Queer Vadis: Marching Beyond SOGIESC Equality's Incipient Gains, Lessons from American and Taiwanese Queer Legal Histories

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I. INTRODUCTION 2
II. LEVELLING OPTIMISM: THE POTENTIAL AND LIMITS OF INCIPIENT GAINS 5
III. THE UNITED STATES: PRUDENT, STRATEGIC MARCH 21
IV. TAIWAN: CONCURRING QUEER AND DEMOCRATIC IDENTITIES 41
V. FROM OBERGEFELL TO INTERPRETATION 748: TRANSCENDENT ITERATION 57
VI. THE PHILIPPINES: TOWARDS A LEGAL REGIMEN 64
A. Building on a Bedrock: On Due Process and Equal Protection

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B. A Double-edged Sword: On Religious Freedom
C. Engaging in a Democracy: Strategic Means and Normative Foundations
VII. CONCLUSION 79

I. INTRODUCTION

The Author previously wrote of the auspicious prospects for SOGIESC equality and LGBTQIA+[1] rights that recent domestic legal developments appear to be ushering in.[2] An embryonic accumulation of statutory expressions, administrative and local government action, and jurisprudential authority suggests "a trajectory of greater understanding, acceptance, and empowerment[.]"[3] Yet, the trajectory is by no means set. It is neither immutable nor certain. Idiosyncrasies, if not pathologies, of the Philippine political-legal landscape pose immense challenges: the rudiments and rigidities of legal advocacy and court action; "the [weaponization] of religious freedom in [defense] of the dominant religion and an assumed majority[;]"[4] and faltering commitment to basic democratic standards.

Addressing these challenges is hinged on formulating responsive domestic actions. Nevertheless, it is helpful to examine and learn from experiences in jurisdictions with linkages to the Philippines which have proven themselves productive even when faced with comparable obstacles.

The United States (U.S.) — after which Philippine political structures are modelled,[5] and from which the Philippines continues to draw constitutional

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1. LGBTQIA+ refers to lesbian, gay, bisexual, transgender, queer, intersex, asexual, and other gender and sexual minorities.

2. Luis Jose F. Geronimo, *Rising Above Contempt: SOGIESC Equality and LGBTQI+ Rights in Philippine Law Through the Lens of Falcis v. Civil Registrar General*, 64 ATENEO L.J. 1309, 1407 (2020).

3. *Id.*

4. Jayeel Cornelio & Robbin Charles M. Dagle, *Weaponising Religious Freedom: Same-Sex Marriage and Gender Equality in the Philippines*, 14 RELIG. & HUM. RTS. 65, 65 (2019).

5. LEIA CASTAÑEDA ANASTACIO, THE FOUNDATIONS OF THE MODERN PHILIPPINE STATE: IMPERIAL RULE AND THE AMERICAN CONSTITUTIONAL TRADITION IN THE PHILIPPINE ISLANDS, 1898–1935 248 & 263 (2016).

wisdom[6] — secured marriage equality as much through "a coherent strategy" as it did through "unflagging persistence."[7] Its progress meant navigating a political and social terrain littered with impediments. Thus, there arose a "strong coalescence"[8] between two distinct movements: "one focused primarily on law reform and the other on social change[.]"[9] Advancing on the legal front entailed an "incrementalist litigation strategy[,]"[10] which involved mapping the legal topography, scrupulously maximizing state and federal constitutional moorings, galvanizing and harnessing public opinion, and pursuing court action only when it had become the "logical, if brave, next step."[11]

Taiwan, the first jurisdiction in Asia to legalize same-sex marriage, did so within just three decades of its emergence from Chinese Nationalist military rule.[12] Taiwan's high regard for LGBTQIA+ rights is intimately tied to its drive to establish an identity unshackled from a centuries-long colonial history, as well as to distinguish itself as a democracy quite unlike its own authoritarian past and an external authoritarian threat.[13] Marriage equality, though not unopposed by internal conservative elements, coincided with the conscious national agenda.[14] It found strong electoral support in its eventual President,

6. *See, e.g.*, Re: Letter of Tony Q. Valenciano, Holding of Religious Rituals at the Hall of Justice Building in Quezon City, A.M. No. 10-4-19-SC, 819 SCRA 313, 425 (2017) (J. Jardeleza, concurring opinion). Majority opinion relying on United States jurisprudence.

7. NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA 4 (2017).

8. Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CAL. L. REV. 157, 158 (2015).

9. *Id.*

10. Stewart Chang, *Made in Taiwan: Alternative Global Models for Marriage Equality*, 34 CONN. J. INT'L L. 143, 146 (2019).

11. Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 9 (2005).

12. Ming-sho Ho, *Taiwan's Road to Marriage Equality: Politics of Legalizing Same-sex Marriage*, 238 CHINA Q. 482, 485 (2019).

13. *See* Miranda Stone, How Taiwan's Search for Identity Propelled its LGBTQ Movement, *available at* https://ketagalanmedia.com/2017/10/25/taiwans-search-identity-propelled-lgbtq-movement (last accessed July 31, 2021) [https://perma.cc/7YXV-DVDW].

14. *Id.*

Tsai Ing-wen, in 2016;[15] it was proclaimed by its Constitutional Court in 2017;[16] and it was finally legislated in 2019.[17]

As a comparative exercise, this Article sets out not to exhaustively chronicle American and Taiwanese queer legal histories, but instead to identify defining actions and episodes in those histories, as well as to draw insight relating to the Philippine experience. The Article begins by revisiting promising contemporary developments, contrasting these developments against the backdrop of pressing domestic challenges, and considering why — given these challenges — American and Taiwanese successes are worthwhile models. The discussion next proceeds with thematic explorations of how marriage equality campaigns in the U.S. and Taiwan yielded decisive judicial victories. More than a retelling of histories, these explorations are narrative demonstrations of how tactical legal action in the U.S. and concerted democratization in Taiwan were the fulcrum of success in securing conclusive judicial pronouncements that marriage equality is not merely proper or desirable, but a constitutional imperative. Drawing from Professor Stewart Chang's analysis,[18] this Article's next part compares the rulings made by the U.S. Supreme Court in *Obergefell v. Hodges*[19] and Taiwan's Constitutional Court in *Judicial Yuan Interpretation No. 748* (*Interpretation 748*).[20] While their outcomes may be similar, their principal anchors are distinct constitutional norms — due process in *Obergefell* and equal protection in *Interpretation 748*. The distinction is borne by variant histories and contemporaneous challenges. It is of immense practical importance, as it influences the availability of benefits beyond marriage equality. The distinction further suggests different strategic options in replicating success. Finally, this Article distills lessons for the Philippines: framing the debate, strategic legal engagement, and engaging constituencies. In drawing lessons, this Article hopes to contribute to fortifying

15. Ho, *supra* note 12, at 496.

16. *Id.*

17. Julia Hollingsworth, *Taiwan Legalizes Same-sex Marriage in Historic First for Asia*, CNN, May 17, 2019, *available at* https://edition.cnn.com/2019/05/17/asia/taiwan-same-sex-marriage-intl/index.html (last accessed July 31, 2021) [https://perma.cc/S2H8-ZSWJ].

18. Chang, *supra* note 10.

19. Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (U.S.).

20. Judicial Yuan Interpretation No. 748, 2017 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. (Constitutional Ct. May 24, 2017) [hereinafter Judicial Yuan Interpretation No. 748].

domestic advocacy so that the country may no longer just admire, but also secure for itself what others have attained, and potentially so much more.

II. Levelling Optimism: The Potential and Limits of Incipient Gains

Contemporary legal developments sustain hope in the struggle for SOGIESC[21] equality and LGBTQIA+[22] rights. Concededly, the SOGIE Equality Bill faces an uphill battle.[23] Still, the need for non-discrimination — first articulated in 1998 in Republic Act No. 8551[24] — has been echoed in nine subsequent statutes and in the issuances of at least 14 bodies.[25]

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21. SOGIESC refers to sexual orientation, gender identity and expression, and sex characteristics. ARC International, et al., Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review, at 13, *available at* https://ilga.org/downloads/SOGIESC_at_UPR_report.pdf (last accessed July 31, 2021) [https://perma.cc/GD53-GUNZ].

22. *Id.* at 12.

23. Geronimo, *supra* note 2, at 1409-10 (citing Bea Cupin, *House Passes SOGIE Equality Bill on Final Reading*, RAPPLER, Sept. 20, 2017, *available at* https://r3.rappler.com/nation/182796-sogie-equality-bill-passes-house (last accessed July 31, 2021) [https://perma.cc/R7LB-2HBX]; Chad de Guzman, *Anti-Discrimination Bill Fails to Hurdle Congress*, CNN PHIL., June 4, 2019, *available at* https://cnnphilippines.com/news/2019/6/4/Anti-discrimination-bill-SOGIE-equality-bill-Senate.html (last accessed July 31, 2021) [https://perma.cc/4JHY-YZUZ]; & Senate of the Philippines, Hontiveros: Sogie Equality Bill Gains New Allies and Wider Acceptance, Will Pass 18th Congress, *available at* https://www.senate.gov.ph/press_release/2019/0604_hontiveros1.asp (last accessed July 31, 2021) [https://perma.cc/4NGF-3TUB]).

24. An Act Providing for the Reform and Reorganization of the Philippine National Police and for Other Purposes, Amending Certain Provisions of Republic Act Numbered Sixty-Nine Hundred and Seventy-Five Entitled, "An Act Establishing the Philippine National Police Under a Re-Organized Department of the Interior and Local Government, and for Other Purposes" [Philippine National Police Reform and Reorganization Act of 1998], Republic Act No. 8551, § 59 (1998).

25. An Act Providing for a Magna Carta for Public Social Workers [Magna Carta for Public Social Workers], Republic Act No. 9433, § 17 (a) (2007); An Act Providing for the Magna Carta of Women [The Magna Carta of Women], Republic Act No. 9710, § 3 (2009); An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851, § 6

(2009); Department of Education, Rules and Regulations Implementing the Anti-Bullying Act of 2013, Republic Act No. 10627, rule II, § 3 (b) (5) (b.1) (2013); An Act Governing the Operations and Administration of the Overseas Workers Welfare Administration [Overseas Workers Welfare Administration Act], Republic Act No. 10801, § 32 (b) (2016); An Act Establishing a National Mental Health Policy for the Purpose of Enhancing the Delivery of Integrated Mental Health Services, Promoting and Protecting the Rights of Persons Utilizing Psychiatric, Neurologic and Psychosocial Health Services, Appropriating Funds Therefor, and for Other Purposes [Mental Health Act], Republic Act No. 11036, § 5 (b) (2018); An Act Strengthening the Philippine Comprehensive Policy on Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) Prevention, Treatment, Care, and Support, and Reconstituting the Philippine National AIDS Council (PNAC), Repealing for the Purpose Republic Act No. 8504, Otherwise Known as the "Philippine AIDS Prevention and Control Act of 1998," and Appropriating Funds Therefor [Philippine HIV and AIDS Policy Act], Republic Act No. 11166, § 3 (h) (2018); Philippine National AIDS Council, Rules and Regulations Implementing the Philippine AIDS Prevention and Control Act of 1998 (RA 8504) (1999); & An Act Providing for the Special Protection of Children in Situations of Armed Conflict and Providing Penalties for Violations Thereof [Special Protection of Children in Situations of Armed Conflict Act], Republic Act No. 11188, § 7 (i) (2019).

See Securities and Exchange Commission, 2000 Revised Rules of Procedure of the Securities and Exchange Commission, annex A, canon 3, rule 3-4 (May 30, 2000); Supreme Court, Adopting the New Code of Judicial Conduct for the Philippine Judiciary, Administrative Matter No. 03-05-01-SC [New Code of Judicial Conduct for the Philippine Judiciary], canon 5, § 1 (Apr. 27, 2004); Social Security System, Code of Ethical Standards for Social Security System Officials and Employees, Resolution No. 376, Series of 2008 [SSC Res. No. 376, s. 2008], § 8 (C) (iv) (July 10, 2008); Professional Regulatory Board of Guidance and Counseling, Code or Manual of Technical Standards for Registered and Licensed Guidance Counselors, Board Resolution No. 01-09 [PRBGC Board Res. No. 01-09], annex A, ¶ 17 (Jan. 22, 2009); Public Attorney's Office, Code of Conduct for Public Attorneys and Employees of the Public Attorney's Office, Memorandum Circular No. 007, Series of 2010 [PAO Memo. Circ. No. 007, s. 2010], § 6 (A) (e) (Aug. 27, 2010); Philippine National Police, Authorized Use of Government Information and Communications Technology Equipment, Facilities or Properties, Memorandum Circular No. 017-10 [PNP Memo. Circ. No. 017-10], ¶ 5 (b) (4) (Sept. 9, 2010); Philippine Health Research Ethics Board, National Ethical Guidelines for Health Research, at 140, *available at* https://www.healthresearch.ph/index.php/about-pnhrs/downloads/category/70-guidelines?download=452:national-ethical-guidelines-for-health-research-2011 (last accessed July 31, 2021); Department of Social Welfare and

Among laws and in administrative action, there is also a nascent "transition towards [legal] recognition, greater enabling measures, and [providing] definite bases of actionable liability."[26] For example, the Expanded Maternity Leave Law,[27] extends a degree of recognition to same-sex relations.[28] Its neutral formulation "indicates that a mother's same-sex partner can avail of maternity leave credits."[29] The Safe Spaces Act[30] articulates "the most

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Development, Enhanced Guidelines on the Code of Conduct for Personnel of the Department of Social Welfare and Development, Memorandum Circular No. 021-12 [DSWD Memo. Circ. No. 021-12], ¶ IV (5) (i) (Oct. 16, 2012); Commission on Higher Education, Establishing a Code of Conduct for the Officials and Employees of the Commission on Higher Education (CHED), Order No. 001-13 [CHED Order No. 001-13], rule III, § 4 (c) (June 25, 2013); Civil Service Commission, 2017 Omnibus Rules on Appointments and Other Human Resource Actions, Resolution No. 1701009 [CSC Res. No. 1701009], rule IX, § 83 (June 16, 2017) (as amended); Office of the President, The Merit Selection Plan in the Office of the President (OP) Proper, Memorandum Order No. 37 [Memo. Order No. 37], ¶ IV (13) (July 18, 2019); Office of the President, Amending the Policies and Guidelines on Scholarships and Other Training Grants in the Office of the President Proper (OP), Memorandum Order No. 40 [Memo. Order No. 40], ¶ I (A) (Oct. 25, 2019); REVISED RULE ON CHILDREN IN CONFLICT WITH THE LAW, A.M. No. 02-1-18-SC, § 42 (Nov. 24, 2009); RULE ON JUVENILES IN CONFLICT WITH THE LAW, A.M. No. 02-1-18-SC (June 26, 2018); 2019 SUPREME COURT REVISED RULE ON CHILDREN IN CONFLICT WITH THE LAW, A.M. No. 02-1-18-SC, § 40 (Jan. 22, 2019); & Department of Education, Department of Social Welfare and Development, Department of Interior and Local Government, and Department of Health, Guidelines on Evacuation Center Coordination and Management, Joint Memorandum Circular No. 01, Series of 2013 [Jt. Memo. Circ. No. 01-13], ¶ VIII (4.3.2) (c) (May 6, 2013).

26. Geronimo, *supra* note 2, at 1378.

27. An Act Increasing the Maternity Leave Period to One Hundred Five (105) Days for Female Workers with an Option to Extend for an Additional Thirty (30) Days Without Pay, and Granting an Additional Fifteen (15) Days for Solo Mothers, and for Other Purposes [105-Day Expanded Maternity Leave Law], Republic Act No. 11210 (2019).

28. *See id.* § 6.

29. Luis Jose F. Geronimo, *Rising Above Contempt: SOGIESC Equality and LGBTQI+ Rights in Philippine Law Through the Lens of Falcis v. Civil Registrar Genera*l, Presentation at the Philippine Queer Studies Conference (Oct. 26, 2020) (transcript on file with Author).

30. An Act Defining Gender-Based Sexual Harassment in Streets, Public Spaces, Online, Workplaces, and Educational or Training Institutions, Providing

comprehensive legislative appreciation, thus far, of SOGIE and imposes liability for gender-based sexual harassment."[31] An Opinion of the Insurance Commission from 4 March 2020[32] enables "LGBTQIA+ persons to designate their partners as life insurance beneficiaries[,]"[33] thus allowing them "to partake of a legal benefit from which they had been thought excluded."[34]

Among local government units, there is increasing momentum to adopt non-discrimination ordinances. As of 2020, at least seven provinces,[35] 25 cities,[36] four municipalities,[37] and three barangays[38] have done so. All such ordinances, except those of Quezon City and Albay, were adopted within the past decade.[39]

In jurisprudence, several decisions, beginning with the 2009 case of *Dojillo, Jr. v. Ching*,[40] indicate that the Supreme Court is becoming "increasingly gender-sensitive and perceptive of LGBTQIA+ concerns."[41]

Protective Measures and Prescribing Penalties Therefor [Safe Spaces Act], Republic Act No. 11313 (2019).

31. Geronimo, *supra* note 2, at 1379.
32. Insurance Commission, Insured's Right to Designate Beneficiary, Legal Opinion No. 2020-02 (Mar. 4, 2020).
33. Geronimo, *supra* note 2, at 1390.
34. *Id.* at 1391.
35. *Id.* at 1404 n. 436. The provinces are Agusan Del Norte, Albay, Batangas, Cavite, Dinagat Islands, Ilocos Sur, and Iloilo. *Id.*
36. *Id.* at 1404 n. 437. The cities are Angeles, Antipolo, Bacolod, Baguio, Batangas, Butuan, Cagayan de Oro, Candon, Cebu, Dagupan, Davao, Dumaguete, General Santos, Ilagan, Iloilo, Malabon, Mandaluyong, Mandaue, Manila, Marikina, Puerto Princesa, Quezon, San Juan, Taguig, and Vigan. *Id.*
37. Geronimo, *supra* note 2, at 1404 n. 438. The municipalities are San Julian, Eastern Samar; Orani, Bataan; Poro, Cebu; and Angono, Rizal. *Id.*
38. *Id.* at 1404 n. 439. The barangays are Bagbag, Greater Lagro, and Pansol, Quezon City. *Id.*
39. *Id.* at 1405 (citing Laurindo Garcia, Manila Beams with Pride, Despite Debut of Anti-Gay Protesters, *available at* https://www.fridae.asia/gay-news/2008/12/08/2168.manila-beams-with-pridedespite-debut-of-anti-gay-protesters (last accessed July 31, 2021) [https://perma.cc/8AF8-LS4B]).
40. Dojillo, Jr. v. Ching, A.M. No. P-06-2245, 594 SCRA 530 (2009).
41. Geronimo, *supra* note 2, at 1371.

Dojillo, Jr. placed a premium on the use of gender-fair language.[42] In 2010, *Ang Ladlad LGBT Party v. Commission on Elections*[43] took exception to how mere dislike animated exclusion from participation in the party-list system.[44] It also asserted that distaste for same-sex conduct was not a view that typifies Philippine moral identity.[45] More recently, *Canete v. Puti*[46] noted that being "*bakla*" itself was not an insult, but the term was derogatory when used by another to deprecate a gay person.[47] In *Abutin v. San Juan*[48] in 2020, the Court admonished a trial court judge for her disregard of basic remedial law standards, which resulted in a lesbian's partner being unable to enjoy property bequeathed to her while she was still alive.[49]

Particularly notable is the 2019 case of *Falcis v. Civil Registrar General*,[50] an apparent defeat that dismissed a petition seeking to allow same-sex marriage.[51] However, it is the most auspicious, thus far, of the Court's pronouncements. The case was dismissed only on procedural grounds, avoiding to close the door on the core issue of marriage equality, and placing no obstructionist precedent that would compound the burden of advocacy, should the matter be revisited at a more opportune time.[52]

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42. *Dojillo, Jr.*, 594 SCRA at 541 (citing New Code of Judicial Conduct for the Philippine Judiciary, canon 5; Negros Grace Pharmacy, Inc. v. Hilario, A.M. No. MTJ-02-1422, 416 SCRA 324, 330 (2003); & Dela Cruz v. Bersamira, A.M. No. RTJ-00-1567, 349 SCRA 626, 629 (2001)).
43. Ang Ladlad LGBT Party v. Commission on Elections, G.R. No. 190582, 618 SCRA 32 (2010).
44. *Id.* at 62.
45. *Id.* at 61 (citing Anonymous v. Radam, A.M. No. P-07-2333, 541 SCRA 12, 18 (2007) (citing Concerned Employee v. Mayor, A.M. No. P-02-1564, 443 SCRA 448, 460 (2004))).
46. Canete v. Puti, A.C. No. 10949, 912 SCRA 572 (2019).
47. *Id.* at 581.
48. Filipina D. Abutin v. Josephine San Juan, G.R. No. 247345, July 6, 2020, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66590 (last accessed July 31, 2021).
49. *Id.* at 17-19.
50. Falcis v. Civil Registrar General, G.R. No. 217910, Sept. 3, 2019, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65744 (last accessed July 31, 2021).
51. *Id.* at 3-5.
52. Geronimo, *supra* note 2, at 1411.

