Tolan, *Taiwan on Verge of History as First Asian Country to Allow Same-Sex Marriage*, *USA TODAY* (Jan. 31, 2017), <https://www.usatoday.com/story/news/world/2017/01/31/taiwan-verge-history-first-asian-country-to-allow-same-sex-marriage/97275002/> [https://perma.cc/4USC-UR7H].

There are some ways we can never compete with China, but this is a way we can compete, set a good example for them, use soft power . . . If Taiwan is to continue to be a beacon of liberty and democracy in Asia, these are the things that can really make us stand out . . . When we pass this law, other nations in Asia will be watching.

Jason Hsu (許毓仁)
KMT legislator¹⁴⁰

In Asia, every country's situation is different But this should certainly offer some encouragement to different societies to consider following in Taiwan's footsteps and giving gays and lesbians the right to marry.

Chi Chia-wei (祁家威)

Gay activist and one of the petitioners in *the Same-Sex Marriage Case*¹⁴¹

This will open doors for a lot of other nations in the region . . . It is also good for Taiwan. It will bring a lot of international attention and recognition.

Toby Chang
Rally participant¹⁴²

Legislator Yu's comment on same-sex marriage advocacy as the "pride of Taiwan"¹⁴³ is representative of this discourse, which upgrades gay pride to national pride and associates the issue of same-sex marriage with the issue of nation status. Unlike the situation in Singapore, where embracing gay identity is mainly considered a rejection of the nation and its people,¹⁴⁴ the perception of gay pride as national pride is echoed by many in Taiwan, including the TCC. In an effort to bring Taiwan and the TCC itself to the international stage by presenting its recognition of same-sex couples' right to marry as a progressive move toward gender equality, the TCC held an international press conference in 2017 to announce the *Same-Sex Marriage Case*, at which the decision was read in Mandarin Chinese, English, and Japanese, and an English translation of the decision was provided to the press. Both the multilingual announcement and the immediate release of an English translation were unprecedented in the history of the TCC. Widely covered and well received by international media, the *Same-Sex Marriage Case* enhanced the TCC's prestige and Taiwan's reputation as a country committed to gender equality. It nevertheless reflects, as well as contributes to the prevailing yet problematic view of gender equality as sameness.

140. Rauhala, *supra* note 26.

141. 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> [<https://perma.cc/Q4QA-U8BN>].

142. Sean Lin, *Same-Sex Marriage: Marriage Equality Advocates Celebrate Announcement*, TAIPEI TIMES (May 25, 2017), <http://www.taipetimes.com/News/front/archives/2017/05/25/2003671245> [<https://perma.cc/DH2H-PBXX>].

143. Alison Hsiao, *Lawmakers Pan Minister over Gay Marriage Stance*, TAIPEI TIMES (Mar. 25, 2017), <http://www.taipetimes.com/News/taiwan/archives/2017/03/25/2003667438> [<https://perma.cc/W38Z-XZB7>].

144. See Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT'L L.J. 309, 349-50 (2014).

The *Same-Sex Marriage Case* can therefore be understood as a culmination of “interest convergence.” Neo Khuu has applied Derrick Bell’s interest convergence theory to explain how sexual minorities’ and majorities’ interests converged institutionally, economically, and ideologically to affirm marital supremacy and made *Obergefell* possible.¹⁴⁵ I would further argue that the *Same-Sex Marriage Case* is a product of interest convergence—not only because sexual minorities’ and majorities’ interests converged in an era when marriage has become less preferable¹⁴⁶ and the divorce rate relatively higher,¹⁴⁷ but also due to Taiwan’s search for international recognition, which demonstrates similarity to Bell’s interpretation of *Brown* as a decision that gave international credibility to America’s freedom and democracy in the global struggle against communism and totalitarianism.¹⁴⁸ Besides, the TCC’s “timely intervention” also indicated how the TCC’s interest in increasing its global visibility converged with President Tsai and her party’s political interest in downplaying their involvement in the marriage equality controversy. It is also worth mentioning that a pivotal moment in the LGBTQ movement in late 2016 was generated by the tragic death of Jacques Picoux, a retired French lecturer at National Taiwan University who committed suicide after his long-term Taiwanese partner passed away and his right to participate in medical decisions and legal claims to the shared property had been denied.¹⁴⁹ Legalizing same-sex marriage is therefore considered, in part, redemption for the death of an elite white French gay man who spent most of his life in Taiwan.