Promisingly, the Decision recognized the LGBTQIA+ community as a marginalized minority.[53] The Court made this determination in passing upon the pivotal matter of the existence of a justiciable case or controversy.[54] In appraising justiciability, the Court declared that "[t]he need to demonstrate an actual case or controversy is even more compelling in cases concerning minority groups."[55] It then proceeded to examine various dimensions — including scientific and medical, anthropological, historical, and legal — of the LGBTQIA+ experience[56] and concluded that

> [t]he history of erasure, discrimination, and marginalization of the [LGBTQIA+] community impels this Court to make careful pronouncements — lest it cheapen the resistance, or worse, thrust the whole struggle for equality back to the long shadow of oppression and exclusion. The basic requirement of actual case or controversy allows this Court to make grounded declarations with clear and practical consequences.[57]

The Court also found counsels liable for lapses. This finding of professional liability similarly turned on a determination that the LGBTQIA+ community is a marginalized minority —

> [B]y thrusting themselves into the limelight to take up the cudgels on behalf of a minority class, they represent the hopes and aspirations of a greater mass of people, not always with the consent of all its members. Their errors and mistakes have a ripple effect even on persons who did not agree with or had no opportunity to consent to the stratagems and tactics they employed.[58]

In a definite departure from pre-2009 jurisprudence replete with indifference, and even outright prejudice,[59] the Court further indicated that it

53. *Falcis*, G.R. No. 217910, at 2.

54. *Id.* at 33.

55. *Id.*

56. *Id.* at 33-46.

57. *Id.* at 46.

58. *Id.* at 105.

59. Geronimo, *supra* note 2, at 1366-71 (citing People v. Joaquin, Jr., G.R. Nos. 98007-08, 225 SCRA 179 (1993); Pablo-Gualberto v. Gualberto V, G.R. No. 154994, 461 SCRA 450 (2005); Almelor v. Regional Trial Court of Las Piñas City, Br. 254, G.R. No. 179620, 563 SCRA 447 (2008); Ngo Te v. Yu-Te, G.R. No. 161793, 579 SCRA 193 (2009); People v. Taruc, G.R. Nos. 69337-38, 171 SCRA 75 (1989); People v. Sandoval, G.R. Nos. 95353-54, 254 SCRA 436 (1996); Silverio v. Republic, G.R. No. 174689, 537 SCRA 373 (2007); & Republic v. Cagandahan, G.R. No. 166676, 565 SCRA 72 (2008)).

"[understood] the desire of same-sex couples to seek, not moral judgment based on discrimination from any of our laws, but rather, a balanced recognition of their true, authentic, and responsive choices."[60] It stated that same-sex couples "certainly deserve legal recognition in some way[ ]"[61] and expressed hope at Congress "[seeing] the wisdom of acting with dispatch to address the suffering of many of those who choose to love distinctively, uniquely, but no less genuinely and passionately."[62]

Falcis, thus, signals a potential watershed moment.[63] As "the most authoritative declaration by the government on [LGBTQIA+ concerns], thus far[,]"[64] it "is brimming with potential arms and munitions in the struggle for equality[, which] are now for advocates and policy-makers to wield."[65]

The collective phenomenon of *Falcis* and its contemporary developments inspire confidence in ongoing attitudinal and policy shifts. There appears to be a trajectory towards securing rights and equality that may induce one to think that protections, benefits, or even marriage equality itself will eventually be ruled as a matter of course. *Falcis*' binary action of, on the one hand, dismissing the petition without denying its substantive plea and, on the other, judicial pronouncement on marginalization and the need to empower, appears particularly potent. In the confines of court action, and consistent with *stare decisis*, the determination of marginalization can propel adjudication inclined towards protection. It can anchor critical analysis of discrimination based on suspect or quasi-suspect classifications, thereby "[triggering] a heightened level of review."[66] As citations and authorities are "the currency of the legal system[,]"[67] *Falcis* may not have delivered the precise value that its proponents hoped it would, but they still won a medium of profound worth. Beyond adjudication, the finding of marginalization and determination of minority status by the highest court of the land is a powerful impetus for legislative and executive action, particularly in extending specific protections.

60. *Falcis*, G.R. No. 217910, at 107.

61. *Id.* at 3.

62. *Id.* at 107.

63. Geronimo, *supra* note 2, at 1410.

64. *Id.* at 1366.

65. *Id.* at 1411.

66. *Ang Ladlad LGBT Party*, 618 SCRA at 87 (C.J. Puno, concurring opinion).

67. Frank B. Cross, et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 490 (2010).

The seeming trajectory, however, is far from immutable or assured. It would be to succumb to a formalist mirage to assume that the course is set. The lived realities of legal practice prove that more needs to be done than to invoke authority or plead precedent. To borrow from *Falcis*, the exercise will "demand[ ] more than the cursory invocation of legal doctrines, as though they were magical incantations swiftly disengaging obstacles at their mere utterance."[68]

Falcis comes at a time when the Supreme Court, saddled by a perennially insurmountable docket, has galvanize[d] "commitment to procedural standards as a means of sieving through cases."[69] In 2019, *Gios-Samar, Inc. v. Department of Transportation and Communications*[70] expressly referenced the "staggering numbers"[71] facing the Court as it "frame[d] the doctrine of hierarchy of courts in absolute terms[.]"[72] It extolled the doctrine as a "filtering mechanism"[73] integral to the design of the judicial system.[74] In 2018, *The Provincial Bus Operators Association of the Philippines v. Department of Labor and Employment*[75] emphasized the Court's desistance from entertaining policy questions.[76] In 2020, *Kumar v. People of the Philippines*[77] maintained that petitions for review on *certiorari* which fail to demonstrate "special and important reasons"[78] justifying review may be denied through mere minute

68. *Falcis*, G.R. No. 217910, at 105.

69. Luis Jose F. Geronimo, *Facing the Facts: Confronting Legislative Facts in Supreme Court Adjudication*, 94 PHIL. L.J. 41, 46 (2021).

70. Gios-Samar, Inc. v. Department of Transportation and Communications, G.R. No. 217158, 896 SCRA 213 (2019).

71. *Id.* at 291.

72. Geronimo, *supra* note 2, at 44.

73. *Gios-Samar, Inc.*, 896 SCRA at 290.

74. *Id.* at 284-90.

75. The Provincial Bus Operators Association of the Philippines, et al. v. Department of Labor and Employment, G.R. No. 202275, July 17, 2018, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64411 (last accessed July 31, 2021).

76. *Id.* at 2.

77. Deepak Kumar v. People of the Philippines, G.R. No. 247661, June 15, 2020, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66335 (last accessed July 31, 2021).

78. 1997 RULES OF CIVIL PROCEDURE, rule 45, § 6.

resolutions,[79] foregoing the need for a comment from the respondent. Also in 2020, *Parcon-Song v. Parcon*[80] noted that the policy of constitutional avoidance impelled the Court to refrain from passing upon the constitutionality of a foreign bank's acquisition of foreclosed real property.[81]

Procedural filters have proven instrumental in halting the progress of cases involving national political interest. This was demonstrated in the denial of separate petitions seeking information on President Rodrigo Duterte's state of health[82] and seeking to enable mass testing for COVID-19.[83] In 2021, much of the discussion concerning 37 consolidated petitions assailing the Anti-Terrorism Act of 2020 centered on the existence of justiciable facts and the viability of a facial challenge.[84]

On top of the typical rigors of litigation and the zero-sum risks associated with the adversarial system, court actions hoping to advance SOGIESC equality and LGBTQIA+ rights must come to terms with this trend in jurisprudence. A paramount challenge then, even before the merits of their claims can be tackled, is the need to navigate narrowing procedural strictures.

Beyond technical-legal rudiments, the Philippines' single, most obstructive hindrance to SOGIESC equality and LGBTQIA+ rights — as it is with cognate progressive issues such as reproductive health and divorce —

79. *Kumar*, G.R. No. 247661, at 6 & 12.

80. Julie Parcon-Song v. Lilia B. Parcon, et al., G.R. No. 199582, July 7, 2020, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66525 (last accessed July 31, 2021).

81. *Id.* at 13 & 17-18.

82. Dino S. De Leon v. Rodrigo Roa Duterte, G.R. No. 252118, May 8, 2020, *available at* https://sc.judiciary.gov.ph/12172 (last accessed July 31, 2021).

83. Citizens Urgent Response to End COVID-19 Spokesperson Prof. Judy M. Taguiwalo, et al. v. Dr. Francisco T. Duque III, et al., G.R. No. 252556, Sept. 1, 2020, *available at* https://sc.judiciary.gov.ph/19458 (last accessed July 31, 2021). *See also* Supreme Court of the Philippines, SC Dismisses Petition Seeking COVID-19 Mass Testing, *available at* https://sc.judiciary.gov.ph/13542 (last accessed July 31, 2021) [https://perma.cc/Y4LK-WVS8].

84. Mike Navallo, *Leonen: Shouldn't SC Wait for 'Actual Case' in Petitions vs Anti-Terrorism Act?*, ABS-CBN NEWS, Feb. 3, 2021, *available at* https://news.abs-cbn.com/news/02/03/21/leonen-shouldnt-sc-wait-for-actual-case-in-petitions-vs-anti-terrorism-act (last accessed July 31, 2021) [https://perma.cc/5CJF-QQ86].

has been religious opposition. Non-establishment notwithstanding,[85] religious considerations have animated exclusionary rulings against LGBTQIA+ persons. The 2007 case of *Silverio v. Republic*[86] immediately betrayed its leanings when, in its epigraph, it adverted to Judeo-Christian creationism and quoted the Book of Genesis — "[w]hen God created man, He made him in the likeness of God; He created them male and female."[87] In reviewing and setting aside the Commission on Elections' prior ruling that served as the subject of *Ang Ladlad*, the Supreme Court needed to admonish the Commission on Elections for invoking religious authorities to justify the petitioner's exclusion from the party-list system —

> [W]hat our non-establishment clause calls for is 'government neutrality in religious matters.' Clearly, 'governmental reliance on religious justification is inconsistent with this policy of neutrality.' We thus find that it was grave violation of the non-establishment clause for the COMELEC to utilize the Bible and the Koran to justify the exclusion of *Ang Ladlad*.
>
> Rather than relying on religious belief, the legitimacy of the Assailed Resolutions should depend, instead, on whether the COMELEC is able to advance some justification for its rulings beyond mere conformity to religious doctrine. Otherwise stated, government must act for secular purposes and in ways that have primarily secular effects.[88]

Compounding the matter is a "[m]ilitant Christianity"[89] that has been noted to have appropriated religious freedom[90] — a mechanism that should protect minorities — and which capitalizes on majoritarian religiosity to not only facilitate LGBTQIA+ erasure, but also to draw belligerent lines —

> The discursive move effortlessly relies upon the normative dispositions of the majority. The majority, it must be [emphasized], is not imagined. Public opinion is not entirely sold to gender equality.

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85. PHIL. CONST. art. III, § 5.

86. Silverio v. Republic, G.R. No. 174689, 537 SCRA 373 (2007).

87. *Id.* at 380 (citing *Genesis* 5:1-2 (New International)).

88. *Ang Ladlad LGBT Party*, 618 SCRA at 58-59 (citing JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 346 (2009) & Estrada v. Escritor, 408 SCRA 1, 82 (2003) (citing Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 160 (1991))).

89. Cornelio & Dagle, *supra* note 4, at 90.

90. *See id.*

> That this is the case is also why to appeal to the majority is to invoke essentialist values about what it means to be Filipino. The heteronormative family remains ideal, a virtue in itself that resonates with the Scriptural readings of different religious groups. ... [R]eligious leaders have warned against the influence of Western values as a result of global shifts [favoring] same-sex marriage. In this light, the [weaponization] of religious freedom in itself manifests religious nationalism, or the belief that the Philippines is a Christian country that must uphold Christian values and principles. By invoking such values, these Christian groups exhibit majoritarianism by claiming 'to represent 'the people,'' and in turn [characterizing] minorities as 'enemies of the nation-state[.'][91]

The net effect is not merely the exclusion and vilification of a defined "other." Rather, it is the erosion of a liberal-democratic order's defining freedoms. "The casualty of [weaponizing] religious freedom is thus clear. The free market of ideas, beliefs, and practices — the very assumption of religious freedom — is in the end restricted."[92]

The exclusionary drive against LGBTQIA+ persons therefore unveils fundamental flaws concerning democratic commitment. Together with anti-pluralism, it is a component of a multi-faceted syndrome of democratic erosion that encompasses other more acknowledged debilities such as patronage and rent-seeking, militarization, attacks on the media, a faltering judiciary, and a politics of impunity.

It is imperative then to go beyond neat formal-legal blueprints and to grapple with realpolitik if the domestic queer movement is to win its struggle for SOGIESC equality and LGBTQIA+ rights, in general, and for marriage equality, in particular. Recognizing the limits of and obstacles in the legal

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91. Cornelio & Dagle, *supra* note 4, at 91-92 (citing Jayeel S. Cornelio, *The Philippines*, *in* CHRISTIANITY IN EAST AND SOUTHEAST ASIA 252 (Kenneth R. Ross, et al. eds., 2020); Jose Mario C. Francisco, S.J., *People of God, People of the Nation: Official Catholic Discourse on Nation and Nationalism*, 62 PHIL. STUD. 341, 362-63 (2014); & Dipankar Gupta, *Citizens Versus People: The Politics of Majoritarianism and Marginalization in Democratic India*, 68 SOCIOLOGY RELIG. 27, 30 (2007)).

92. Cornelio & Dagle, *supra* note 4, at 92 (citing Winnifred Fallers Sullivan, et al., *Introduction*, *in* POLITICS OF RELIGIOUS FREEDOM 1-9 (Winnifred Fallers Sullivan, et al. eds., 2015) & Elizabeth Shakman Hurd, *Believing in Religious Freedom*, *in* POLITICS OF RELIGIOUS FREEDOM 45-56 (Winnifred Fallers Sullivan, et al. eds., 2015)).

terrain and driven by the need to devise responses accordingly, it is helpful to examine and learn from analogous foreign experiences.

A caveat, it is illusory to assume that any particular foreign context suffices as a consummate stand-in for the Philippine setting. Compounding the difficulty, SOGIESC equality, LGBTQIA+ rights, and marriage equality are still being fought for the world over. Few, if any, jurisdictions can boast of superlative attainment. Nevertheless, significant lessons can be learned from the experiences of jurisdictions which have struggled with comparable difficulties, and which have linkages to and bear likeness with the domestic legal and political contexts.

In selecting models, the Article sets as a threshold requisite the *de jure* attainment of marriage equality. This is neither to say that matrimony encapsulates the entirety of LGBTQIA+ ideals,[93] nor to misrepresent the LGBTQIA+ movement as a monolith fixed on the conjugal objective.[94]

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93. There have been differences within the queer community itself on the propriety and adequacy of marriage as an objective. For example, a distinction has been drawn between formal equality, represented in marriage, and transformative equality —

> The gay-liberal argument for same-sex marriage primarily rests upon the norm of *formal equality:* The [S]tate ought to accord the same legal options for committed same-sex couples that different-sex couples now enjoy, including the rights and duties entailed in civil marriage. Although almost all [LGBTQIA+] Americans agree that the [S]tate should not discriminate against or exclude them from [S]tate institutions, they do not all support same-sex marriage. Gay-radicals, for example, believe in *transformative equality*: a culture that has denigrated and randomly persecuted gender-benders and sexual minorities must itself change if these unfairly disadvantaged groups are to assume their rightful place as equal citizens; marriage is a prominent part of such an oppressive society. Hence[,] LGBT people should seek new forms of legal recognition rather than assimilate into a questionable form.

WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 13 (2006).

94. Nathaniel Frank similarly recalled —

> Indeed, across the first several decades of the gay rights movement, most of its members were working toward goals other than marriage: protecting gays and lesbians from violence, eliminating laws that made sodomy a crime and thus turned gay people into presumed criminals, fighting for child custody rights, and ensuring access to jobs, health care,

Marriage, nevertheless, is vital for what it represents. It is "profoundly significant ... on personal, legal, [and] cultural ... levels."[95] It has been regarded "as one of the vital personal rights essential to the orderly pursuit of happiness by free [persons]."[96] Culturally, "marriage represents the ideal institution of connection and commitment."[97] Legally, marriage is an unparalleled gateway to a "constellation of benefits,"[98] "touching nearly every aspect of life and death."[99] The Supreme Court demonstrated this in *Falcis*, whose Part VIII — spanning 33 of its 109 pages[100] — considered the "litany of provisions"[101] on the legal incidents of marriage. Thus, "[LGBTQIA+] people and families are categorically denied enormous rights and protections [just] because they are denied marriage."[102] This denial relegates LGBTQIA+ persons to subordinate citizenship.[103] Drawing on the struggle to undo dominant, oppressive modes, and drawing analogies between distinct minority experiences in the U.S., Nancy F. Cott considered the extent to which the denial of marriage betrays the truth of state-sanctioned segregation —

> Bring same-sex marriage into view, however, and the suitability of the disestablishment parallel fails. If disestablishment of formal and legal

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> and military service. To those working in the trenches of these harrowing social and political battles to protect the rights and very lives of gay people — most traumatically in the 1980s during the catastrophic AIDS crisis — marriage could seem like an impossibility or, at best, a distant luxury. In any event, as heirs to 1960s radicalism, many gay activists viewed marriage as bourgeois, constrictive, exclusionary, and — particularly among feminists — patriarchal. Outsiders to the mainstream, they hoped instead to advance an alternative vision of family and community. Some proposed entirely new legal arrangements that would recognize and protect relationships without replicating the privileged hierarchies of traditional marriage.

FRANK, *supra* note 7, at 2-3.

95. Bonauto, *supra* note 11, at 2-3.

96. Loving v. Commonwealth of Virginia, 388 U.S. 1, 12 (1967).

97. Bonauto, *supra* note 11, at 4.

98. *Obergefell*, 135 S.Ct. at 2601.

99. Goodridge v. Department of Public Health, 440 Mass. 309, 323 (Mass. 2003) (U.S.).

100. *Falcis*, G.R. No. 217910, at 50-82.

101. *Id.* at 78.

102. Bonauto, *supra* note 11, at 5.

103. *See id.* at 6.

> Christian-model monogamy were real, public authorities would grant the same imprimatur to every kind of couple's marriage. That has not happened. ... As late as 1986, the U.S. Supreme Court upheld a Georgia law under which two consenting male homosexuals were arrested for what they did in private and at home. In 1996, Supreme Court Justice Antonin Scalia grouped murder, polygamy, and homosexuality together as kinds of inherently reprehensible conduct ... . [R]esistance to same-sex marriage show[s] that the profound transformation of disestablishment has *not* taken place.
>
> Lesbians and gay men seek legal marriage for some of the same reasons ex-slaves did so after the Civil War, to show that they have access to basic civil rights. The exclusion of same-sex partners from free choice in marriage stigmatizes their relationship, and reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy.[104]

In the interest of congruous comparisons, and to keep fidelity with analysis of legal technique, the Article shall focus further on jurisdictions that secured marriage equality through adjudication rather than through legislation. Divergent techniques are involved in obtaining relief through court action, as against adopting legislation. Rigid technical rules bind the former, while pliable political lobbies drive the latter. Focusing on successful legislative lobbies therefore leans immensely on political analysis. Melding analysis of divergent techniques — legal and political — risks dissonant tactical comparisons.[105]

Among the jurisdictions that secured marriage equality judicially, the Article focuses on the U.S. and Taiwan. Some of the Philippines' most obstructive barriers were among the same challenges which marriage equality movements in these jurisdictions have had to overcome: legal strictures and religious militancy in the U.S., and democratic legitimacy in Taiwan. The American example demonstrates how success was secured through prudent legal action that accounted for and adapted to topographical vulnerabilities. Taiwan exemplifies how social currents were harnessed, such that marriage equality's tethering to fundamental norms and national ideals drove success.

Historical-legal function and political aspiration further drive these choices. American constitutional theories have been uniquely persuasive

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104. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 215-16 (2000).

105. A consideration of political strategy will inevitably be made, given the actualities of American and Taiwanese marriage equality advocacies. However, any such consideration will be made with a view to framing analysis of legal technique.

authorities.[106] This is on account of common ancestry, or, in other words, a concededly colonial vestige. A number of the Philippines' extant constitutional structures are products of a deliberate American effort to replicate their modalities and traditions.[107] The transplant has urged a

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106. In re Application of MAX SHOOP for Admission to Practice Law, 41 Phil. 213 (1920). This colonial-era decision by the Philippine Supreme Court adverts to the weight of American (and Spanish) sources in declaring that the Court "relies upon the theories and precedents of Anglo-American cases, subject to the limited exception of those instances where the remnants of the Spanish written law present well-defined civil law theories and of the few cases where such precedents are inconsistent with local customs and institutions." *Id.*

    Further, a 2020 decision involving the right against unreasonable search and seizure illustrates the continuing potency of American sources — "[c]onsidering that the doctrine that an extensive warrantless search of a moving vehicle necessitates probable cause was adopted by the [Supreme] Court from United States jurisprudence, examining United States jurisprudence can aid in a fuller understanding[.]" People of the Philippines v. Jerry Sapla y Guerrero, G.R. No. 244045, June 16, 2020, at 12, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66263 (last accessed July 31, 2021).

107. This is not to say that the transplant has neither been factually problematic nor normatively unchallenged. Leia Castañeda Anastacio explored the problems posed by the colonial transplanting of avowedly liberal structures —

    > The Philippine Commonwealth and the Philippine government that succeeded it essentially replicated the Insular Government and preserved a constitutional tradition produced by Americans and Filipinos, who implemented American liberal constitutional principles under colonial rule and determined thereby what it meant for the Islands to be ruled by law. And it is striking how much of this colonial constitutional experience was kept by Filipino framers. Like the British North American colonial assemblies, the Insular Legislature had championed the rights of the Filipino people against their American rulers, but Filipino framers did not mimic the new [S]tate governments, which honored the achievements of colonial assemblies by concentrating power in legislatures and emasculating the British-controlled magisterial executive and judicial branches. Rather than create a strong legislature by institutionalizing the Insular Legislature's parliamentary responses to a colonial presidential model, Filipino framers not only left practically intact the colonial configuration of power, but further strengthened the chief executive within this inherited scheme.
    >
    > ...

> Ultimately, the problems are rooted in America's well-intentioned yet perhaps wrong-headed efforts to reconcile the irreconcilable: to tame colonialism with liberalism by providing sovereignty's trappings without its title. As we have seen, American colonial policymakers accomplished this exceptional feat by severing the principles of the American democratic and liberal constitutional tradition, not only from the institutional arrangements that qualified their application, but more fundamentally, from the community of the governed whose consent must be its foundation and source of legitimacy. But because the control necessary to maintain order and ensure the success of colonial aims often proved incompatible with the degree of consent and participation necessary to create the illusion of legitimacy, the fiction of exceptional imperialism strained under the weight of its own contradiction. This strain laid bare the true locus of sovereign authority even as it gave rise to a political practice that swathed it in a shimmering diaphanous rhetoric of rights and popular consent.

ANASTACIO, *supra* note 5, at 262 & 265 (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–87 136, 149, & 155 (1969)).

Contemporary discourse in the Supreme Court itself has also been critical of reliance on American authorities, with one example being the exchange between Associate Justice Marvic M.V.F. Leonen and Atty. Alfredo Molo III during the oral arguments on the Anti-Terrorism Act of 2020 —

> Justice Leonen: Well, you quoted Justice Jackson. Is that a Filipino justice?
>
> Atty. Molo: No, Your Honor, but his *ponencia* was...
>
> Justice Leonen: Yes, but why should we listen to Justice Jackson? It's the Philippine Flag that flies over the Supreme Court. I notice that you are fond of citing Jackson, *Baker v. Carr, U.S. v. Stevenson*... These are not jurisprudence here, is that not correct?
>
> Atty. Molo: Your Honor, yes. You are correct.
>
> Justice Leonen: You might have as well cited South African jurisprudence, or Indian jurisprudence. But, as far as we are concerned, as I will show you later, we have had our own interpretation of actual case, and the more recent one. Is that not correct?
>
> Atty. Molo: Yes, Your Honor. Yes.
>
> Justice Leonen: So, in other words, the Court has maintained a policy of deference simply because of the nature of the Court itself. Is that not correct?
>
> Atty. Molo: Yes, sir.

The Supreme Court of the Philippines, Video, *Oral Arguments on the Anti-Terrorism Act of 2020, Republic Act No. 11479 – February 2, 2021*, YOUTUBE, Feb.

modelling of mechanisms concerning judicial review (e.g., filters for justiciability, constitutional avoidance, and the vehicle of *certiorari*).[108]

In contrast with what impels reference to the U.S., Taiwan's embrace of LGBTQIA+ rights is driven by self-determination. This embrace is moved by the forging of a distinct, "explicitly not Chinese[,]"[109] national identity. It is rooted in liberalism inherent in and inexorable from an exercise in democratization consciously meant to transcend a colonial past,[110] as well as to dispel a looming authoritarian specter.[111] Taiwan's political status may be challenged, but it has delivered on its democratic commitment and, thus, has earned its place as an exemplar among the world's democracies.[112]

III. THE UNITED STATES: PRUDENT, STRATEGIC MARCH

Fresh out of law school in 1987, Mary L. Bonauto actively "resisted a dash to the Supreme Court"[113] or, for that matter, any American court to sue for marriage equality. She courted frustration and endured the anguish of same-sex couples who sought her help as soon as she joined Gay & Lesbian

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2, 2021, *available at* https://www.youtube.com/watch?v=dwPdzdVkkEA (last accessed July 31, 2021).

108. *See* Heirs of Eliza Q. Zoleta v. Land Bank of the Philippines, G.R. No. 205128, 836 SCRA 367 (2017).

109. Jeffrey Bruce Jacobs, *Whither Taiwanization? The Colonization, Democratization and Taiwanization of Taiwan*, 14 JAPANESE J. POL. SCI. 567, 567 (2013).

110. Chao-ju Chen, *Migrating Marriage Equality Without Feminism: Obergefell v. Hodges and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L.J. 65, 95-96 (2019).

111. *Id.* at 96.

112. Trevor Sutton & Brian Harding, *Why Taiwan's Gay Marriage Ruling Matters*, DIPLOMAT, June 1, 2017, *available at* https://thediplomat.com/2017/06/why-taiwans-gay-marriage-ruling-matters (last accessed July 31, 2021) [https://perma.cc/Y4L4-SFKG].

113. Randy Maniloff, 5 Years After Landmark Gay Marriage Ruling by SCOTUS, Lawyer in the Case Says It's 'Gone Swimmingly Well', *available at* https://www.abajournal.com/web/article/5-years-after-landmark-gay-marriage-case-mary-bonauto-says-its-gone-swimmingly-well (last accessed July 31, 2021) [https://perma.cc/7NUG-32F5].

Advocates & Defenders (GLAD)[114] in 1990. However, she "was convinced the nation was not ready for gay marriage"[115] —

> For years, Mary had heard firsthand the heartbreaking stories of same-sex couples, some together for decades, who had to deal with indignities such as having blood relatives who had been out of touch for years swoop in after a death to claim property that the couple had shared for their entire lives, or needing blood relatives to rush across the country to make medical decisions because the life partner was not permitted to do so. She knew marriage would fix all of this, as well as serve as a marker of the full citizenship of gay and lesbian people for whom the denial of marriage was a powerful injustice. But Mary held off on filing a marriage lawsuit for years, believing the courts weren't yet ready.[116]

Decades later, however, she would be celebrated as a "first-rate lawyer and a first-rate strategist[.]"[117] Openly gay Massachusetts Representative Barney Frank dubbed her "our Thurgood Marshall,"[118] after the civil rights champion who argued and won *Brown v. Board of Education*,[119] among other civil rights cases, before the U.S. Supreme Court, and who would himself become the first African-American U.S. Supreme Court Justice.[120] Roberta A. Kaplan, who successfully argued *United States v. Windsor*,[121] called Mary L.

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114. *Id.* The organization is now named GLBTQ Legal Advocates & Defenders. *Id.*

115. Yvonne Abraham, 10 Years' Work Led to Historic Win in Court, *available at* http://archive.boston.com/news/local/articles/2003/11/23/10_years_work_led_to_historic_win_in_court (last accessed July 31, 2021) [https://perma.cc/3BTM-WRHT].

116. MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS — AND WON 3-4 (2014).

117. Sheryl Gay Stolberg, *In Fight for Marriage Rights, 'She's Our Thurgood Marshall'*, N.Y. TIMES, Mar. 27, 2013, *available at* https://www.nytimes.com/2013/03/28/us/maine-lawyer-credited-in-fight-for-gay-marriage.html (last accessed July 31, 2021) [https://perma.cc/42R3-ZP8Y].

118. *Id.*

119. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

120 National Association for the Advancement of Colored People Legal Defense and Educational Fund, Inc., Who Was Thurgood Marshall?, *available at* https://www.naacpldf.org/about-us/history/thurgood-marshall/ (last accessed July 31, 2021) [https://perma.cc/TA9H-ESQ8].

121. United States v. Windsor, 570 U.S. 744 (2013).

Bonauto "the undisputed architect of the marriage equality movement."[122] Kaplan also expounded on the Justice Marshall comparison, saying, "[s]he conceived of a strategy just like him, over a long number of years, and then implemented it[.] ... It was strategically brilliant, and she succeeded."[123] Bonauto proved herself such an effective advocate, winning the respect of even her opponents. "She has always been the consummate professional, very courteous and gentle," said Kris Mineau of the Massachusetts Family Institute, even as he said her courtroom victories had "degraded the value of marriage."[124]

The march to marriage equality in the U.S. was slow and laborious.

In 1967, in *Loving v. Virginia*,[125] the U.S. Supreme Court struck down anti-miscegenation laws and marital restrictions based on race.[126] Urged by *Loving*[127] and kindled by the 1969 Stonewall Riots, the "[f]irst trio of marriage cases"[128] was brought before U.S. courts: *Baker v. Nelson* (1972),[129] *Jones v. Hallahan* (1973),[130] and *Singer v. Hara* (1974).[131] Each of these pleas for same-sex marriage was "roundly rejected"[132] and ominously so —

> In the U.S., same-sex marriage was first brought to the Supreme Court's attention in 1972 in *Baker v. Nelson*. This involved an application for marriage license by gay couple James Michael McConnell and Richard John Baker.

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122. ROBERTA A. KAPLAN, THEN COMES MARRIAGE: HOW TWO WOMEN FOUGHT FOR AND WON EQUAL DIGNITY FOR ALL 179 (2015).

123. Stolberg, *supra* note 117.

124. *Id.*

125. Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967).

126. *Id.* at 12.

127. Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC, July 1, 2015, *available at* https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052 (last accessed July 31, 2021) [https://perma.cc/6PMK-Z7MZ].

128. Chris Geidner, *The Court Cases That Changed L.G.B.T.Q. Rights*, N.Y. TIMES, June 19, 2019, *available at* https://www.nytimes.com/2019/06/19/us/legal-history-lgbtq-rights-timeline.html (last accessed July 31, 2021) [https://perma.cc/J28F-GHEN].

129. Baker v. Nelson, 409 U.S. 810 (1972).

130. Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973) (U.S.).

131. Singer v. Hara, 11 Wn.App. 247 (Wash. Ct. App. 1974) (U.S.).

132. Geidner, *supra* note 128.

> Before being brought to the U.S. Supreme Court, during oral arguments before the Minnesota Supreme Court, Justice Fallon Kelly 'rotated his chair to face the wall, literally turning his back' on lawyer Mike Wetherbee as he argued the case for McConnell and Baker. When it was its turn, the U.S. Supreme Court did not merely rule against the appeal. It did so unceremoniously, in a one-sentence order: 'Appeal from Sup. Ct. Minn, dismissed for want of substantial federal question.'
>
> *Jones* was particularly dismissive, stating, 'what they propose is not a marriage' and that 'no constitutional issue [was] involved.'[133]

In a disconcerting sign, on 24 November 1975, the Immigration and Naturalization Service of the U.S. Department of Justice did not balk at the use of a slur in an official document denying the spousal visa sought by gay couple Richard Adams and Anthony Sullivan in order that Sullivan, an Australian, could stay in the U.S. — "[y]ou have failed to establish that a bona fide marital relationship can exist between *two faggots*."[134]

Intervening developments between the first trio and 2015's *Obergefell v. Hodges*[135] only appeared to set back hopes of marriage equality. An initial victory at the State level would be thwarted both at the federal and State levels, suggesting that success was a long way off.

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133. Geronimo, *supra* note 2, at 1408 (citing *Baker*, 409 U.S.; ESKRIDGE, JR. & SPEDALE, *supra* note 93, at 22; Andrew Janet, *Eat, Drink, and Marry: Why Baker v. Nelson Should Have No Impact on Same-Sex Marriage Litigation*, 89 N.Y.U. L. REV. 1777, 1778 (2014)).

134. Robert Barnes, *40 Years Later, Story of a Same-Sex Marriage in Colo. Remains Remarkable*, WASH. POST, April 18, 2015, *available at* https://www.washingtonpost.com/politics/courts_law/40-years-later-a-same-sex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfabc310_story.html (last accessed July 31, 2021) [https://perma.cc/7DP5-X84U] (emphasis supplied). *See also* Gina Voortella & Nox Voortella, Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign, *available at* http://www.freedomtomarry.org/pages/how-it-happened (last accessed July 31, 2021) [https://perma.cc/5VKK-Z8Y7] & German Lopez, This Shocking 1975 Letter Shows How Far the Federal Government Has Come on Gay Rights, *available at* https://www.vox.com/2015/4/20/8457441/justice-department-marriage-equality (last accessed July 31, 2021) [https://perma.cc/JP8G-8VED].

135. Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (U.S.).

In 1993's *Baehr v. Lewin*,[136] the Hawaii Supreme Court found merit in a suit brought by three same-sex couples who claimed that the State's refusal to issue marriage licenses to them amounted to unjust discrimination.[137] The Hawaii Supreme Court did not go to the extent of completely striking down Hawaii's exclusion of same-sex couples from marriage and instead remanded the case to the trial court, where the State could be allowed to demonstrate that the exclusion satisfies the strict scrutiny test — that it "furthers *compelling* state interests and is *narrowly drawn* to avoid unnecessary abridgments of constitutional rights."[138]

As a reaction to *Baehr*, however, the Defense of Marriage Act[139] was passed in 1996 "by the overwhelming margins of 342 to 67 in the [U.S.] House of Representatives and 85 to 14 in the [U.S.] Senate."[140] It defined marriage, for federal purposes, as "only a legal union between one man and one woman as husband and wife."[141] It thus, barred federal recognition of same-sex marriages, stipulating —

> No State, territory, or possession of the [U.S.] ... shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[142]

In 1998, Hawaii's state constitution was amended, giving its legislature "the power to reserve marriage to opposite-sex couples."[143] Following this, in 1999, the Hawaii Supreme Court was constrained to rule "that Hawaii's

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136. Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993) (U.S.).

137. *Id.* at 48-49.

138. *Id.* at 68 (emphases supplied).

139. Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1666 (2017) (citing Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996), aff'd, 950 P.2d 1234 (Haw. 1997), remanded from Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)) & SOLOMON, *supra* note 116, at 4.

140. SOLOMON, *supra* note 116, at 4.

141. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2420 (1996) (U.S.).

142. *Id.* § 2.

143. HAW. CONST. art 1, § 23.

constitution no longer protects lesbian and gay individuals with regard to their freedom to marry."[144]

The first lasting triumph came in the wake of *Baehr*. *Baehr*'s gains did not last, but they inspired hope.[145] It signaled that marriage had "moved from an evanescent pipedream ... to something realizable[.]"[146] Following the ruling, disparate individuals were galvanized into a movement that not only desired marriage, but focused on it as a specific goal.[147] On the legal front, the need for a proverbial "Plan B" became apparent as soon as the Defense of Marriage Act was passed and as the prospects for sustained success in Hawaii dimmed.[148]

Vermont was a calculated second front.[149] This time, the battleground was chosen "by a coalition of strategic actors with a clear idea of how not only to win but to defend a victory."[150] With the support of GLAD's Executive Director, Gary Buseck, and with Evan Wolfson (counsel for the plaintiffs in *Baehr*) on board, Mary L. Bonauto brought her first marriage suit in Vermont[151] together with local lawyers Beth Robinson and Susan Murray. Both time and locus were fertile, "the legal and constitutional climate was more hospitable[,]"[152] diminishing the chances of a Hawaii-like regression. In the years prior, Vermont had been receptive to measures against discrimination based on sexual orientation, as well as to adoption by gay persons.[153] By 1997, Vermont could also count on the backing of an experienced civil society[154] —

> In 1997 their plan started to take shape as Bonauto discussed the idea of a lawsuit with GLAD's supportive new executive director, Gary Buseck. Having carefully assessed the composition of the courts, the electoral and

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144. Lambda Legal, Baehr v. Miike, *available at* https://www.lambdalegal.org/in-court/cases/baehr-v-miike (last accessed July 31, 2021) [https://perma.cc/2M2K-QQ9G].

145. Abraham, *supra* note 115.

146. Goldberg, *supra* note 8, at 159.

147. *Id.*

148. FRANK, *supra* note 7, at 128.

149. Stolberg, *supra* note 117.

150. FRANK, *supra* note 7, at 128.

151. KAPLAN, *supra* note 122, at 50.

152. Stolberg, *supra* note 117.

153. FRANK, *supra* note 7, at 128.

154. *Id.*

> constitutional amendment cycles, the [S]tate's demographics, and the status of grassroots organizing, the lawyers noted several ingredients that made both the [S]tate and that moment auspicious. A coalition of gay rights organizations now had many years of outreach, organizing, and public education under their belts. Vermont's Supreme Court had issued a positive ruling in favor of adoptions by gay people in 1994, suggesting it might be open-minded in other gay rights cases. And it was far more difficult to amend Vermont's constitution than it was Hawaii's, so a court win would be harder to overturn. The women reached out to colleagues and other organizations in hopes of getting broad support for opening the next front. Although Wolfson was now onboard, they had become confident that this was the right move regardless of whose endorsement they had. 'We didn't feel we had to get somebody's permission to go forward,' Robinson said, 'but we were committed to trying to move forward in a way that included some national buy-in, and I think that happened.'[155]

The choice of Vermont paid off. In 1999, in *Baker v. Vermont*,[156] the Vermont Supreme Court ruled that the denial of marriage benefits to same-sex couples ran afoul of the State constitution.[157] Thus, the State was "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[158] *Baker* did not institutionalize marriage itself.[159] Further legislation was needed.[160] In conformity with *Baker*, on 26 April 2000, Governor Howard Dean signed into law a bill institutionalizing civil unions in the State.[161] Thus came the U.S.' "first-ever [S]tate-sanctioned relationship recognition for same-sex couples."[162]

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155. FRANK, *supra* note 7, at 128 (citing Interview *by* Nathaniel Frank *with* Mary L. Bonauto & Interview *by* Nathaniel Frank *with* David Garrow (May 9, 2004)).

156. Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (U.S.).

157. *Id.* at 889.

158. *Id.* at 867.

159. *Id.* at 889.

160. *Id.*

161. *See* Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. TIMES, Apr. 26, 2000, *available at* https://www.nytimes.com/2000/04/26/us/vermont-gives-final-approval-to-same-sex-unions.html (last accessed July 31, 2021) [https://perma.cc/ZM88-RARC].

162. Goldberg, *supra* note 161, at 162 (citing *Baker*, 744 A.2d at 886).

Vermont's legislation enabled a "civil rights package"[163] that allowed civil unions to be "same-sex marriages in almost everything but the name."[164] This configuration, however, was fundamentally problematic. It was a *facsimile* of marriage [—] "*something close* to the very goal of the gay legal advocates who had pushed 20 years earlier for a broader way to recognize relationships"[165] — but not marriage in itself.

Thus, it became apparent that civil unions were a Solomonic "concession to a restive interest group[ ]"[166] "designed precisely to avoid granting full [and true] equality[.]"[167] At this, attention turned to a new battlefront. "Vermont offered further momentum. The next question was where, when, and how to *secure marriage itself*."[168]

Like Vermont, Massachusetts had been receptive to anti-discrimination.[169] Its institutions had adopted progressive policies;[170] its constitutional set-up made a repeat of Hawaii's setback unlikely;[171] and there was a robust civil society.[172] Massachusetts had a particularly strong constitutional tradition in individual rights and privacy, such that Mary L. Bonauto and GLAD knew that the State would be "[embarrassing] itself when it did not adhere to those principles."[173] Massachusetts showed such promise that marriage equality through legislation — thus, indicative of popular

163. Carey Goldberg, *Vermont Panel Shies From Gay Marriage*, N.Y. TIMES, Feb. 10, 2000, *available at* https://www.nytimes.com/2000/02/10/us/vermont-panel-shies-from-gay-marriage.html (last accessed July 31, 2021) [https://perma.cc/QP4W-U7ZL].

164. Goldberg, *supra* note 8.

165. FRANK, *supra* note 7, at 129 (emphasis supplied).

166. *Id.*

167. *Id.*

168. *Id.* at 131 (emphasis supplied).

169. Bonauto, *supra* note 11, at 9-11.

170. *Id.* at 11.

171. FRANK, *supra* note 7, at 131.

172. Bonauto, *supra* note 11, at 12-14.

173. Bonauto, *supra* note 11, at 25. (citing Roberts v. City of Boston, 59 Mass. 198 (1849) (U.S.); Plessy v. Ferguson, 163 U.S. 537 (1896); School Committee of Springfield v. Board of Education, 319 N.E.2d 427 (Mass. 1974) (U.S.), Ferrera v. United States, 421 U.S. 947 (1975); & Attorney General v. Massachusetts Interscholastic Athletic Association, Inc., 393 N.E.2d 284 (Mass. 1979) (U.S.)).

support — was seriously considered.[174] Ultimately however, marriage equality through litigation was determined to be the superior tactical option —

> The most promising answer was Massachusetts. The [S]tate had shown support for gay equality with its 1989 non-discrimination law. Its high court had proven itself open-minded, with several pro-gay decisions around adoption, parenting, privacy, and sexual harassment. The [S]tate's constitution had strong equality clauses and required a more laborious process for amendments than places like Hawaii and California. And GLAD and other gay groups and grassroots activists had been laying the groundwork for pro-gay policies and a sympathetic climate there for years. In fact, GLAD contemplated the viability of securing marriage via the [S]tate's legislature, where victory would indicate broad public support for same-sex marriage. But the advocates knew the legislature well, and despite years of outreach and organizing, they could not envision a legislative path to victory there. 'Frankly, we didn't see any other way to do it' but by lawsuit, explained Bonauto.[175]

The question of litigating marriage equality in Massachusetts had come well before 2001. It was also considered then that, perhaps, litigation could be made through the "side door," that is, without seeking same-sex marriage *per se*, but by assailing dimensions of marriage that evinced discrimination.[176] In 1995, an opportunity arose to appeal an administrative ruling concerning workplace benefits discrimination.[177] GLAD and Mary L. Bonauto decided against pursuing the appeal, noting a history of unwieldy decisions that even "contained harmful dicta[.]"[178] Writing for the Harvard Civil Rights-Civil Liberties Law Review, Bonauto recounted their choice to desist in 1995 —

> We also believed we needed to be extremely cautious about litigating marriage discrimination through the side door. Decisions around the country

174. FRANK, *supra* note 7, at 131.

175. *Id.* (citing Interview *by* Frank *with* Bonauto, *supra* note 155; & Bonauto, *supra* note 11).