The national pride perspective is, however, not commonly shared. Activists in other Asian countries are not enthusiastic about the influence of the *Same-Sex Marriage Case* in their own countries, and Taiwan activists’ celebration of “First in Asia” can be understood as an indication of a colo-

145. Neo Khuu, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184, 214–24 (2017).

146. The Taiwan Social Change Survey constantly shows a decline in approval of the idea that “having a bad marriage is better than not being married” and an increase of support for the view that “it is fine to cohabit and not getting married.” See TAIWAN SHEHUI BIANQIAN JIBEN DIAOCHA JIHUA DIQIQI DIERCI DIAOCHA JIHUA ZHIXING BAOGAO (台灣社會變遷基本調查計畫第七期第二次調查計畫執行報告) [EXECUTIVE REPORT ON THE TAIWAN SOCIAL CHANGE SURVEY, ROUND 7 YEAR 2] 205, 207 (Fu Yang-chih (傅仰止) et al. eds., 2016).

147. Since 1998, the crude divorce rate has remained above 2.0 per mille. The crude divorce rate in 2018 was 2.31 per mille. See MINISTRY OF INTERIOR, NUMBER AND RATES OF BIRTH, DEATH, MARRIAGE AND DIVORCE (2017), available at https://www.moi.gov.tw/files/site_stuff/321/1/month/m1-02.ods [<https://perma.cc/8PT4-8W7X>].

148. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (arguing that “the decision helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples”).

149. Caroline Mortimer, Taiwan Could Become First Asian Country to Legalise Same-Sex Marriage Following Suicide of Prominent Gay Professor, INDEPENDENT (Oct. 28, 2016), <https://www.independent.co.uk/news/world/asia/taiwan-equal-marriage-same-sex-marriage-lgbt-rights-asia-jacques-picoux-a7384686.html> [<https://perma.cc/54HP-9NXE>].

nized mind.¹⁵⁰ East Asia, in contrast, is considered to be in a backward condition, lacking in progressive and individual values, which casts doubts about whether Japan, Korea, and other Asian countries are ready to embrace such values and to legalize same-sex marriage in the near future.¹⁵¹ Moreover, marriage equality opponents fiercely condemn the *Same-Sex Marriage Case* as a national disaster rather than a cause for national pride, because they believe it will destroy the foundation of the country, set a disastrous example for other Asian countries, and contribute to the global expansion of sexual liberation. For them, the fight against the legalization of same-sex marriage is also a fight for the nation (and Asia):

The overall aim is to destroy marriage as we know it . . . Some places are waiting for Taiwan to set the example. If Taiwan falls, then the rest of Asia will fall.

Joanna Lei (雷倩)
Former legislator¹⁵²

Taiwan is the first place in Asia they [the libertines] want to gain control of.
Chen Chih-hung (陳志宏) and Paul Chang (張全鋒)
Leaders of religious groups¹⁵³

If marriage equality is approved, it will shake this nation to its foundations. It will lead to the nation's destruction due to the end of procreation by Taiwanese.

Chang Shou-yi (張守一)
Leader of the alliance of religious groups¹⁵⁴

I am not a religious believer, much less a Christian, but it is important to stand up for Taiwan, the next generation and family values.

Mr. Lin
Anti-same-sex marriage rally participant¹⁵⁵

150. Chen Yi-Chien (陳宜倩), *Buzhishi Tonghun?* (不只是同婚?) [*More than Same-Sex Marriage?*], 107 FUYAN ZONGHENG (婦研縱橫) [FORUM IN WOMEN'S AND GENDER STUDIES] 44, 48 (2017).

151. See, e.g., Yuki Arai, *Is Japan Ready to Legalize Same-Sex Marriage*, 16 ASIAN-PAC. L. & POL'Y J. 122 (2014); Jae Won Shin, *Coming out of the Closet: A Comparative Analysis of Marriage Equality between the East and West*, 49 N.Y.U. J. INT'L L. & POL. 1119, 1122-23, 1132 (2017). Their view has been somewhat challenged by the facts that the Thailand government began its plan to recognize same-sex civil partnerships in 2018 and that a group of same-sex couples jointly filed lawsuits against Japanese government claiming that the denial of their marriages violates the country's constitution on Valentine's day in 2019.

152. Ralph Jennings, *As Taiwan Debates Gay Marriage, Advocates Eye Influence Abroad*, CHRISTIAN SCI. MONITOR (May 23, 2017), <https://www.csmonitor.com/World/Asia-Pacific/2017/0523/As-Taiwan-debates-gay-marriage-advocates-eye-influence-abroad> [<https://perma.cc/4UJJ-6H9T>].

153. Ho Yi, *Something Wicked This Way Comes*, TAIPEI TIMES (June 30, 2014), <http://www.taipetimes.com/News/feat/archives/2014/06/30/2003593988/1> [<https://perma.cc/89B4-EBZJ>].

154. Jason Pan, *Groups Oppose Legalizing Same-Sex Marriage*, TAIPEI TIMES (May 10, 2017), <http://www.taipetimes.com/News/taiwan/archives/2017/05/10/2003670298> [<https://perma.cc/6MSJ-9EN9>].