176. Bonauto, *supra* note 11, at 22.

177. *Id.* at 22-23 (citing Huff v. Chapel Hill Chauncy Hall School, 16 Mass. Discrim. L. Rep. 1605 (1994) & Huff v. Chapel Hill Chauncy School, 17 Mass. Discrim. L. Rep. 1247 (1995)).

178. Bonauto, *supra* note 11, at 22 (citing Hinman v. Department of Personnel Administration, 213 Cal. Rptr. 410, 419 (Cal. Ct. App. 1985) (U.S.); Phillips v. Wisconsin Personnel Commission, 482 N.W.2d 121, 127 (Wis.App. 1992) (U.S.); In re Estate of Hall, 707 N.E.2d 201, 204–05 (Ill.App. 1 Dist. 1998) (U.S.); & Rutgers Council of AAUP Chapters v. Rutgers University, 689 A.2d 828, 831 (N.J.Super.A.D. 1997) (U.S.)).

> seeking spousal protections, often concerning employer health insurance or other workplace benefits, told the losing plaintiffs that they should change or challenge the marriage laws and often contained harmful dicta about the legitimacy of those bans. GLAD and its client in a workplace benefits discrimination case even decided not to appeal an administrative agency ruling in 1995 out of concern about muddying the waters for a possible marriage case [someday]. The complainant, an employee at a boarding school who was required to live on campus, was essentially told to choose between her job and her partner because the school would not allow unmarried couples to live together on campus. The Massachusetts Commission Against Discrimination rejected the employee's claim of disparate impact based on sexual orientation on the grounds that the gay and lesbian civil rights law was not to be construed 'to legitimize or validate a 'homosexual marriage,' so-called' and that allowing her to live in on-campus housing would be treating her as though she were married. It further ruled on the disparate treatment claim that the real culprits were the marriage laws since all unmarried couples — same-sex and opposite-sex — were treated the same way by the respondent's policy. In 1995, I believed we were not ready for a marriage case — either directly or indirectly — in Massachusetts.[179]

A narrowing focus on Massachusetts was also partly dealt by circumstance. Following *Baker* in Vermont, an effort was launched in Massachusetts by the Massachusetts Catholic Conference and other groups to amend the Massachusetts Constitution so as to bar same-sex unions.[180] GLAD weighed its options and determined that Massachusetts' legal, political, and social landscape was conducive to a court victory.[181] More importantly, it knew that the strength of its case lay in the lives of real people and in the foundational principles of fairness and equality.[182] Thus, it took it upon itself to litigate, to make an affirmative case, and to proactively frame the issues.[183] Ultimately, as Bonauto recounted —

> Knowing that the legislature and public would be embroiled in the marriage and amendment discussions in any event, and aware of the generally

179. Bonauto, *supra* note 11, at 22-23 (citing *Hinman*, 213 Cal. Rptr. at 419; *Phillips*, 482 N.W.2d at 127; *In re Estate of Hall*, 707 N.E.2d at 204-05; Rutgers Council of AAUP Chapters, 689 A.2d at 831; *Huff*, 16 Mass. Discrim. L. Rep. 1605; *Huff*, 17 Mass. Discrim. L. Rep. 1247, & *Huff*, 16 Mass. Discrim. L. Rep. at 1613 & 1615-16 (citing 1989 Mass. Acts 803) (U.S.))).

180. Abraham, *supra* note 115.

181. *See* Bonauto, *supra* note 11, at 26-27.

182. Bonauto, *supra* note 11, at 27.

183. *Id.*

> favorable momentum toward relationship recognition, we viewed an affirmative marriage case as an opportunity to frame the issues positively and in the voices of [LGBTQIA+] people. We also thought the best defense was the same thing that had moved us forward so far: shining a light (this time through a lawsuit) on the lives of the real people affected and the bedrock American principles of fairness and equality. We knew we had a window of opportunity: a constitutional amendment must be approved by two legislatures before it can be put out to the voters for ratification at a general election.[184]

Preparations were made. In August 2000, Bonauto worked to secure the consent of two dozen community leaders.[185] There was also no shortage of willing plaintiffs, but the choice of the actual plaintiff couples needed to be meticulous —

> The plaintiffs, who would serve as the public face of the lawsuit, were chosen carefully. They had to be varied in age, ethnicity, and profession. They had to be well-spoken, but not too political. They had to be longtime couples who had been faithful to one another. They had to stand up to rigorous criminal background checks, and to convince the lawyers that there were no skeletons in their closets.[186]

Months after initial consent of the queer movement was obtained, and after "hundreds of hours[ ]"[187] spent crafting legal arguments, finally, on 11 April 2001, Bonauto, as lead counsel, brought suit in Massachusetts on behalf of seven same-sex couples.[188]

From the incomplete victory in Vermont, the focal question of marriage equality in its genuine and consummate sense remained. Mary L. Bonauto knew that the Massachusetts case had to be approached differently.[189] A principal focus in Vermont had been the rights and benefits attendant to marriage and previously denied to same-sex couples.[190] The Vermont Supreme Court was convinced of the iniquity of denying these rights and benefits and, accordingly, ruled that Vermont must "extend to same-sex couples *the common benefits and protections* that flow from marriage under

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184. *Id.*

185. Abraham, *supra* note 115.

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.*

190. *Id.*

Vermont law."[191] The Vermont legislature took heed and thus prepared a "civil rights package[,]"[192] though one not actually amounting to marriage. Thus, same sex couples may have won a measure of relief, but marriage equality was not secured.

Changing tack in Massachusetts, GLAD focused less on the utilitarian package-of-rights outcome and devoted greater attention to marriage itself as "a basic civil and human right."[193]

> In Vermont, a major part of the plaintiffs' case had focused on the rights and protections given to married couples, such as hospital visitation and tax benefits. That focus had left room for the Legislature to give gay and lesbian couples some of the rights and protections of marriage, without granting marriage itself. To avoid that in Massachusetts, GLAD lawyers had to convince the court that marriage is more than the sum of its protections.
>
> 'We spent more time in Massachusetts talking about how marriage is a basic civil and human right,' Bonauto said. 'It cannot be splintered into state and federal protections. We talked about what marriage is in our culture.'[194]

The refined Massachusetts strategy paid dividends. On 18 November 2003, the Massachusetts Supreme Judicial Court ruled for the plaintiff couples in *Goodridge v. Department of Public Health.*[195] Sustaining the plaintiffs' position, the decision was anchored on an appreciation of marriage as a fundamental right, without which "one is excluded from the full range of human experience and denied full protection of the laws[.]"[196] In eloquent language, the Massachusetts Supreme Judicial Court emphasized how "[t]he Massachusetts Constitution affirms the dignity and equality of all individuals[and] forbids the creation of second-class citizens."[197] *Goodridge* reveals the extent to which primacy was placed on marriage itself, and not merely on its incidental benefits —

> Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. 'It is an association that

191. *Baker*, 744 A.2d at 867 (emphasis supplied).

192. Goldberg, *supra* note 8.

193. Abraham, *supra* note 115.

194. *Id.*

195. Goodridge v. Department of Public Health, 440 Mass. 309, 323 (Mass. 2003) (U.S.).

196. *Id.* at 326 (citing *Baker*, 744 A.2d at 889).

197. *Goodridge*, 440 Mass. at 312.

> promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.' ... Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.[198]

Moreover,

> [w]ithout the right to marry — or more properly, the right to choose to marry — one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.' ... Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion.[199]

Furthermore,

> [t]hat same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.[200]

Goodridge was a turning point in judicial thought. In the aftermath, other States' supreme courts would also rule for marriage equality, with some examples being Connecticut in the 2008 case of *Kerrigan v. Commissioner of Public Health*,[201] and Iowa in the 2009 case of *Varnum v. Brien*.[202] A similar ruling was also made in California in the 2008 case of *In re Marriage Cases*.[203] California would, however, suffer a Hawaii-like setback when its voters approved Proposition 8, amending the State constitution to bar same-sex marriages.[204] Still, even that setback would be temporary. In *Hollingsworth v. Perry*,[205] the District Court for the Northern District of California struck down

198. *Id.* at 322 (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

199. *Goodridge*, 440 Mass. at 326 (citing *Baker*, 744 A.2d at 889).

200. *Goodridge*, 440 Mass. at 337.

201. Kerrigan v. Commissioner of Public Health, 289 Conn. 135 (Conn. 2008) (U.S.).

202. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (U.S.).

203. In re Marriage Cases, 43 Cal.4th 757 (Cal. 2008) (U.S.).

204. Georgetown Law Library, Proposition 8, *available at* https://guides.ll.georgetown.edu/c.php?g=592919&p=4182204 (last accessed July 31, 2021) [https://perma.cc/UZ9N-PFEB].

205. Hollingsworth v. Perry, 570 U.S. 693 (2013).

Proposition 8 as unconstitutional.[206] The District Court would be affirmed by the Ninth Circuit Court of Appeals.[207] An appeal brought before the U.S. Supreme Court by Proposition 8's proponents would not prosper for lack of standing.[208]

Though *Goodridge* may have beckoned a shift in judicial thought, an uphill battle still had to be fought for wider public appreciation. Initial battles were won in Vermont and Massachusetts in large part because not only their courts, but also their constituencies were ready. The same could not be said for most other states. In 2004, the year following *Goodridge*, voters in 13 states — Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah — approved amendments in their respective constitutions barring same-sex marriage.[209] These 13 states joined three states that adopted constitutional bans in years prior: Alaska in 1998, Nebraska in 2000, and Nevada in 2002.[210] In 2005, Kansas and Texas followed suit.[211] Eight more states — Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin — joined them in 2006.[212] In 2008, even as Connecticut joined Massachusetts as the next state to secure marriage equality through a court decision, voters in two more states — Arizona and Florida — adopted constitutional prohibitions.[213] This would continue until 2012 with North Carolina.[214]

The sweep of constitutional prohibitions across states showed that, court victories notwithstanding, "direct democracy [was] the most powerful *bête noire* of the [LGBTQIA+] rights movement."[215] However, as it was its initial bane, so too would popular democracy be the movement's strength.

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206. *Id.* at 702 (citing Perry v. Schwarzenegger, 704 F.Supp.2d 921, 1004 (N.D. Cal. 2010) (U.S.)).

207. *Hollingsworth*, 570 U.S. at 703.

208. *See id.* at 701.

209. Pew Research Center, Same-Sex Marriage, State by State, *available at* https://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state (last accessed July 31, 2021) [https://perma.cc/9A8Q-TWY2].

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Hunter, *supra* note 139, at 1662 (emphasis supplied).

Eventually, the movement would forge "an electoral politics-style campaign"[216] that would take back states en route to its decisive win in *Obergefell*.

In June 2005, reeling from the initial tide of state constitutional prohibitions, 10 leaders of LGBTQIA+ organizations, mostly lawyers — including previous collaborators Mary L. Bonauto of GLAD and Evan Wolfson, who launched Freedom to Marry[217] in 2003 — gathered in New Jersey for a summit.[218] They knew they needed to rethink their strategy.[219] The summit resulted in the adoption on 21 June 2005 of the concept paper "*Winning Marriage: What We Need to Do*."[220] The paper proceeded "from a particular historical understanding of why certain civil rights movements had succeeded[.]"[221] It further entailed a calibration of how adjudication and legislation were understood — "that the Supreme Court and Congress function as *consolidators, rather than creators*, of new social norms, '[d]espite widespread beliefs to the contrary.'"[222] Thus, while "federal law [could] 'foster[ ] the eventual national resolution' to allow same-sex marriage,"[223] the paper acknowledged that, on a national level, marriage equality would be secured "only after it became socially acceptable and legally valid in many

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216. *Id.*

217. Other representatives and their organization were Michael Adams of Lambda Legal; Toni Broaddus of the Equality Federation; Rea Carey of the Task Force; Matt Coles of the American Civil Liberties Union; Seth Kilbourn of the Human Rights Campaign; Shannon Minter of the National Center for Lesbian Rights; Alexander Robinson of the National Black Justice Coalition; & Roey Thorpe of Basic Rights Oregon. Michael Adams, et al., Winning Marriage: What We Need to Do, at 15, *available at* http://s3-us-west-2.amazonaws.com/ftm-assets/ftm/archive/files/images/Final_Marriage_Concept_Paper-revised_(1).pdf (last accessed July 31, 2021) [https://perma.cc/68VD-GV5Y].

218. *Id.*

219. Voortella & Voortella, *supra* note 134.

220. Adams, *supra* note 217. The concept paper was updated five years later as "Winning Marriage: The Path Forward." Hunter, *supra* note 139, at 1688 (citing MATT COLES, ET AL., WINNING MARRIAGE: THE PATH FORWARD (2010)).

221. Hunter, *supra* note 139, at 1688.

222. *Id.* (citing Adams, et al., *supra* note 217, at 14) (emphasis supplied).

223. Hunter, *supra* note 139, at 1688.

states."[224] With the marriage equality movement's reflections on the role of national legal institutions came the tactical re-orientation of its efforts —

> If we are going to succeed, we need to become as energized as our opponents, not to fight a last stand, but to surmount a final great hurdle. We need to have a coordinated, national campaign, building on the work that is already being done, but going way beyond it to take on the comprehensive national work that is not being done today but that is crucial to success. This must be a thoroughly professional campaign, professionally staffed and run, with the enthusiastic support of the organizations working on marriage today.[225]

Winning Marriage laid out its target, which was dubbed "10/10/10/20" — in 15 to 20 years, secure "10 states with marriage, 10 states with civil union or ... protection by some other name, 10 states with some more limited protection ... [and] some 'whittling away' at anti-marriage amendments, or nondiscrimination laws, and significant 'climate change' ... in the remaining 20."[226] Notably, there was an express recognition that marriage *per se* could not be won immediately in the majority of states.[227] Thus, there was willingness to settle — in the interim — for less than ideal gains.

Winning Marriage further identified concrete measures: "high-level, coordinated, national communications strategy[;]"[228] "increase [ ] capacity ... to do on-the-ground organizing[;]"[229] and "facilitate co-ordination among existing organizations,"[230] among others. Ultimately, *Winning Marriage*'s social movement strategies complemented the work of litigating. It facilitated "a highly sophisticated mobilization toward the goal of winning marriage equality at the ballot box in order to create a strong enough tipping point to bring about a victory in the Supreme Court."[231]

Waging a more concerted and better coordinated campaign, the marriage equality movement won battles state by state and gradually reversed the tide

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224. *Id.* (citing Adams, et al., *supra* note 217, at 14).

225. Adams, et al., *supra* note 217, at 2.

226. *Id.* at 3.

227. *Id.*

228. *Id.* at 6.

229. *Id.* at 8.

230. *Id.* at 9.

231. Hunter, *supra* note 139, at 1699.

of prohibitions that mounted in 2004.[232] In addition to the State Supreme Court victories in Connecticut and Iowa, in 2009, New Hampshire adopted a law legalizing same-sex marriage.[233] Vermont, too, adopted a similar law, finally transcending the initial institution of civil unions.[234] Civil unions would become legal in Hawaii, and same-sex marriage in New York, in 2011.[235] Further same-sex legislation would be adopted in Maine, Maryland, and Washington in 2012.[236] In a tremendous stride for political support, in 2012, President Barack H. Obama became the first incumbent President to manifest support for same-sex marriage.[237] In 2013, more victories came judicially, such as in California, New Jersey, and New Mexico, but even more came legislatively, as in Delaware, Hawaii (fully embracing same-sex marriage), Illinois, Minnesota, and Rhode Island.[238]

The year 2013 proved that opportunities for decisive judicial action had ripened. That year, the Defense of Marriage Act's barriers crumbled.[239] In *United States v. Windsor*,[240] the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act, which had barred federal recognition of same-sex marriages, for violating the due process clause.[241]

By 2014, well ahead of its target, *Winning Marriage* delivered on its prospects. Same-sex marriage had become socially acceptable and "legally valid" not just "in many states[,]"[242] but in a *majority* of states. This time — as a further testament to how litigation's efficacy had ripened — all 18 states that embraced marriage equality in 2014 did so judicially: Oregon, Pennsylvania, Colorado, Indiana, Oklahoma, Utah, Virginia, Wisconsin, Nevada, West Virginia, North Carolina, Idaho, Alaska, Arizona, Wyoming, Kansas, South

232. *See* Pew Research Center, *supra* note 209.

233. Pew Research Center, *supra* note 209.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. Pew Research Center, *supra* note 209.

240. United States v. Windsor, 570 U.S. 744 (2013).

241. *Id.* at 774–75.

242. Hunter, *supra* note 139, at 1688.

Carolina, and Montana.[243] Marriage equality would also be secured judicially in Florida just a few days removed from 2014.[244]

Finally, in 2015, almost 10 years to the date of the New Jersey summit that birthed *Winning Marriage*, and 10 years ahead of the initial (and, as it turns out, modest) 10/10/10/20 target, the marriage equality movement was ready to deliver the decisive stroke that would secure marriage equality throughout the U.S. As she had done before, but this time on the most paramount of platforms, GLAD's Mary Bonauto would argue for marriage equality as lead counsel, demonstrating significant "poetic justice"[245] as she "had been carefully stewarding the legal strategy on marriage since Vermont in 1998[.]"[246] True to how the victories beginning with *Baker v. Vermont*[247] were won, however, 2015's *Obergefell* would not be a solitary pursuit, as "[e]ach of the four national [LGBTQIA+] legal organizations — [the American Civil Liberties Union], GLAD, Lambda Legal, and [the National Center for Lesbian Rights] — was involved in at least one of the [consolidated] cases, alongside private attorneys and law firms."[248]

Victory came on 26 June 2015, when the U.S. Supreme Court emphasized in *Obergefell* that marriage is a fundamental right that is neither subject to majoritarian sway, nor contingent on legislative *fiat* —

> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' ... This is why 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.' [ ] It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the

243. Pew Research Center, *supra* note 209.

244. Brenner v. Scott, 999 F.Supp.2d 1278 (N.D.Fla. 2014) (U.S.).

245. *See* Voortella & Voortella, *supra* note 134.

246. Voortella & Voortella, *supra* note 134.

247. Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (U.S.).

248. Voortella & Voortella, *supra* note 134.

> democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.[249]

Justice Anthony Kennedy — who, 12 years prior, penned the majority opinion in *Lawrence v. Texas*[250] and there emphatically declared that it was wrong to sustain sodomy laws,[251] as well as 2013's *Windsor* — wrote for the majority and echoed the eloquence and substance of *Goodridge* in emphasizing the sublime right that is marriage and how its denial is an affront to same-sex couples' dignity —

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[252]

For the marriage equality movement in the U.S., the first hurdles to overcome were deep and personal — restraining individual inclinations to sue (even when there had long been legitimate causes for suit); reining inflated estimations of success; and enduring tribulations both private and professional. Victories in court would be won, only to be promptly followed by regressions to more disadvantageous states of affairs because public consciousness was yet unreceptive. Thus, while State constitutions used to be silent on same-sex marriage, they would be amended to explicitly prohibit it.

Initial progress inched state by state. This entailed identifying suitable fronts, learning as the movement went along (often from previous inadequacies and excesses), and realigning strategies. Favorable court decisions rested on individual cases being meticulously built, with plaintiffs carefully chosen — at times from an abundance of volunteers — with "hundreds of

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249. *Obergefell*, 135 S.Ct. at 2605-06 (citing West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943)).

250. Lawrence v. Texas, 539 U.S. 558 (2003).

251. *Id.* at 578. "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Id.*

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

hours[ ]"[253] spent crafting arguments, with consensus being built among representative organizations, and with the collaboration of several counsels all gradually honing expertise.

There was no shortage of opposition. That opposition drew upon fears and stirred apprehension into resentment. Soon, it became apparent that efforts on the legal front could not be fought on their own. An understanding of public institutions like courts and legislatures needed to be re-oriented, and acceptance made of their limited, even if sovereign, capacities. Popular consciousness needed to be won, and the well-heeled, concerted opposition matched. Thus, came a burgeoning movement — focusing on marriage as a specific, attainable objective — that mounted a tactical and professional campaign to turn the tide of democratic rejection, where popular votes led to prohibitions in state constitutions.

The work was tireless and protracted, but the effort to captivate people's understanding gradually succeeded. Where once individuals belonging to sexual minorities were seen as strangers, or worse, depicted as insidious interlopers, the American public came to know them as their own family members, friends, fellow church members, neighbors, and colleagues.[254]

By 2013 came an unprecedented peak in popular support for same-sex couples' right to marry.[255] Reflecting the renewed national consciousness, and

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253. Abraham, *supra* note 115.

254. Speaking in a like manner about winning *Goodridge*, Mary L. Bonauto explained that

> the marriage issue was not sprung upon the people of Massachusetts by a conspiring judiciary, but that it has instead come upon the people of Massachusetts gradually, just as they have been getting to know their LGBT family members, neighbors, colleagues, and co-religionists. Casting *Goodridge* as a mandate on an unwilling populace is a caricature, not a reality-based analysis of life in the Commonwealth. Indeed, on Sunday, November 23, 2003, just days after the *Goodridge* ruling, two statewide polls showed that Massachusetts was ready for the decision. The front page of the *Boston Herald* said it best: 'Gays A-OK in Bay State.'

Bonauto, *supra* note 11, at 21 (citing David R. Guarino, *Poll Finds Massive Backing for Gay Unions; Narrow Marriage Support*, BOSTON HERALD, Nov. 23, 2003, at 7; & Frank Phillips & Rick Klein, *50% in Poll Back SJC Ruling on Gay Marriage*, BOSTON GLOBE, Nov. 23, 2003, at A1).

255. Goldberg, *supra* note 8, at 164 (citing Jon Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, WASH. POST, Mar. 18, 2013, *available at*

confirming their role as consolidators, State legislatures and courts facilitated marriage equality in a majority of states by 2014. As 2015 came, what was once impossible had become inexorable. *Obergefell*'s national marriage equality mandate was not sprung inventively. It had been earned, a natural and logical progression of painstakingly built gains.

IV. TAIWAN: CONCURRING QUEER AND DEMOCRATIC IDENTITIES

Like James Michael McConnell and Richard John Baker, the activist gay couple who brought the suit subject of 1972's *Baker v. Nelson*,[256] Taiwanese activist Chi Chia-Wei would be rebuffed for his efforts at having the Legislative Yuan (Taiwan's unicameral legislature) legalize same-sex marriage in 1986.[257] Where McConnell's and Baker's rebuff came by way of a Minnesota Justice literally turning his back during oral arguments[258] and the unceremonious dismissal of their appeal by the U.S. Supreme Court,[259] Chi's rebuff was worse, coming in the form of five months in detention without ever being formally charged.[260] Unlike McConnell and Baker, however, whose efforts had to be taken over by others en route to victory, Chi himself would petition the Taiwanese Constitutional Court and win in 2017's *Interpretation 748*.[261] Chi was not to be the sole petitioner. Joining him was the Taipei City Government itself.[262]

The concurrence of Chi's activism and the Taipei City Government's official action is microcosmic of how Taiwan's dynamic democracy secured marriage equality. While the American effort was protracted and unwieldy, Taiwan's path was decisive. It was not a path free of obstacles, avertible delays,

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https://www.washingtonpost.com/news/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll (last accessed July 31, 2021) [https://perma.cc/PV6R-EY6C]).

256. Baker v. Nelson, 409 U.S. 810 (1972).

257. Chang, *supra* note 10, at 150.

258. ESKRIDGE, JR. & SPEDALE, *supra* note 93, at 22.

259. *Baker*, 409 U.S. at 810.

260. Chang, *supra* note 10, at 150 (citing *Victory at Last for Taiwan's Veteran Gay Rights Champion Chi Chia-wei*, STRAITS TIMES, May 25, 2017, *available at* https://www.straitstimes.com/asia/east-asia/victory-at-last-for-taiwans-veteran-gay-rights-champion-chi-chia-wei (last accessed July 31, 2021) [https://perma.cc/U8NP-7BXZ]).

261. Chang, *supra* note 10, at 147.

262. Judicial Yuan Interpretation No. 748, ¶ 2.

or even personal crises. Still, Taiwan's democracy enabled broad official commitment and a steadfast civil society to work in tandem and surmount challenges.

Reeling from civil war and needing to consolidate power, the Chinese Nationalist Kuomintang (KMT) that retreated to Taiwan invoked legitimizing Confucian ideals of piety and reverence for authority.[263] This entailed emphasis on what had been supposed as traditional family values which, in turn, "heterosexualized" public discourse —

> Taiwanese society between the 1950s and 1960s could be described as heterosexualized in terms of discourse; 'family values' were regarded as deriving directly from a stable Confucian and Chinese tradition and public discourses of same-sex desire were almost non-existent[—]
>
> > Confucianism was invoked essentially as a set of stripped down ethical values which had a specific role in the service of the state. As a generalized moral philosophy, or a kind of social ethics that could be easily translated into secular action, Confucianism entailed here a devotion to filial piety, respect for social authority, and everyday etiquette.
>
> A Confucian morality was used to strengthen the power and influence of the KMT and the mainlanders who had come to Taiwan together with the Nationalist troops in 1949.[264]

This meant the erasure of diversity in SOGIE and the deprecation of persons who did not conform to dominant cultural binaries.[265] Such individuals were spoken of as "violating the natural order[,]" or referred to as

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263. Jens Damm, *Same Sex Desire and Society in Taiwan, 1970-1987*, 181 CHINA Q. 67, 68-69 (2005) (citing Allen Chun, *From Nationalism to Nationalizing: Cultural Imagination and State Formation in Postwar Taiwan*, *in* CHINESE NATIONALISM 137 (Jonathan Unger ed., 2016); Antonia Yengning Chao, Embodying the Invisible: Body Politics in Constructing Contemporary Taiwanese Lesbian Identities, at 189 (1996) (unpublished Ph.D. dissertation, Cornell University) (on file with Cornell University); Government Information Office, East and West, Traditional and Modern, *available at* https://web.archive.org/web/20080120083628/http://www.gio.gov.tw/info/taiwan-story/culture/edown/3-3.htm (last accessed July 31, 2021); & Tze-Lan Deborah Sang, *Translating Homosexuality: The Discourse of Tongxing'ai in Republican China (1912-1949)*, *in* TOKENS OF EXCHANGE: THE PROBLEM OF TRANSLATION IN GLOBAL CIRCULATIONS 276-304 (Lydia H. Liu ed., 1999)).

264. *Id.*

265. Damm, *supra* note 263, at 69.

"*renyao*" — "'freaks' or 'monsters[.]'"[266] Medical discourse approached them with a view to treating pathology, describing same-sex conduct as a mental illness alongside depression and alcoholism.[267] Raids were conducted on gay meeting places.[268] Terms used by the media concerning incidents involving gay men reeked of prejudice: "'abnormal contacts' (*bu zhengchang jiaowang*), 'abnormal relations' (*bu zhengchang guanxi*), 'abnormal psychology' (*bu zhengchang xinli*)[,] ... 'perverts' (*biantai*)[,] ... 'degenerate desire' (*jiqing*), [ ] 'ugly' (*choulou*), 'brutal' (*xiexing*)[,] 'to be feared' (*kongbu*)[, and t]hey were said to 'act in a disgusting way' (*choutai baichu*)[.]"[269] Penalties were imposed for such innocuous 'offenses' as men sporting long hair and women wearing trousers, the offense being officially denominated "wearing of odd/inappropriate outfits" (*qizhuang yifu*) under Article 66 of the Law for Punishment of Police Offences (*weijing fafa*).[270]

In the fallout of the 1979 Meilidao Incident, in which the Chinese Nationalist regime violently cracked down on pro-democracy demonstrations, political restrictions gradually loosened.[271] This paved the way for the toleration of organized opposition in 1986 and the lifting of martial law in 1987.[272] From this ensued Taiwan's democratization which came to be typified by multiculturalism and the primacy of individual rights.[273]

As restrictions eased, pluralistic identities galvanized and writings on topics previously seen as anathema surfaced.[274] Among these identities, a feminist movement emerged. It would be the precursor to Taiwan's queer movement as it "lay the foundations for a different view of gender and sexuality."[275]

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266. *Id.*

267. *Id.* at 71.

268. *Id.* at 75 (citing FRAN MARTIN, SITUATING SEXUALITIES: QUEER REPRESENTATION IN TAIWANESE FICTION, FILM AND PUBLIC CULTURE 45-116 (2003)).

269. Damm, *supra* note 263, at 76-77 (citing ZHONGGUO SHIBAO, Mar. 6, 1975, at 2; & LIANHEBAO, Mar. 6, 1975, at 6).

270. Damm, *supra* note 263, at 70 n. 14 (citing Chao, *supra* note 263, at 33).

271. Jens Damm, *Discrimination and Backlash Against Homosexual Groups*, *in* POLITICS OF DIFFERENCE IN TAIWAN 154 (Tak-Wing Ngo & Hong-zen Wang eds., 2011).

272. *Id.*

273. *Id.* at 152.

274. *Id.* at 154-55.

275. *Id.* at 156.

Albeit writing under pseudonyms, dissident thought challenged the dominant pathological view of non-heteronormative persons and introduced humanist notions to the medical discourse.[276] Particularly notable too, was a paper by Chen Qidi in a legal journal published by the National Taiwan University,[277] which challenged Chinese Nationalist authoritarianism. This paper referenced an American court decision concerning a Missouri gay and lesbian student group "to advocate a new legal consciousness and the establishment of a state under the rule of law[.]"[278] In addition to drawing attention to democratic values, the paper "also shaped the Taiwanese [queer] movement's later perspective on the United States as the idealized prototype of Taiwan's movement."[279]

The lifting of martial law in 1987 begot change not only in the formal-legal sense, from one-party military dictatorship to multi-party democracy.[280] With it came a burgeoning marketplace of ideas where the notion of an independent Taiwan could be discussed without fear of prosecution.[281] Democracy meant self-rule, through which the people of Taiwan could chart their course free of the yoke of the successive foreign powers that, since 1624, had imposed their wills upon them. These foreign powers included the Chinese Nationalists who, in 1949, came as an external force "[exercising] colonial rule ... with the aim of constructing Taiwan as a model Chinese

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276. *Id.* at 154-55 (citing Peng Huaizhen, *Zhen Jia Tongxinglian* (*Real and Pseudo-Homosexuality*), ZONGHE YUEKAN (SCOOPER MONTHLY), 153 & 155 (1981); Peng Huaizhen, *Jianyu Li De Tongxinglian* (*Homosexuality in Prison*), SHIBAO ZAZHI (TIMES MAGAZINE), 124 (1982); PENG HUAIZHEN, TONGXING, ZISHA, JINGSHENBING (HOMOSEXUALITY, SUICIDE, PSYCHOSIS) (1983), PENG HUAIZHEN, TONGXINGLIANZHE DE AI YU XING (LOVE AND SEXUALITY OF HOMOSEXUALS (1987); Shen Chuwen *Tan tongxinglian* (*On homosexuality*) (1986), LINCHUANG YIJIE (CLINICAL MEDICINE), 1986, at 23–27; Hu Yiyun (1985) *Toushi Boliquan Mimi* (*To Look Through the Miracle of the Glass Circle*), FEICUI ZHOUKAN (JADE WEEKLY); & Er Dong, Bu gan shuo chu kou de ai (The Love That Dares Not Speak its Name) (Mar. 11, 1985, & June 10, 1985)).

277. Chen Qidi, *Tongxinglian de Falü Wenti* (Legal Problems of Homosexuals), 45 FALÜ PINGLUN 1 (1979).

278. Damm, *supra* note 263, at 155 (citing Qidi, *supra* note 277).

279. Damm, *supra* note 263, at 155.

280. *Id.* at 154.

281. *Id.* at 157.

province."[282] With democratization thus came "Taiwanization," the forging of a distinct, "explicitly not Chinese[,]" national identity[283] —

> Other than during the Civil War of 1945–1949, Taiwan has never been part of a Chinese state ruled by Han Chinese in Mainland China. With the arrival of the Dutch in 1624, Taiwan underwent a succession of six foreign colonial rulers: the Dutch (1624–1662), the Spanish (in northern Taiwan, 1626–1642), the Cheng family (1662–1683), the Manchus (1683–1895), the Japanese (1895–1945), and the Chinese Nationalists (1945–1988). Only with democratization, beginning in 1988, have the people of Taiwan been able to rule themselves. With democratization, the people of Taiwan have increasingly identified as Taiwanese, an identification that is explicitly not Chinese.[284]

Taiwan's new-found democracy, too, induced a "new catalogue of social values[.]"[285] Confucian tenets fell out of favor for being "connected ... with the tumultuous four decades of martial law."[286] In their place were adopted the perceived universal values of pluralism and individualism.[287]

It was in the 1990s that Taiwan's queer movement came into being. The "tongzhi" movement[288] emerged from groups of different backgrounds: university-based student groups, borne of encounters removed from

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282. *Id.* at 152.

283. Jacobs, *supra* note 109, at 567.

284. *Id.*

285. Damm, *supra* note 263, at 157.

286. Chang, *supra* note 10, at 156.

287. Damm, *supra* note 263, at 157.

288. Adam Dedman, *Taiwan's 'tongzhi' Warm Power*, TAIPEI TIMES, Aug. 30, 2019 *available at* https://www.taipeitimes.com/News/editorials/archives/2019/08/30/2003721371 (last accessed July 31, 2021) [https://perma.cc/7TG4-YAB7]. "First coined in Hong Kong, the term *tongzhi* began circulating in Taiwan in the early 1990s as the preferred Sinophone term for something akin to LGBT in English." *Id.*

> At the beginning of the 1990s, the term *tongzhi*, or 'comrades', which was originally created in Hong Kong in 1988 in an attempt to translate 'queer cinema' into Chinese, and was used to refer to both men and women, found its way to Taiwan, where it gained even greater acceptance than in Hong Kong or the PRC, where the term *tongzhi* still had strong connotations with the earlier years of strict Communist rule and was generally the standard form of address.

Damm, *supra* note 263, at 158 (citing Damm, *supra* note 263, at 67 n. 3).

conservative families and exposure to progressive academics; feminist groups, "which also actively covered topics of same-sex desire[;]"[289] and HIV/AIDS care groups.[290]

The opposition Democratic Progressive Party (DPP) came to power after more than five decades of KMT rule in 2000.[291] With this, multiculturalism not only became official policy,[292] but grew to be intertwined with "'constitutional patriotism' (*Verfassungspatriotismus*) and to the question of a national identity."[293] Multiculturalism came to be particularly understood as furthering "'[r]ecognition of linguistic varieties, protection of minority rights[,] and adherence to international law[.]"[294] The expansion of the multiculturalism discourse beyond recognized ethno-linguistic groups — the Hoklo, the Hakka, mainlanders, and aborigines[295] — enhanced the visibility of the *tongzhi* as a minority worthy of protections.

DPP President Chen Shui-bian held audiences with *tongzhi* leaders and international activists.[296] On one occasion, he declared, "Homosexuality is

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289. Damm, *supra* note 263, at 158.

290. *Id.*

291. Chang, *supra* note 10, at 148.

292. Damm, *supra* note 263, at 159.

293. *Id.* at 152.

294. Jennifer M. Wei, *Language Choice and Ideology in Multicultural Taiwan*, 7 LANGUAGE & LINGUISTICS 87, 90 (2006) (citing Nancy H. Hornberger, *Language Policy, Language Education, Language Rights: Indigenous, Immigrant, and International Perspectives*, 27 LANGUAGE SOC'Y 439 (1998); Matthias Koenig, *Social Conditions for the Implementation of Linguistic Human Rights Through Multicultural Policies: The Case of the Kyrgyz Republic*, 6 CURRENT ISSUES LANGUAGE & SOC'Y 57 (1999); Stephen May, *Language and Education Rights for Indigenous Peoples*, 11 LANGUAGE, CULTURE & CURRICULUM 272 (1998); Stephen May, *Uncommon Languages: The Challenges and Possibilities of Minority Language Rights*, 21 J. MULTILINGUAL & MULTICULTURAL DEV. 366 (2000); Dennis Smith, *Strategies for Multiculturalism: The Catalan Case Considered. A Response to Miquel Strubell*, 5 CURRENT ISSUES LANGUAGE & SOC'Y 215 (1998); Sue Wright, *Reconciling Inclusion, Multiculturalism and Multilingualism*, 4 CURRENT ISSUES LANGUAGE & SOC'Y 91 (1997); & Charles Taylor, The Politics of Recognition, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994).

295. Damm, *supra* note 263, at 152.

296. *See id.* at 160.

not a crime, nor is it a disease."[297] During his presidency, Taiwan adopted laws against workplace discrimination on the basis of sexual orientation by enacting the Gender Equality in Employment Act of 2002 and amending the Employment Service Act in 2007.[298]

As a sign of the *tongzhi* movement's improving confidence in government, *tongzhi* organizations formally registered with relevant authorities: the Taiwan Gay Hotline with the Ministry of the Interior, the Taiwan Gay and Lesbian Human Rights Association with the Kaohsiung Bureau of Social Affairs, and the Taipei Association for the Promotion of Gay Rights with the Taipei Bureau of Social Affairs.[299] As an opposition party with links to civil society, the DPP's ascent to power also led to former members of NGOs assuming government posts.[300]

It would also be during Chen's presidency that the Taiwanese government would begin to take steps toward marriage equality, albeit unsuccessfully. In 2001, the Ministry of Justice prepared a draft of the Human Rights Basic Law, Article 6 of which was to allow same-sex couples to "'form a family' through marriage and adoption of children[.]"[301] A similar attempt was made by the Executive Yuan in 2003, only to fail, as opposition was still strong among legislators and cabinet members.[302] Even members of the *tongzhi* movement

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297. Damm, *supra* note 263, at 160 (citing Wang Ping & Gofyy, Taiwan Human Rights Report 2000: Year 2000 Taiwan Gay Rights Report, *available at* https://web.archive.org/web/20111031024257/http://www.tahr.org.tw/site/data/report00/eng00/gay.htm (last accessed July 31, 2021)).

298. Chang, *supra* note 10, at 156 (citing Cing-Kae Chiao, *Discrimination in Taiwan*, *in* NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW (Roger Blanpain, et al. eds., 2008)).

299. DAMM, *supra* note 263, at 160 (citing Ping & Gofyy, *supra* note 297).

300. DAMM, *supra* note 263, at 157 (citing Josephine Chuen Juei-Ho, In Defense of Academic Research and Internet Freedom of Expression, *available at* http://sex.ncu.edu.tw/members/Ho/english_new/FinalReport.html (last accessed July 31, 2021) [https://perma.cc/JYE8-W7XU]; & Josephine Chuen-Juei Ho, *Sex Revolution and Sex Rights Movement in Taiwan*, *in* TAIWANESE IDENTITY FROM DOMESTIC, REGIONAL AND GLOBAL PERSPECTIVES 123-39 (Jens Damm & Gunter Schubert eds., 2007)).

301. Chang, *supra* note 10, at 148 (citing Victoria Hsiu-Wen Hsu, *Colors of Rainbow, Shades of Family: The Road to Marriage Equality and Democratization of Intimacy in Taiwan*, 16 GEO. J. INT'L AFF. 154, 155 (2015)).

302. Damm, *supra* note 263, at 162.

were unable to publicly mobilize out of fear of family pressure.[303] In 2006, Representative Hsiao Bi-khim proposed a same-sex marriage law.[304] However, her bill would not even be subjected to committee deliberations for sheer lack of majority support.[305]

Civil society took the lead after these failed attempts. In 2009, activists formed the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR).[306] Though concerned with same-sex marriage, TAPCPR adopted an inclusive agenda that encompassed "all non-traditional family structures, including civil partnerships, same-sex marriages, multiple-person families, and never-married individuals with adopted children."[307] As its advocacy embraced even those whose relations were not anchored on romantic attraction, the movement came to be known as the "Diverse Families Movement[.]"[308] In 2013, the movement proposed the so-called "Three Bills for Diverse Families[,]"[309] which addressed its advocacy's range of relations: "[first,] same-sex marriage; [second,] a civil partnership system without restrictions as to the gender, gender identity, or sexual orientation of the partners; and [third,] groups of friends who choose to live together and take care of one another as a family."[310] Representative Yu Mei-nu adopted one of the movement's proposals, and, on October 2013, introduced a bill seeking to amend the Civil Code to allow for same-sex marriages.[311] Prior to this, Representative Yu had introduced another same-sex marriage bill in 2012.[312] Both bills introduced by Representative Yu failed to become law but, unlike previous attempts, would advance to the stage of committee deliberations.[313]

By the time of the 2014 and 2016 election cycles, same-sex marriage was a significant enough issue to win the support of key candidates.[314] In 2014,

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303. *Id.*

304. Hsu, *supra* note 301, at 155.

305. Judicial Yuan Interpretation No. 748, ¶ 9.

306. Chang, *supra* note 10, at 148.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. Judicial Yuan Interpretation No. 748, ¶ 9.

312. Chang, *supra* note 10, at 148.

313. *Id.* (citing Judicial Yuan Interpretation No. 748, ¶ 9).

314. Chang, *supra* note 10, at 148.

Dr. Ko Wen-je, candidate — and eventual winner — for Taipei mayor pledged to support same-sex marriage.[315] Then presidential candidate Tsai Ing-wen did the same in 2016.[316] The escalating attention on and support for marriage equality, however, also galvanized opposition.[317] With this, attempts to amend the Civil Code remained unsuccessful even as President Tsai's DPP held majority seats in the Legislative Yuan, and even as majority of Taiwanese citizens were in favor of same-sex marriage.[318]

Support for marriage equality gained momentum in late 2016 following the suicide of gay professor Jacques Picoux.[319] Professor Picoux, a long-time Taipei resident, was anguished not only by the death of his partner of 35 years, Tseng Ching-chao, but also by his inability to make medical decisions for

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315. *Id.*

316. *Id.* at 148-49 (citing Chris Horton, *Court Ruling Could Make Taiwan First Place in Asia to Legalize Gay Marriage*, N.Y. TIMES, May 24, 2017, *available at* https://www.nytimes.com/2017/05/24/world/asia/taiwan-same-sex-marriage-court.html?mcubz=O (last accessed July 31, 2021) [https://perma.cc/RHV2-VN9P]).