155. Abraham Gerber, *Protesters Hold Rally against Same-Sex Marriage in Taipei*, TAIPEI TIMES (Mar. 5, 2017), <http://www.taipetimes.com/News/taiwan/archives/2017/03/05/2003666176> [<https://perma.cc/8WCR-3TH4>].

This divided picture of same-sex marriage reveals how the issue has become a matter of national survival or national pride in Taiwan. The legalization of same-sex marriage will either enrich the nation and make it a leader in Asia or destroy Taiwan and sink other Asian countries.¹⁵⁶ Obsessed with the nation and its place in Asia as well as in the world, the Taiwanese people engage with the marriage equality controversy in ways that reflect their struggle for international recognition as well as self-identity—a struggle that is entangled with international politics as well as with the global movements for and against marriage equality.

Conclusion

The resemblance between *Obergefell v. Hodges* and the *Same-Sex Marriage* case demonstrates a convergence of the constitutional ideas of formal equality and marital supremacy. Marriage equality has served as a site of contestation in which various visions of marriage and equality compete and interact, and in which Western hegemony is at once affirmed and contested. This has resulted in the unfortunate rise of marital supremacy, the continuing prevalence of formal equality, and the loss of feminist voice in the migration of marriage equality. American feminist critiques of marriage supremacy, as diverse as they are, did not migrate with *Obergefell* to Taiwan, partly because *Obergefell* did not recognize them. Sex discrimination arguments for marriage equality did not travel across borders, partly because they did not win in courts at home.

As the standard account of marriage's trajectory shifts its focus from male supremacy to the exclusion of same-sex couples—a phenomenon that is not unique to Taiwan—it is worrying that the marriage equality movement, as it expands, is losing its critical edge and has marginalized feminist concerns. Unlike feminists in the 1990s, who held a critical view toward marriage and sought critical connection to American lesbian feminism, marriage equality advocates in the 2000s embraced the TCC's endorsement of marital supremacy and collaborated with "the father of the right to marry in the United States." Although lesbians do play a significant part in the marriage equality movement, including serving as plaintiffs for ongoing cases of marriage registration and adoption of children, lesbian feminism is rarely the prioritized issue, and lives outside marriage are left in the dark corners. In the meantime, "destroy family, abolish marriage" queer critics have borrowed from queer criticism against neo-liberal sexual governance in the United States,¹⁵⁷ and religious conservatives have translated and articulated the American Christian right's agenda and exper-

156. Cases involving the recognition of transgender marriage and the regulation of intermarriages between Taiwanese and Chinese also demonstrate the entanglement of the marriage institution and the nation's viability. See generally Sara L. Friedman, *Stranger Anxiety: Failed Legal Equivalences and the Challenges of Intimate Recognition in Taiwan*, 29 *PUB. CULTURE* 433 (2017).

157. Liu Wen (劉文), *Kuer Zuoyi "Chao Ying Gan Mei"? "Tongxinglian Zhengdian Hua" de Pianzhi ji Taiwan Tongzhi Yundong de Xiufu Quanshi* (酷兒左翼「超英趕美」? 「同性戀正典化」的偏執及臺灣同志運動的修復詮釋) [*The Queer Paranoia of Homonormativ-*

iences for their interests.¹⁵⁸ Transnational feminism is absent to the extent that the mainstream marriage equality advocacy in Taiwan has chosen to link with the American same-sex marriage movement and scholarship that emphasize formal equality and marital supremacy, rather than with skeptical marriage equality criticism and substantive equality theory. The result is that Taiwanese marriage-equality advocacy has bypassed American feminists' past efforts to recognize non-marital relationships¹⁵⁹ as well as the continuing fight against non-marital discrimination after same-sex marriage. The asymmetry of transnational flow—including the globalization of the religious conservative movement that accompanies the expansion of American experiences to Asia and not vice versa—also demonstrates the selective influence of American hegemony.

With respect to marriage equality, the challenge for transnational feminism is its very absence, which is shaped by local agents' choices, by movement and countermovement dynamics, and by the local-global structure. Although a critical connection will remain, albeit constrained by the local contexts and global structure, it is crucial to revisit the hidden histories that existed before "marriage equality," to learn from the gains and losses brought by merely extending the access to marriage, to focus on hierarchy rather than on sameness and difference, and to attend to the inequalities of those living outside marriages. A claim won in American courts may well travel to Asia with American jurisprudence as its claim to superiority, yet it may well be efforts and theories standing outside of court successes that deserve more attention from a critical mind looking for a radical change.

ity and Reparative Reading of the Taiwanese LGBT Movement], 58 YINGYONG LUNLI PIN-GLUN (應用倫理評論) [APPLIED ETHICS REV.] 101, 107-110 (2015).

158. Huang, *supra* note 67, at 132.

159. For instance, consider the advocacy of the Beyond Marriage Movement, the legislation of the Permanent Partners Immigration Act, and the law reform proposal for cohabitants. See generally CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010). These efforts are certainly not limited to the United States.