317. Chang, *supra* note 10, at 149 (citing The Economist, Taiwan Debates Gay Marriage, *available at* https://www.economist.com/asia/2016/12/03/taiwan-debates-gay-marriage (last accessed July 31, 2021) [https://perma.cc/A2TD-UYPV] & Jermyn Chow, *Thousands Protest Against Gay Marriage Bill in Taiwan*, STRAITS TIMES, Nov. 18, 2016, *available at* https://www.straitstimes.com/asia/thousands-protest-against-gay-marriage-bill-in-taiwan (last accessed July 31, 2021) [https://perma.cc/7N89-ULXZ]).

318. Chang, *supra* note 10, at 149 (citing Judicial Yuan Interpretation No. 748, ¶ 9; Emily Rauhala, *A Backlash Against Same-Sex Marriage Tests Taiwan's Reputation for Gay Rights*, WASH. POST, Apr. 20, 2017, *available at* 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 (last accessed July 31, 2021) [https://perma.cc/8DQF-GWW8]; & Jeff Kingston, *Same-Sex Marriage Sparks a 'Culture War' in Taiwan*, JAPAN TIMES, Dec. 10, 2016, *available at* https://www.japantimes.co.jp/opinion/2016/12/10/commentary/sex-marriage-sparks-culture-war-taiwan (last accessed July 31, 2021) [https://perma.cc/5CMV-5P7V]).

319. Chang, *supra* note 10, at 149 (citing Nicola Smith, *Professor's Death Could See Taiwan Become First Asian Country to Allow Same-Sex Marriage*, GUARDIAN, Oct. 28, 2016, *available at* https://www.theguardian.com/world/2016/oct/28/professors-death-could-see-taiwan-become-first-asian-country-to-allow-same-sex-marriage (last accessed July 31, 2021) [https://perma.cc/H73N-AXUZ]).

Tseng as he battled cancer.[320] The outpouring of sympathy led several legislators to file bills anew.[321] In December 2016, marriage equality bills hurdled first reading following the deliberations of the Legislative Yuan's Judiciary and Organic Laws and Statutes Committee.[322] Still, further action on the bills did not appear forthcoming.[323]

Such was the legislative situation in 2017 when Chi Chia-wei, the activist who suffered five months in detention in 1986, won his appeal before Taiwan's Constitutional Court. Ever persevering, Chi had made several more attempts at legalized same-sex marriage following his 1986 detention.[324] With Taiwan's nascent democracy in 1988, Chi and his partner had a marriage ceremony celebrated.[325] In 1994, he sought the marriage's recognition from the Ministry of Justice and the Ministry of the Interior.[326] In response, the Ministry of Justice issued Letter of 1994-Fa-Lu-Jue-17359, which maintained that, under the Civil Code, marriage is between a man and a woman.[327] In 1998 and 2000, Chi unsuccessfully sought permission from the Taipei District Court for a notary public to solemnize a marriage.[328] He filed an appeal which the Constitutional Court denied in 2001.[329]

Another attempt launched by Chi in 2013 would turn out differently. That year, Chi and his partner again tried "to register their marriage[, this time] at the Wanhua District household registration office in Taipei.[330] Failing, they filed an unsuccessful administrative appeal before the Taipei City Government.[331] Undeterred, Chi filed a complaint before the Taipei High

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320. Chang, *supra* note 10, at 149.

321. *Id.*

322. *Id.*

323. *Id.* at 149-50 (citing Judicial Yuan Interpretation No. 748, ¶ 9).

324. Chang, *supra* note 10, at 150-51.

325. *Id.* at 150 (citing Central News Agency, Man to Seek Constitutional Interpretation on Gay Marriage (Update), Taiwan News, Dec. 24, 2012, *available at* https://www.taiwannews.com.tw/en/news/2652956 (last accessed July 31, 2021) [https://perma.cc/XEE4-YE59]).

326. Chang, *supra* note 10, at 150.

327. *Id.* (citing Judicial Yuan Interpretation No. 748, ¶ 8).

328. Chang, *supra* note 10, at 150.

329. *Id.*

330. *Id.* at 151.

331. *Id.*

Administrative Court, which found no fault in the denial rendered by the Wanhua office.[332] A further appeal to the Supreme Administrative Court was also denied.[333] Finally, Chi filed a petition before the Taiwan Constitutional Court which, in 2017 issued *Interpretation 748*.[334]

As mentioned, Chi was not the sole petitioner in *Interpretation 748*. In July 2015, encouraged by *Obergefell*'s promulgation the month prior, Taipei Mayor Dr. Ko Wen-je delivered on his 2014 campaign promise to support marriage equality.[335] At his instruction, the Taipei City Government sought and was granted leave by the Ministry of the Interior to obtain an interpretation from the Constitutional Court.[336] Maintaining that it should be free to register marriages of same-sex couples, Taipei set out on its judicial challenge to the heteronormative status quo.

Interpretation 748 granted Chi's and the Taipei City Government's consolidated petitions and ruled that same-sex couples' exclusion from marriage was "in violation of the Constitution's guarantees of both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7."[337] Article 22 is a catch-all rights clause which provides that "[a]ll other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution."[338] Article 7 spells out Taiwan's equal protection clause, stating that "[a]ll citizens ... , irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law."[339] *Interpretation 748* gave the Legislative Yuan two years to enact compliant legislation.

Citing precedent,[340] the Constitutional Court explained that decisional autonomy as regards marriage (i.e., whether to marry and whom to marry) "is vital to the sound development of personality and safeguarding of human dignity and therefore is a fundamental right to be protected by Article 22[.]"[341]

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332. *Id.*

333. *Id.*

334. Chang, *supra* note 10, at 151.

335. *Id.* at 150.

336. *Id.*

337. Judicial Yuan Interpretation No. 748, ¶ 1.

338. TAIWAN CONST. ch. II, art. 22.

339. Judicial Yuan Interpretation No. 748, ¶ 14.

340. Judicial Yuan Interpretation No. 362.

341. Judicial Yuan Interpretation No. 748, ¶ 13.

It added that "[t]he need, capability, willingness, and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature"[342] are no less essential for same-sex couples than they are for opposite-sex couples, yet they are denied to same sex couples. Thus, non-heteronormative persons' exclusion from marriage runs afoul of Article 22.

Turning to Article 7, the Constitutional Court noted that its enumeration is "only illustrative, rather than exhaustive."[343] Thus, Article 7 is equally concerned with such other classifications as those based on "disability or sexual orientation[.]"[344] The Court drew from history and determined that "homosexuals ... have been a discrete and insular minority" who, "[i]mpacted by stereotypes, [ ] have been among those lacking political power for a long time, [and] unable to overturn their legally disadvantaged status through ordinary democratic processes."[345] Accordingly, different treatment based on sexual orientation triggers scrutiny under "a heightened standard[.]"[346] The Court then turned to the justifications invoked for differentiating same-sex couples in marriage: procreation and the supposed need "to safeguard the basic ethical orders[.]"[347] It noted that the capacity to reproduce is not essential to marriage, as neither unwillingness nor inability to reproduce voids or terminates a marriage.[348] It added that the basic ethical considerations in marriage — "minimum age ... , monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other"[349] — will remain even if same-sex couples marry. Thus, the invoked justifications cannot anchor the exclusion of same-sex couples. Ultimately then, limiting marriage to opposite-sex couples runs afoul of Article 7.[350]

Marriage equality would hit one final snag before being fully realized. In 2018, a multi-question referendum initiated by the Alliance for the Happiness of the Next Generation, a coalition of conservative Christian groups, secured

342. *Id.*

343. *Id.* ¶ 14.

344. *Id.*

345. *Id.* ¶ 15.

346. *Id.*

347. Judicial Yuan Interpretation No. 748, ¶ 16.

348. *Id.*

349. *Id.*

350. *Id.*

popular support to block the enforcement of *Interpretation 748*.[351] Ahead of the referendum, however, the government asserted its commitment to *Interpretation 748*.[352] On 22 May 2019, President Tsai signed into law the Enforcement Act of Judicial Yuan Interpretation No. 748.[353] On 24 May 2019, Taiwan commenced the registration of marriages between same-sex couples.[354]

It has been underscored that Taiwan's LGBTQIA+ inclusivity and enabling of marriage equality were also moved by geopolitical imperatives, that is, by antagonisms with the People's Republic of China and by Taiwan's need to "gain global legitimacy[ ]"[355] in the face of its challenged political status. A convergence of interests has thus meant that gay pride has been upgraded to national pride, and the issue of marriage equality has been associated with the issue of nation status.[356]

Taiwan's leaders openly acknowledge the capacity for "projection to world politics[ ]"[357] that is facilitated by Taiwan's success in advancing LGBTQIA+ rights. For example, DPP Representative Yu Mei-nu, the legislator who, in 2013, adopted and advocated for one of the Three Bills for Diverse Families, stated that "Taiwan is under the threat of China and can't speak out in the international community ... . If we're the first in Asia, that will definitely raise Taiwan's international profile. The world can see that we emphasize democracy, the rule of law, and freedom."[358] In similar manner, KMT Representative Jason Hsu noted that

351. MEI-FANG FAN, DELIBERATIVE DEMOCRACY IN TAIWAN: A DELIBERATIVE SYSTEMS PERSPECTIVE 58-59 (2021).

352. *Anti-Gay Marriage Groups Win Taiwan Referendum Battle*, STRAITS TIMES, Nov. 26, 2018, *available at* https://www.straitstimes.com/asia/east-asia/anti-gay-marriage-groups-win-taiwan-referendum-battle (last accessed July 31, 2021) [https://perma.cc/8WUR-78J7].

353. George Liao, Taiwan's New Same-Sex Marriage Law to be Enacted on May 24, *available at* https://www.taiwannews.com.tw/en/news/3708500 (last accessed July 31, 2021) [https://perma.cc/JK9H-G7JD].

354. *Id.*

355. Damm, *supra* note 263, at 153.

356. Chen, *supra* note 110, at 103-04.

357. Alison Brysk, *Constructing Rights in Taiwan: The Feminist Factor, Democratization, and the Quest for Global Citizenship*, 34 PAC. REV. 838 (2021).

358. Casey Tolan, Taiwan on Verge of History as First Asian Country to Allow Same-Sex Marriage, *available at* https://www.usatoday.com/story/news/world

> [t]here are some ways [Taiwan] can never compete with China, but this is a way [to] set a good example for them[and to] 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 [it] stand out.[359]

It, too, has been recognized by civil society. Josephine Ho, celebrated as the "godmother of the Taiwanese queer movement,"[360] explained that, "[t]he China issue is closely related to [the] gay issue and [the] gay movement in Taiwan because it can serve a very important function in promoting Taiwan's image as a democratic state, as 'in' with the international trends of gay equality."[361] Taiwanese youth culture, which is particularly concerned with Taiwan's future in relation to China, has consequently been supportive of LGBTQIA+ concerns. Youth leader Miao Poya spoke of Taiwan's potential as an Asian model, stating, "[t]he fact that we can achieve this as such a small and politically unstable country, means other countries can as well. Japan's material conditions are better than ours. South Korea's development is incredible. So on gender issues, for example, there's no question that they can do better."[362]

The leveraging of queer issues to enhance Taiwan's soft power and international standing tempts a radical, dismissive view of Taiwan's gains as mere products of political pragmatism. Such an analysis confounds causes and effects. Taiwan set out on the path to democracy in 1987.[363] Around the same time, particularly following China's response to the Tiananmen Square protests, China moved farther than it ever was from democracy.[364] Taiwan's and China's contemporaneous shifts share similarities with the asymmetric polarization observed in American party politics, where one side — the

/2017/01/31/taiwan-verge-history-first-asian-countryto-allow-same-sex-marriage/97275002 (last accessed July 31, 2021) [https://perma.cc/FVS3-FLFC].

359. Rauhala, *supra* note 318.

360. Josephine Ho, *available at* http://sex.ncu.edu.tw/members/Ho/english_new/index.html (last accessed July 31, 2021) [https://perma.cc/QCT8-NF7C].

361. Quartz, Video, *How Taiwan Became the Most LGBT-Friendly Country in Asia*, YOUTUBE, Apr. 10, 2019, *available at* https://www.youtube.com/watch?v=KdvxaRqr_CQ&t=183s (last accessed July 31, 2021).

362. *Id.*

363. *See* Chang, *supra* note 10, at 155.

364. *See generally* Jean Philippe-Béja, *China Since Tiananmen: The Massacre's Long Shadow*, 20 J. DEMOCRACY 3, 5-15 (2009).

Republican Party — has drawn itself farther into extremism and illiberalism,[365] except that Taiwan's shift has been from the extreme and into the center. In any case, concurrent Taiwanese and Chinese shifts, drove them farther apart. It made them more distinct. The more pronounced contrast rendered appropriate Taiwan's affirmation of its identity. In the process, Taiwan's rights-based approach demonstrated its capacity for self-reinforcement. Its emphasis on liberty fosters both internal and external strength, facilitating its projection to world politics —

> Rights build legitimacy at home, as Taiwan's population identifies increasingly with the distinct national identity, which is intertwined with liberal democracy and an ethos of tolerance. Taiwan's citizens rank the importance of living in a democracy at 8.9 on a scale of 10. ... 88% of Taiwan's youth consider themselves politically Taiwanese, and 1/3 state that the feature of Taiwan they are most proud of is its democracy ... . On the National Happiness scale, Taiwan ranks #25 in the world and the highest in Asia, just below Europe and above Singapore, Korea, Japan, and China. ...
>
> The consolidation of rights has also helped Taiwan to navigate the challenges of globalization and its contested entanglement with a hostile neighbor. Taiwan's relatively successful response to the COVID-19 pandemic despite massive exposure to its origins in China manifests the rewards of rights for citizens' survival in an era of border-crossing threats. Taiwan's rights-based public health system, transparent government communication, and social solidarity laid the foundation for early intervention and containment of the virus.[366]

On the actual path taken to marriage equality, this Article shall next show that Taiwan, while replicating American success, is not indebted to it. On the

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365. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM n (2012).

366. Brysk, *supra* note 357, at 26-27 (citing Frédéric Krumbein, *Human Rights and Democracy in Taiwan's Foreign Policy and Cross-Strait Relations*, 2 INT'L J. TAIWAN STUD. 292 (2019); Young-Hee Chang, et al., *Popular Value Perceptions and Institutional Preference for Democracy in "Confucian" East Asia*, 41 ASIAN PERSPECTIVE 347 (2017); Election Study Center, National Chengchi University, Changes in the Taiwanese/Chinese Identity of Taiwanese (1992-2006) *available at* https://vtechworks.lib.vt.edu/bitstream/handle/10919/37918/WuChengqiuVTPGGDissertation2007.pdf (last accessed July 31, 2021) [https://perma.cc/D3YY-XYH4]; & John F. Helliwell, et. al., World Happiness Report, *available at* https://worldhappiness.report/ed/2019 (last accessed July 31, 2021) [https://perma.cc/2HNV-NQA6]).

contrary, it transcended American gains, enabling greater liberty and protections than *Obergefell* affords. Its legal framework for marriage equality is a testament to self-determination, not a mere facsimile that undiscerningly duplicated foreign thought in the name of assimilation.

Ultimately, viewing Taiwan's embrace of queer and marriage equality as merely a product of geopolitical pragmatism is reductive and myopic. It inordinately emphasizes contemporary geopolitical dynamics at the expense of the history which the Taiwanese actually lived and experienced. It fails to acknowledge that democratization, liberalism, Taiwanization, multiculturalism, and rights were *organic* developments, borne by the genuine, harrowing experience of dictatorship. It denies legitimacy to the civil society and queer uprising begotten by history, and robs them of the inertia earned by their labor. It also reduces Taiwan's leadership to the caricature of an officialdom beguiled by external challenges. It is true that analysis must account for the incidents and gains occasioned by aspirational projections, and for this reason, geopolitical aims and means must be considered. But, it is equally error to typecast genuine successes as purely utilitarian devices.

In truth, the Taiwanese example renders tangible the promises of democratic commitment. "Taiwan's story [ ] illustrates the rewards to rights. Despite some inevitable shortfalls and trade-offs, the pursuit of rights in Taiwan has fostered human development, domestic solidarity, and membership in global society."[367] Its gender inclusivity has delivered concrete economic benefits "by attracting trade, talent, and tourism."[368]

> The Netherlands is now one of Taiwan's leading investors, and has upgraded the name of its de facto diplomatic representative beyond trade to recognize a wide range of liberal cooperation — including 'public governance best practices.' ... As the leading country in Asia for freedom of expression, Taiwan hosts an information economy and a thriving culture industry in music and film. ... Attracting talent, Taiwan has been ranked the Best Country for Expats by the largest international association of foreigners overseas for five years in a row, and Taipei the leading city twice ... . Taiwan is a leading tourist destination which benefits from its tolerant brand with special appeal and services for both LGBTQ[I+] 'rainbow tourism' — and Asian Muslim populations ... . Tourism brings over $20 billion/year to Taiwan. In addition, Taiwan's frequent hosting of international conferences, NGOs, and medical exchanges also yields economic benefits and international recognition — like Costa Rica, international organizers favor

367. Brysk, *supra* note 357, at 862-63.

368. *Id.* at 863.

> Taiwan as a site for events within its region as a safe, stable, well-governed, and tolerant locale.[369]

The story of Taiwan's queer movement is the story of its democracy. Reeling from its own past torments, facing an external existential threat, and compelled to stand on its own, Taiwan built a body politic typified by the mutually constitutive dimensions of "democratization, gender equity, and global good citizenship[.]"[370] More than three decades into its democracy, still challenged and vulnerable, Taiwan is an ongoing demonstration of what it means for a society to be anchored in and to live to democratic commitment. It may be with a measure of irony, but the Taiwanese polity — embattled as it is — has earned its place as an exemplar for other, supposedly better-established, but actually democratically-challenged states to emulate.

V. FROM *OBERGEFELL* TO *INTERPRETATION 748*: TRANSCENDENT ITERATION

Though both the Taiwanese and American marriage equality movements secured victories through decisive judicial pronouncements, it is inaccurate to believe that *Obergefell* and *Interpretation 748* are merely iterative. *Interpretation 748* was decided two years after *Obergefell* and specifically cites it.[371] However, as Professor Stewart Chang notes, *Interpretation 748* "strongly departs from *Obergefell*'s analytical framework."[372] Though they both invoke due process and equal protection, each relies more heavily on one than the other.[373]

369. *Id.* (citing Joseph Yeh, Netherlands Rep Office Changes Name to 'Netherlands Office Taipei', *available at* https://focustaiwan.tw/politics/202004270015 (last accessed July 31, 2021) [https://perma.cc/2C57-X4BA]; InterNations, The Best & Worst Places for Expats in 2019, *available at* https://www.internations.org/expat-insider/2019/best-and-worst-places-for-expats-39829 (last accessed July 31, 2021) [https://perma.cc/37Y7-HVV4]; & Davina Tham, *The Potential of Taiwan's Rainbow Tourism*, TAIPEI TIMES, May 21, 2019, *available at* https://www.taipeitimes.com/News/feat/archives/2019/05/21/2003715502 (last accessed July 31, 2021) [https://perma.cc/ZU8W-FPPF]).

370. Brysk, *supra* note 357, at 864.

371. *Interpretation 748*'s reference to *Obergefell* was not on a legal point. In its first endnote, *Interpretation* 748 quoted *Obergefell*'s statement that "sexual orientation is both a normal expression of human sexuality and immutable." (*Obergefell*, 135 S.Ct. at 2596 (citing Brief for American Psychological Association et al. as Amici Curiae 7–17)).

372. Chang, *supra* note 10, at 146.

373. *Id.*

The distinction is not a matter of hair-splitting theoretical abstraction. *Obergefell* and *Interpretation 748* are products not just of the immediate arguments and techniques marshalled to secure relief, but evince greater underlying tapestries. Their distinction is borne by varied national and minority histories, as well as differing formative experiences in legal advocacy. [374] Moreover, far from merely satisfying academic curiosity, recognizing the distinction is of profound practical legal importance. Though both *Obergefell*'s and *Interpretation 748* constitutional anchors secured the immediate relief of enabling marriage equality, those anchors' divergence conditions potency for securing benefits and protections beyond same-sex marriage. Thus, the distinction is pivotal to the continuing struggle for equality beyond the bounds of matrimony.

Obergefell set out in its discussion by noting that "the Court has long held [that] the right to marry is protected by the Constitution."[375] It conceded however, that the prior decisions[376] that contributed to this determination involved marital relations between opposite-sex couples. It needed to be settled, therefore, whether the fundamental right that has been upheld for opposite-sex couples must also be enjoyed by same-sex couples and has therefore been unjustly withheld from them. To resolve this, *Obergefell* considered "the basic reasons why the right to marry has been long protected."[377] It identified four principles and traditions and proceeded to discuss how those principles and traditions "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[378]

First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[379] *Obergefell* noted that the matters of

374. *Id.* at 154-55 (citing David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH L. REV. 523, 538 & 557 (2011)).

375. *Obergefell*, 135 S.Ct. at 2598.

376. *See, e.g.*, *Loving*, 388 U.S. at 1; Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley, 482 U.S. 78 (1987); M.L.B. v. S.L.J., 519 U.S. 102 (1996); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); *Griswold*, 381 U.S. at 479; Skinner v. Oklahoma, 316 U.S. 535 (1942); & Meyer v. Nebraska, 262 U.S. 390 (1923).

377. *Obergefell*, 135 S.Ct. at 2599.

378. *Id.*

379. *Id.*

privacy and decisional autonomy apply no less to same-sex couples than they do to opposite-sex couples.[380]

Second, marriage's unique capacity to "[support] a two-person union [is] unlike any other in its importance to the committed individuals."[381] *Obergefell* noted that "[s]ame-sex couples have the same right as opposite-sex couples to enjoy intimate association."[382]

Third, marriage protects children and families, and therefore "draws meaning from related rights of childrearing, procreation, and education."[383] Here, *Obergefell* clarified that marriage is conditioned neither on the capacity nor on the commitment to procreate.[384] Nevertheless, it noted that same-sex couples' exclusion from marriage demeans children of non-heteronormative persons —

> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[385]

Fourth, is marriage's social function, it is "a keystone of [the] social order."[386] On this concern, *Obergefell* found no distinction between same-sex couples and opposite-sex couples.[387] It lamented that by their exclusion from marriage, however, "same-sex couples are denied the constellation of benefits that the States have linked to marriage."[388]

Having determined that, on account of same-sex couples' unjustified exclusion from the exercise of a fundamental right, there is a violation of the

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380. *Id.* at 2599 (citing *Windsor*, 570 U.S. at 769-73). "This is true for all persons, whatever their sexual orientation." *Id.*

381. *Obergefell*, 135 S.Ct. at 2599.

382. *Id.* at 2600.

383. *Id.* (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925) & *Meyer*, 262 U.S. at 399).

384. *Obergefell*, 135 S.Ct. at 2601 (citing *Lawrence*, 539 U.S. at 567).

385. *Id.* (citing *Windsor*, 570 U.S. at 772).

386. *Obergefell*, 135 S.Ct. at 2601.

387. *Id.*

388. *Id.*

due process clause, *Obergefell* then turned to equal protection. Here, it touched on the "long history of disapproval"[389] suffered by same-sex relations. Nevertheless, its discussion on equal protection still turned on marriage's being a fundamental right from which same-sex couples had been unjustly excluded —

> Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.[390]

Thus, as Professor Chang notes, "*Obergefell* is a due process case that only mentions equal protection."[391]

Interpretation 748 similarly recognized marriage, as a fundamental right, i.e., "vital to the sound development of personality and safeguarding of human dignity[.]"[392] *Interpretation 748* however, transcends *Obergefell* in that it definitively recognizes non-heteronormative persons' status as a "discrete and insular minority" which has suffered a history of being discriminated and legally disadvantaged.[393] The equal protection analysis in *Interpretation 748* turned on this specific consideration. It impelled resort to a "heightened standard"[394] of review, a standard that the exclusion of same-sex couples would fail to satisfy —

> [H]omosexuals were once denied by social tradition and custom in the past. As a result, they have long been locked in the closet and suffered various forms of *de facto* or *de jure* exclusion or discrimination. Besides, homosexuals, because of the population structure, have been *a discrete and insular minority* in the society. Impacted by stereotypes, they have been among *those lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic processes*. Accordingly, to determine the constitutionality of different treatment based on sexual orientation, *a*

389. *Id.* at 2604.

390. *Id.* (citing *Zablocki*, 434 U.S. at 383-88 & *Skinner*, 316 U.S. at 541).

391. Chang, *supra* note 10, at 160.

392. Judicial Yuan Interpretation No. 748, ¶ 13.

393. *Id.* ¶ 15.

394. *Id.*

> *heightened standard shall be applied*. Such different treatment must be aimed at furthering an important public interest by means that are substantially related to that interest, in order for it to meet the requirements of the right to equality as protected by Article 7 of the Constitution.
>
> The reasons that the State has made laws to govern the factual existence of opposite-sex marriage and to establish the institution of marriage are multifold. The argument that protecting reproduction is among many functions of marriage is not groundless. The Marriage Chapter, nonetheless, does not set forth the capability to procreate as a requirement for concluding an opposite-sex marriage. Nor does it provide that a marriage shall be void or voidable, or a divorce decree may be issued, if either party is unable or unwilling to procreate after marriage. Accordingly, reproduction is obviously not an essential element to marriage. The fact that two persons of the same sex are incapable of natural procreation is the same as the result of two opposite-sex persons' inability, in an objective sense, or unwillingness, in a subjective sense, to procreate. *Disallowing the marriage of two persons of the same sex because of their inability to reproduce is a different treatment having no apparent rational basis*. Assuming that marriage is expected to safeguard the basic ethical orders, such concerns as the minimum age of marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other are fairly legitimate. Nevertheless, the basic ethical orders built upon the existing institution of opposite-sex marriage will remain unaffected, even if two persons of the same sex are allowed to enter into a legally-recognized marriage pursuant to the formal and substantive requirements of the Marriage Chapter, inasmuch as they are subject to the rights and obligations of both parties during the marriage and after the marriage ends. *Disallowing the marriage of two persons of the same sex for the sake of safeguarding basic ethical orders is a different treatment also having no apparent rational basis. Such different treatment is incompatible with the spirit and meaning of the right to equality as protected by Article 7 of the Constitution*.[395]

Professor Chang explains that the American incrementalist litigation strategy evolved from how the same-sex marriage debate was framed "as a culture war where core American family values were at stake."[396] The marriage equality movement needed to first establish that same-sex couples were no different from opposite-sex couples, as were their families.[397] Thereafter, it was opportune to challenge the discriminatory treatment of withholding a fundamental right from them. The task of first presenting same-sex couples as equal citizens was particularly urgent, not only because there

395. *Id.* ¶¶ 15-16 (emphases supplied).

396. Chang, *supra* note 10, at 153.

397. *Id.* at 153-54.

had been historical marginalization. Worse, same-sex conduct was, until recently, viewed as criminal.[398] As the incrementalist litigation strategy strived for assimilation, it drew attention away from what made same-sex couples distinct and the concurrent need to treat them equally despite being distinct —

> The incremental approach to gay rights sought to effect change by incrementally swaying public opinion through a strategy of assimilation. They presented their equal protection argument not on the right to be treated equally despite being different, but that they should be treated the same because they are the same as other families. In the campaign for same-sex marriage equality, incrementalist activists showcased gay families and their similarities to other normative families. Gay individuals were presented as equal citizens through their assimilation into American norms of family, and their differences from the norm were underplayed. Thus, incrementalism in the United States focused first on eliminating the strongly negative stereotypes associated with the gay population that was perpetuated by the criminalization of same-sex activity, which would then set the framework for normalizing gay relationships through marriage equality. The strategy for litigating *Lawrence v. Texas* underplayed the sex and overplayed the relational aspects of sexual orientation, and this remained the strategy through *United States v. Windsor* and *Obergefell v. Hodges*.[399]

Obergefell therefore avoids identifying non-heteronormative persons, in particular, or sexual minorities, in general, as a protected class.[400] Its due process analysis hinges on the issue of the accessibility of marriage as a defined goal, along with its dimensions of privacy and decisional autonomy. It delivers the immediate objective sought, that is, enabling marriage, but not much else.[401] Hence, in the U.S., many dimensions of LGBTQIA+ protection remained unsettled and continued to be the subject of subsequent cases. For example, a ban imposed by the Trump administration on military service by transgender individuals was the subject of *Karnoski v. Trump*,[402] while workplace discrimination was the subject of 2020's *Bostock v. Clayton*

398. *See Lawrence*, 539 U.S. at 558.

399. Chang, *supra* note 10, at 153-54 (citing Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002); *Lawrence*, 539 U.S. at 558; *Windsor*, 570 U.S. at 744; & *Obergefell*, 135 S.Ct. at 2584)).

400. *Id.* at 163.

401. *Id.* at 147.

402. Karnoski v. Trump, No. 2:17-cv-01297-MJP, 2017 WL 8229552 (9th Cir. 2017) (Westlaw, U.S.).

County.[403] Notably, *Bostock* ruled for queer rights without even referencing *Obergefell*.

Interpretation 748 does what *Obergefell* skirts. It is doctrinally and functionally more expansive.[404] *Obergefell* did mention "a long history of disapproval[,]"[405] but it stopped at that. *Interpretation 748* acknowledges a history of marginalization *and* makes determination on being a constitutionally-protected class. This opens the door for specific protections befitting that classification. Strategically then, *Interpretation 748* offers a more versatile model "because it does not narrow equality as a privilege to be enjoyed only within the context of privacy rights, but creates more robust protections ... against discrimination on all levels[.]"[406]

The intrepid expansiveness of *Interpretation 748* is not entirely surprising. Consistent with the democratic impetus that has urged other Taiwanese institutions, and proceeding from the Constitutional Court's consciousness of the authoritarian experience that gives pluralism and individual rights a premium, the Court was being true to form when it recognized historical suffering and facilitated protections. Indeed, "the resulting history of Taiwan after de-colonization [set] the stage where much of public discourse on rights and liberties was already focused on equal protection."[407] Just as the framing of a culture war impelled the American marriage equality movement to assimilate, the knowledge of past indignities urged the Constitutional Court to make amends. Unlike in the American experience where courts and legislatures were conceded to be passive consolidators, rather than active creators of social norms,[408] *Interpretation 748* exhibits the potency of institutions' willingness to act in the face of manifest injustice.

The Constitutional Court, in *Interpretation 748*, did not descend to activism. Rather, it kept fidelity with its mandate to adjudicate cases involving constitutional transgression. Finding such a transgression, it knew to stay its hand when it came to the consequent task of carving how marriage equality was to be affected. Striking a balance between the urgency of seeing its judicial ruling implemented and the policy refinement necessary to actually effect it,

403. Bostock v. Clayton County, 140 S.Ct. 1731 (2020) (U.S.).

404. Chang, *supra* note 10, at 146.

405. *Obergefell*, 135 S.Ct. at 2604.

406. Chang, *supra* note 10, at 147.

407. *Id.* at 155.

408. Hunter, *supra* note 139, at 1688 (citing Adams, *supra* note 217, at 14).

it extended a reasonable period for the Legislative Yuan to enact enabling legislation.[409]

Due process and equal protection are not mutually exclusive. Precisely, *Obergefell* and *Interpretation 748* invoked both of them and, in so doing, delivered resounding victories. Nevertheless, as the variant examples of *Obergefell* and *Interpretation 748* show, doctrinal anchors bear heavily on outcomes and are prompted by context. As fame and renown are the distracting postscripts to well-fought struggles, the allure of similar rewards detracts from the greater task of learning from the challenges that had to be endured and the measures and sacrifices that were key to obtaining those rewards. *Obergefell* and *Interpretation 748* are admirable successes. But they do not stand by their lonesome. They are products of histories and crises, testaments to skill and diligence. Emulating their successes calls for more than merely invoking them, but more importantly, discerning and understanding the sensibilities that engendered them.

VI. THE PHILIPPINES: TOWARDS A LEGAL REGIMEN

The divergence in constitutional anchors between *Obergefell* and *Interpretation 748* points not merely to underlying histories and prospective extra-decisional benefits. They are also founded on variant legal bases and techniques. This is vital to replicating success. If domestic efforts at securing marriage equality are to culminate in constitutional litigation — as they did in the U.S. and Taiwan — the framing of issues, invocation of appropriate authorities, manner of pleading arguments, build-up of cases, and quality of accompanying extra-legal engagement can spell the difference between decisive victory in the tradition of *Obergefell* and *Interpretation 748*, or a defeat that will compound burdens as 1972's *Baker v. Nelson*[410] did.

A. Building on a Bedrock: On Due Process and Equal Protection

Favorable judgments on due process and equal protection grounds are endpoints arrived at from initial premises. As regards due process, the initial premise in both *Obergefell* and *Interpretation 748* is the nature of the privacy and decisional autonomy inherent in marriage as fundamental freedoms. This triggered resort to the strict scrutiny test, which requires "the presence of compelling, rather than substantial, governmental interest and on the absence

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409. Chang, *supra* note 10, at 153.

410. Baker v. Nelson, 409 U.S. 810 (1972).

of less restrictive means for achieving that interest[.]"[411] *Kabataan Party-List v. Commission on Elections*[412] expressly references how American jurisprudence has evolved to admit an expanded understanding of which rights amount to fundamental rights —

> In terms of judicial review of statutes or ordinances, strict scrutiny refers to the standard for determining the quality and the amount of governmental interest brought to justify the regulation of fundamental freedoms. Strict scrutiny is used today to test the validity of laws dealing with the regulation of speech, gender, or race as well as other fundamental rights as expansion from its earlier applications to equal protection. As pointed out by petitioners, the United States Supreme Court has expanded the scope of strict scrutiny to protect fundamental rights such as suffrage, judicial access, and interstate travel.
>
> Applying strict scrutiny, the focus is on the presence of compelling, rather than substantial, governmental interest and on the absence of less restrictive means for achieving that interest, and the burden befalls upon the State to prove the same.[413]

As regards equal protection, *Interpretation 748* proceeds from a determination of being a discrete and insular minority.[414] The U.S. Supreme Court shed light on the concept of a discrete group in *Lyng v. Castillo*.[415] In explaining that 'close relatives' in that case did not entail suspect or quasi-suspect classification, *Lyng* stated —

> The District Court erred in judging the constitutionality of the statutory distinction under 'heightened scrutiny.' The disadvantaged class is that comprised by parents, children, and siblings. Close relatives are not a 'suspect' or 'quasi-suspect' class. As a historical matter, they have not been *subjected to discrimination*; they do not *exhibit obvious, immutable, or distinguishing*

411. Kabataan Party-List v. Commission on Elections, G.R. No. 221318, 777 SCRA 574, 606 (2015) (citing White Light Corporation v. City of Manila, G.R. No. 122846, 576 SCRA 416, 437 (2009)).

412. *Kabataan Party-List*, 777 SCRA at 574.

413. *Id.* at 606 (citing *White Light Corporation*, 576 SCRA at 437; Garcia v. Drilon, G.R. No. 179267, 699 SCRA 352, 450 (2013) (J. Leonardo-De Castro, concurring opinion); & *Ang Ladlad LGBT Party*, 632 Phil. at 106) (C.J. Puno, separate concurring opinion)).

414. Judicial Yuan Interpretation No. 748, ¶ 15.

415. Lyng v. Castillo, 477 U.S. 635 (1986).

> *characteristics that define them as a discrete group*; and they are not *a minority or politically powerless*.[416]

In support of its determination, *Interpretation 748* considered how persons in same-sex relations have not only "suffered various forms of *de facto* or *de jure* exclusion or discrimination[,]"[417] but have also been "lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic processes."[418] In our jurisdiction, classifications that burden suspect classes trigger strict scrutiny whereby "the government has the burden of proving that the classification (*i*) is necessary to achieve a compelling State interest, and (*ii*) is the least restrictive means to protect such interest or the means chosen is narrowly tailored to accomplish the interest."[419] In *Interpretation 748*, the Constitutional Court stopped short of applying strict scrutiny. It instead employed a "heightened standard"[420] (i.e., "different treatment must be aimed at furthering an important public interest by means that are substantially related to that interest[ ]").[421]

Similar determinations as those which were the premises in *Obergefell* and *Interpretation 748* have already been made in Philippine jurisprudence. In *Republic v. Manalo*,[422] the Supreme Court adverted to the right to marry as a fundamental right —

> 'Fundamental rights' whose infringement leads to strict scrutiny under the equal protection clause are those basic liberties explicitly or implicitly guaranteed in the Constitution. It includes the right of procreation, the *right to marry*, the right to exercise free speech, political expression, press, assembly, and so forth, the right to travel, and the right to vote.[423]

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416. *Id.* at 638 (citing Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976)) (emphases supplied).

417. Judicial Yuan Interpretation No. 748, ¶ 15.

418. *Id.*

419. Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City, G.R. No. 225442, 835 SCRA 350, 414 (2017) (citing Disini, Jr. v. Secretary of Justice, G.R. No. 203335, 723 SCRA 109, 301 (2014); Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299, 436-47 (2004) (C.J. Panganiban, dissenting opinion & J. Carpio, dissenting opinion)).

420. Judicial Yuan Interpretation No. 748, ¶ 15.

421. *Id.*

422. Republic v. Manalo, G.R. No. 221029, 862 SCRA 580 (2018).

423. *Id.* at 609 (citing Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, 637 SCRA 78, 359 (2010) (J. Brion, separate concurring opinion); *Central*

As mentioned, *Falcis* recognized that LGBTQIA+ persons have suffered a "history of erasure, discrimination, and marginalization[.]"[424] In *Ang Ladlad*, the Court noted that that same-sex conduct has "borne the brunt of societal disapproval."[425]

It is possible to leverage these extant pronouncements. As it stands however, any such leveraging must grapple with limitations. Particularly, though they exist as jurisprudential pronouncements, they do not, as yet, carry the weight of canonical doctrines. They can be revisited and discarded with relative ease. Worse, is the risk of them being cast as non-binding *obiter dicta*, in which case, their value, though not depleted, will be diminished.

Though *Manalo* characterized the right to marry as a fundamental right, such characterization has yet to emphatically reverberate among majority decisions. Still, there have been separate opinions that reflect, and which have emphasized the primacy of privacy and decisional autonomy. For example, one of *Manalo*'s bases was Justice Conchita Carpio Morales' dissent in *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*,[426] which cited *Loving* and included the right to marry in its enumeration of fundamental rights warranting strict scrutiny.[427]

Justice Francis H. Jardeleza's concurrence in *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*[428] expressly referenced *Obergefell* in asserting the primacy of one's "freedom to make personal choices that define [one's] life and personhood[ ]" —

> As I have already discussed, the rights to personal liberty and privacy are embodied in the Due Process Clause and expounded by jurisprudence. These rights pertain to the freedom to make personal choices that define a human being's life and personhood. The decision to marry and to whom are two of the most important choices that a woman can make in her life. In the

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Bank Employees Association., Inc., 446 SCRA at 496-98 (J. Carpio-Morales, dissenting opinion); & *Samahan ng mga Progresibong Kabataan (SPARK)*, 835 SCRA at 464 (J. Leonen, separate opinion)).

424. *Falcis*, G.R. No. 217910, at 46.

425. *Ang Ladlad LGBT Party*, 618 SCRA at 60.

426. *Central Bank Employees Association, Inc.*, 446 SCRA at 455 (J. Carpio-Morales, dissenting opinion).

427. *Id.* at 496 (citing *Loving*, 388 U.S. at 12; *Skinner*, 316 U.S. at 541; & Maynard v. Hill, 125 U.S. 190 (1888)).

428. Capin-Cadiz v. Brent Hospital and Colleges, Inc., G.R. No. 187417, 785 SCRA 18, 41 (2016) (J. Jardeleza, concurring opinion).

> words of the US Supreme Court in *Obergefell* '[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.' The State has no business interfering with this choice. Neither can it sanction any undue burden of the right to make these choices. Brent, in conditioning Christine Joy's reinstatement on her marriage, has effectively burdened her freedom. She was forced to choose to lose her job or marry in order to keep it. By invoking the MRPS and the Labor Code, Brent is, in effect, saying that this kind of compelled choice is sanctioned by the State. Contrary to this position, the State cannot countenance placing a woman employee in a situation where she will have to give up one right (the right to marry as a component of personal liberty and privacy) for another (the right to employment). This is not the kind of State that we are in. Nor is it the kind of values that our Constitution stands for.[429]

Ultimately however, Justice Jardeleza still had to write separately to assert "that our reading of the constitutional right to personal liberty and privacy should approximate how personal liberty as a concept has developed in the [United States] as adopted in our jurisprudence."[430]

Justice Jardeleza wrote a similar concurrence in *Union School International v. Dagdag*.[431] There, he specifically referenced *Manalo* as recognizing the fundamental right to marry.[432] He also referenced *Capin-Cadiz* and noted that in it, the Court upheld privacy and decisional autonomy, having previously "recognized a woman's inherent, intangible and inalienable right to choose her status[.]"[433] Yet again however, Justice Jardeleza's separate opinion needed to make a submission that "it is high time that the Court recognize [the] liberty interest [to engage in consensual sexual relations] as 'fundamental,' as to require a higher burden of proof to justify its intrusion."[434]

The Philippines has recognized the right to privacy "as a component of liberty under the Due Process Clause and as a constitutional right arising from

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429. *Id.* at 51 (citing *Obergefell*, 135 S.Ct. at 2608).

430. *Capin-Cadiz*, 785 SCRA at 49 (J. Jardeleza, concurring opinion).

431. Union School International v. Dagdag, G.R. No. 234186, 886 SCRA 563, 578 (2018) (J. Jardeleza, concurring opinion).

432. *Id.* at 584 (citing *Manalo*, 862 SCRA at 580).

433. *Union School International*, 886 SCRA at 584 (citing *Capin-Cadiz*, 785 SCRA at 37-38).

434. *Union School International*, 886 SCRA at 579 (citing *Central Bank Employees Association, Inc.*, 446 SCRA at 387).

zones created by several other provisions of the Constitution."[435] In *Morfe v. Mutuc*,[436] the Supreme Court even anchored its reasoning on *Griswold v. Connecticut*[437] — which was among *Obergefell*'s bases — and stated that as it was in the United States, "[s]o it is likewise in our jurisdiction. The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection."[438] However, taking cue from Justice Jardeleza's concurrences, Philippine jurisprudence lacks the precise conditions and particularly advanced appreciation of privacy and autonomy on which *Obergefell* was predicated.

Falcis and *Ang Ladlad*, though recognizing the historical tribulations of LGBTQIA+ persons, both noticeably stopped short of conclusively stating that sexual minorities are a suspect or quasi-suspect class. This was reasonably expected of *Falcis*. As it was terminated on procedural issues, it never got to the extent of engaging in equal protection analysis. Rather, its determinations on erasure, marginalization, and discrimination were made in the course of calibrating existing doctrines on justiciability. A more opportune window would have been *Ang Ladlad*, which was concerned with prospective congressional representation of an identified sector. Indeed, Chief Justice Reynato Puno wrote a separate opinion not only lamenting the Court's desistance from making a determination on (quasi-)suspect classification, but also demonstrating why heightened review was necessary —

> I humbly submit, however, that a classification based on gender or sexual orientation is a quasi-suspect classification, as to trigger a heightened level of review.
>
> ...
>
> The first consideration is whether homosexuals have suffered a history of purposeful unequal treatment because of their sexual orientation. One cannot, in good faith, dispute that gay and lesbian persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation. ...
>
> ...
>
> A second relevant consideration is whether the character-in-issue is related to the person's ability to contribute to society. Heightened scrutiny is applied

435. *Capin-Cadiz*, 785 SCRA at 46 (J. Jardeleza, concurring opinion) (citing Ople v. Torres, G.R. No. 127685, 293 SCRA 141 (1998)).

436. Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424 (1968).

437. *Griswold*, 381 U.S. at 484.

438. *Morfe*, 22 SCRA at 444.

> when the classification bears no relationship to this ability; the existence of this factor indicates the classification is likely based on irrelevant stereotypes and prejudice. ...
>
> ...
>
> Clearly, homosexual orientation is no more relevant to a person's ability to perform and contribute to society than is heterosexual orientation.
>
> A third factor that courts have considered in determining whether the members of a class are entitled to heightened protection for equal protection purposes is whether the attribute or characteristic that distinguishes them is immutable or otherwise beyond their control. ...
>
> ...
>
> [I]t is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment, because a person's sexual orientation is so integral an aspect of one's identity. Consequently, because sexual orientation 'may be altered [if at all] only at the expense of significant damage to the individual's sense of self,' classifications based thereon 'are no less entitled to consideration as a suspect or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic.' ...
>
> The final factor that bears consideration is whether the group is 'a minority or politically powerless.' ...
>
> Applying this standard, it would not be difficult to conclude that gay persons are entitled to heightened constitutional protection despite some recent political progress. The discrimination that they have suffered has been so pervasive and severe — even though their sexual orientation has no bearing at all on their ability to contribute to or perform in society — that it is highly unlikely that legislative enactments alone will suffice to eliminate that discrimination. Furthermore, insofar as the [LGBTQIA+] community plays a role in the political process, it is apparent that their numbers reflect their status as a small and insular minority.[439]

As with any exercise in persuasion, the primordial challenge in constitutional litigation is the framing of issues. *Obergefell* and *Interpretation 748* pose distinct routes which are equally viable. The greater challenge is not in simply hearkening to due process or equal protection, but in laying doctrinal foundations from which shall ensue the grant of judicial relief. Framing issues

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439. *Ang Ladlad LGBT Party*, 618 SCRA at 87-104 (C.J. Puno, concurring opinion) (citing *Kerrigan*, 289 Conn.; *Varnum*, 763 N.W.2d; Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); & *In re Marriage Cases*, 43 Cal. 4th.).

impels readiness to advance and defend one's position, and such readiness entails marshalling resources and mechanisms to bridge norms and objectives.

Philippine jurisprudence, in its current state, is not loathe to these routes. Pioneering pronouncements have been made, and some of the Court's members have urged it to be more progressive. However, it remains that potential premises have yet to fully ripen. Current inadequacies may be addressed passively, by simply awaiting jurisprudential developments, or actively, through a more concerted effort at litigation, where test cases are built, issues are proactively framed, and later successes build upon prior successes. The broad path taken in the U.S. — where litigation not just with respect to marriage equality itself, but also concerning other dimensions of LGBTQIA+ protections was pursued and where test cases reinforced each other over time — offers insight into what active litigation may entail.

To be clear, it is also not impossible for marriage equality litigation to successfully lay lacking premises on its own. In *Interpretation 748* for example, though the Constitutional Court cited *Judicial Yuan Interpretation No. 362* as precedent concerning decisional autonomy, no similar reference was made in its determination of being a discrete and insular minority. To do so however, will mean compounding efforts. If actual marriage equality litigation is to be pursued within the current state of Philippine jurisprudence, it must not only be with full awareness of current doctrinal limitations, but, more importantly, be equipped with capacity to discharge the burden of not only arguing for marriage equality itself, but also to lay premises where they are wanting.

B. A Double-edged Sword: On Religious Freedom

Obergefell and *Interpretation 748* do not only demonstrate viable routes. By their omission, they also suggest that another route, though available, is perilous and undesirable. Neither *Obergefell* nor *Interpretation 748* turned on the issue of same-sex couples' religious freedom. Rather than capitalize on matrimony's religious connections, *Obergefell* "[detached] ecclesiastic interests from the marriage equality petition before it[.]"[440] It underscored that while marriage was "once viewed as a religious concern, [it] is contemporarily 'understood to be a voluntary contract.'"[441]

440. Raphael Lorenzo A. Pangalangan, *Relative Impermeability of the Wall of Separation: Marriage Equality in the Philippines*, 13 ASIAN J. COMP. L. 415, 418 (2018) (citing *Obergefell*, 576 U.S. at 6).

441. *Id.* at 422 (citing *Obergefell*, 135 S.Ct at 2613).

> [T]he [United States Supreme Court] characterized marriage as a mere 'voluntary contract[.'] Indeed, in the body of the decision, religion came to the fore merely to recognize the antiquated, and purportedly abandoned, theological underpinnings of the marital bond. Religious liberties, on the other hand, were addressed only to 'emphasize that religions, and those who adhere to religious doctrines, may continue to advocate ... by divine precepts, [that] same-sex marriage should not be condoned'.[442]

The Philippines is saddled with dissonance in that while "[t]he separation of church and state has long been ... entrenched in legal doctrine[, it has been] compromised in practice."[443] Though Philippine constitutions[444] have consistently adopted the parlance of American constitutional law which "erects the colloquial 'Jeffersonian wall' of *strict separation* to shield the state from the church,"[445] jurisprudence has adopted the notion of "benevolent

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442. *Id.* at 418 (citing *Obergefell*, 576 U.S. at 6 & 27).

443. Pangalangan, *supra* note 440, at 415 (citing PHIL. CONST. art. II, § 6 & art. III, § 5).

444. PHIL. CONST. art. II, § 6. The 1987 Constitution provides, "The separation of Church and State shall be inviolable." PHIL. CONST. art. II, § 6.

It separately stipulates free exercise and non-establishment, providing, "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights." PHIL. CONST. art. III, § 5.

The 1973 Constitution similarly provided for the separation of church and state, as well as free exercise and non-establishment of religion. 1973 PHIL. CONST. art. XV, § 15 & art. IV, § 8 (superseded in 1987).

The 1935 Constitution stipulated non-establishment and free exercise, providing, "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights." 1935 PHIL. CONST. art. III, § 1 (7) (superseded in 1973).

The Malolos Constitution recognized the separation of church and state, providing, "The State recognizes the freedom and equality of all religions, as well as the separation of the Church and State." 1899 PHIL. CONST. tit. III, art. 5 (superseded in 1935).

445. Pangalangan, *supra* note 440, at 416 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878); Lemon v. Kurtzman, 403 U.S. 602 (1971); & Zorach v. Clauson, 343 U.S. 306 (1952)).

neutrality,"[446] which "protect[s] the church from the state."[447] Thus, "[l]ike a one-way mirror, the wall of separation in the Philippines is [ ] only relatively impermeable; adverse to government action, yet pervious to creed."[448]

This uneven permeability has been particularly demonstrated in jurisprudence on marriage. Article 36 of the Family Code, which provides for psychological incapacity as a ground for declaration of nullity of marriage,[449] has consistently been interpreted with deference to Roman Catholic Canon Law. To begin with, Article 36 was derived from Canon 1095 of the New Code of Canon Law[450] as appeasement, that is, "as an 'acceptable alternative to divorce' to avoid 'the strong opposition that any provision on absolute divorce would encounter from the Catholic Church[.']"[451]

The Supreme Court first had occasion to interpret Article 36 in 1995's *Santos v. Court of Appeals*.[452] In it, the Court adverted to the "value as an aid[ ]"[453] of Canon Law jurisprudence prevailing at the time of the Family Code's enactment. In 1997's *Republic v. Court of Appeals and Molina*,[454] the Court designate as *amicus curiae* Bishop Oscar V. Cruz, then Vicar Judicial (Presiding Judge) of the Roman Catholic National Appellate Matrimonial Tribunal.[455] *Molina* proceeded to lay down guidelines for the interpretation and application of Article 36. The seventh of these was that "[i]nterpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great

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446. *See* Estrada v. Escritor, A.M. No. P-02-1651, 492 SCRA 1, 35 (2006).

447. Pangalangan, *supra* note 440, at 416 (citing *Estrada*, 492 SCRA at 39).

448. Pangalangan, *supra* note 440, at 416.

449. The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209, art. 36 (1987).

450. *See* Santos v. Court of Appeals, G.R. No. 112019, 240 SCRA 20, 31-32 (1995).

451. Pangalangan, *supra* note 440, at 422-23 (citing *Santos*, 240 SCRA at 40 (J. Romero, concurring opinion)).

452. Santos v. Court of Appeals, G.R. No. 112019, 240 SCRA 20 (1995).

453. *Id.* at 32.

454. Republic v. Court of Appeals, G.R. No. 108763, 268 SCRA 198 (1997).

455. *Id.* at 208-09.

respect[.]"[456] *Molina* justified the seventh guideline in a manner that practically validated religious hegemony —

> Since the purpose of including such provision in our Family Code is to harmonize our civil laws with the religious faith of our people, it stands to reason that to achieve such harmonization, great persuasive weight should be given to decisions of such appellate tribunal. Ideally — subject to our law on evidence — what is decreed as canonically invalid should also be decreed civilly void.[457]

Molina's other guidelines equated psychological incapacity with mental incapacity and personality disorders in violation of Article 36's genuine intent[458] and "spurred emphasis on the importance of expert testimony."[459] Over time, its guidelines would acquire notoriety for being "a strait-jacket, forcing all sizes to fit into and be bound by it."[460] There would be subsequent clarification that psychological incapacity rests on totality of evidence rather than expert testimony.[461] Still the tendency to rigidly apply the *Molina* guidelines continued. It would not be until 2021, in *Tan-Andal v. Andal*[462] that guidelines would dramatically be relaxed.[463]

Relative impermeability is problematic not only because it distorts the wall of separation, but more so because of how "[t]here is no fragmentation in the Philippines' religious market. [Rather, a] single religion dominates; lording it over with its own lord."[464] It is in this context of religious dominance and tepid commitment to separation that religious freedom — to

456. *Id.* at 212.

457. *Id.* at 212-13.

458. *See* Supreme Court of the Philippines, Press Briefer (May 12, 2021), *available at* https://sc.judiciary.gov.ph/18420 (last accessed July 31, 2021) [https://perma.cc/73HU-5F85] [hereinafter Supreme Court of the Philippines, Press Briefer].

459. Jeffrey M. Calma v. Mari Kris Santos-Calma, G.R. No. 242070, Aug. 24, 2020, at 6, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66925 (last accessed July 31, 2021).

460. *Ngo Te*, 579 SCRA at 193.

461. Marcos v. Marcos, G.R. No. 136490, 343 SCRA 755, 757 (2000).

462. Rosanna L. Tan-Andal v. Mario Victor M. Andal, G.R. No. 196359, May 11, 2021, *available at* https://sc.judiciary.gov.ph/20821 (last accessed July 31, 2021).

463. *Id.* at 1-2.

464. Pangalangan, *supra* note 440, at 445.

the prejudice of the democratic ethos of protecting minorities[465] — is "deployed with political valence by various majoritarian groups."[466]

This has been the actual case in efforts to obstruct LGBTQIA+ rights, where protections were not only opposed, but minorities were misrepresented as belligerents. This reframes the debate from an issue of inordinate withholding of fundamental freedoms (as in the case of the due process track), or discrimination against a disempowered class (as in the case of the equal protection track), to a clash of religious freedoms. Such a reframing is precarious, as it undermines the immutability and transcendence of fairness and equality, and shifts the discussion to the balancing of competing interests. This reduces a principled plea for humaneness to a zero-sum, adversarial game —

> Religious freedom[ ] ... can take on a different meaning when deployed by a dominant religious group. The work of the Catholic Church, other Christian groups, and allies testifies to ... the [weaponization] of religious freedom against sexual minorities. The move is made possible by appealing to the heteronormative values of the majority, who are presumed to be conservative Christian. The implicit assumption is that the [LGBTQIA+] community embodies Western values that are inimical to the sanctity of the family and the Christian nation. Thus, the [weaponization] of religious freedom manifests religious nationalism.
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> In effect, the interests of sexual minorities are silenced. This is even if some of these [LGBTQIA+] individuals may in fact represent progressive forms of Christianity. Thus, they are also religious minorities whose religious freedom to pursue same-sex union, for example, is rejected in favour of the majority. ... This is why framing the whole issue as the lack of religious freedom is not always helpful. In this light, that influential Christian leaders have defined the move for same-sex marriage ... as an affront to the religious freedom of the majority has already limited the discursive space. That same-sex marriage and gender equality are civil rights is downplayed as a result.[467]

Effectively framing issues entails not only propounding assertions, but equally, declining to delve into unproductive pursuits. Philippine legal history attests to how, even if marriage equality can invoke religious freedom, such an invocation is unwieldy. Worse, it may even mean willing submission to how dominant forces would prefer to frame the debate. In any case, *Obergefell* and *Interpretation 748* show that marriage equality litigation can be won by

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465. Cornelio & Dagle, *supra* note 4, at 87.

466. *Id.* at 88.

467. *Id.* at 93.

exclusively appealing to due process and equal protection, and without having to invoke the double-edged sword of freedom of religion.

C. Engaging in a Democracy: Strategic Means and Normative Foundations

Constitutional advocacy does not operate in a vacuum. Questions of rights touch on the most palpable and intimate of human concerns. The American and Taiwanese experiences show how marriage equality was won not only as an exercise in litigation but also as an affirmation of democratic foundations. Thus, equally important were the marshalling of constituencies and institutions. Judicial victory hinged as much on litigation's manner and context, as it did on its substance and content.

The American marriage equality movement succeeded not only with strategy, professionalism, and collaboration, but also with discipline and temperance. There is no question that judicial relief was proper long ago. Fairness and equality were no less sublime in the 1970s than they were in 2015. Yet, the defeat of the first trio of marriage cases with hardly a whimper spoke an unpalatable truth, that courts simply were not ready. The crass denial of a spousal visa to Anthony Sullivan revealed something even worse, that bigotry ran rampant, even utilizing the trappings of official function.

The decades-long American march to marriage equality secured initial judicial victories, but not precipitously.[468] In 1993, the Hawaii Supreme Court delivered the first victory in *Baehr*, drawing wisdom in the process from 1967's *Loving*.[469] James Michael McConnell's and Richard John Baker's 1970s suit in *Baker v. Nelson*[470] was also motivated by *Loving*,[471] yet it failed where *Baehr* succeeded. When victory in Hawaii proved fleeting, further litigation was pursued, but not for its own sake. The choice to shift to Vermont was strategic, made only after its legal terrain had been surveyed and seen to be promising, after a supportive civil society was ascertained, and after it was determined that Vermont was a suitable flashpoint from which the rest of the U.S. could follow. The same was true in further shifting litigation to Massachusetts. Moreover, the initiative in Massachusetts was backed by a broader coalition and pursued with the efforts of more lawyers who had accumulated — and continued to accumulate — expertise.

468. Bonauto, *supra* note 11, at 22.

469. *Baehr*, 852 P.2d at 67-68 (citing *Loving*, 388 U.S. at 8).

470. Baker v. Nelson, 409 U.S. 810 (1972).

471. Ball, *supra* note 127.

The initial victories in court indicated broad-mindedness within professional and expert circles. However, whatever gains were won by litigation were also quickly stunted by popular electoral action. Subsequent gains — legislative and judicial — were secured by complementing the litigation strategies honed in Hawaii, Vermont, and Massachusetts with a deliberate and professional campaign for support among constituencies. Leading to *Obergefell*, public opinion had become favorable; lawyers had accumulated a mass of experience; and a supportive wave across states had been invigorated. When marriage equality was won, what came about was a victory in law reform secured not only through the direct interpretive communities of courts and legislative bodies, but also the supplemental interpretive community that is the general public.[472]

In Taiwan, public institutions and the national constituency share a democratic vision. This vision was forged from authoritarian and foreign colonial histories, and continues to be spurred by independence and identity. Though not without struggle, marriage equality was secured through decisive official action by a Constitutional Court faithful to its mandate of rectifying transgressions against disempowered minorities.

If marriage equality in Taiwan was secured with relative ease, such an outcome speaks not of political expedience but of what it means to live democracy to its fullest. The fruits of democracy are, by definition, for all, but fidelity to rights is particularly crucial for minorities. Otherwise, democracy distorts into majoritarian tyranny. *Interpretation 748* was a willing disruption of the legal status quo because it was clear that relegating non-heteronormative persons to exclusion amounted to leaving them behind in the dark days of authoritarian rule, while those in opposite-sex relations could, without restraint, enjoy all the benefits and protections that came with the legal institution of marriage.

Taiwan's example urges fidelity to democracy and the pursuit of LGBTQIA+ rights as its necessary consequence. Respect for and the protection of sexual minorities is an imperative; otherwise, liberty is selective, and democracy is nothing but lip service. To paraphrase Dr. Martin Luther King, Jr.,[473] all that was done was to encash democracy's check that it may deliver on its undertaking — "[w]e hold these truths to be self-evident, that

472. Goldberg, *supra* note 8, at 159.

473. Martin Luther King, Jr., *I Have a Dream*, Speech at the March on Washington for Jobs and Freedom (Aug. 28, 1963).

all [ ] are created equal."[474] But Taiwan's example, too, shows that LGBTQIA+ rights should be pursued not only because they are an inherent good, but equally so because they deliver definite benefits. An inclusive society fosters social cohesion, reaps economic gains, and undergirds geopolitical strength.

Securing marriage equality in the U.S. and Taiwan were fundamentally democratic victories. Legal rigidities were navigated, all the while, not with begrudging resentment that dismisses them as empty formalities and pure obstacles. Indeed, legal and technical specifications are devised not as burdens, but as protocols for due process and fair play. They are hallmarks of the rule of law. Thus, advocates harnessed those specifications to carry out grounded, topographical strategies. In turn, those strategies proved their efficacy by meriting decisive reform unlike previous, fleeting gains.

Constituencies and institutions were also engaged, not because equality needs to be fancied by the majority, but rather because consensus is preferred over schism. To again borrow from Dr. King, "their destiny is tied up with our destiny. ... [T]heir freedom is inextricably bound to our freedom. We cannot walk alone."[475] Democracy's ideals and fundamentals can come to the fore, and constituencies can rally around them, ultimately building stronger polities.

This is all not to say however, that the struggle for rights must be consigned to interminable waiting for the popular tide. Precisely, the peculiarity of resorting to judicial review is the counter-majoritarian difficulty.[476] *Obergefell* came to be because some states remained firm against marriage equality. In the face of this, the U.S. Supreme Court stood its ground and delivered the fundamental rights and equality that were due. Likewise, *Interpretation 748* and the resulting Enforcement Act of Judicial Yuan Interpretation No. 748 demonstrate how, even in the face of obstructive popular referendum results, strong democratic institutions must and will rise to the occasion, promoting minority rights and forestalling the tyranny of the majority.

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474. *Id.*

475. *Id.*

476. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

VII. CONCLUSION

The Philippines remains to be a struggling democracy afflicted with worsening pathologies. Certain debilities stand out and are particularly problematic obstructions to LGBTQIA+ rights and marriage equality: anti-pluralism and exclusionary religiosity, as well as the inability of public institutions to stand apolitically firm for minorities. In addition to these, technical-legal strictures demarcate the bounds of constitutional litigation. Any attempt at advancing LGBTQIA+ rights or securing marriage equality through courts must navigate the terrain carved by formal and procedural qualifications.

Queer and marriage equality movements in the U.S. and Taiwan similarly contended with challenging legal landscapes, obtrusive religious crusades, and questions of democratic legitimacy. Still, they proceeded to secure decisive judicial pronouncements enabling same-sex marriage. Their examples reveal techniques that warrant careful study and consideration for potential domestic efforts to replicate their success.

First, is the crafting of and adherence to meticulous strategies. This entailed not only proactive litigation where cases were built to optimize the chances of success, but also desistance from litigation when it was counter-productive. When litigation was pursued, participating litigants were selected based on who could most suitably represent the cause of marriage equality. In the United States, the federal system allowed for the selection of states where litigation was conducive on account of the nuanced configuration of State constitutions, robust human rights traditions, histories of inclusivity, and reliable civil societies. Litigation, too, was pursued with the consent and support of local queer movements. Lawyers spent considerable time crafting arguments. They collaborated, accumulated experience, and gradually built expertise. Initial success was limited. Rather than discourage, limited initial success induced reflection; thus, strategies were calibrated to address prior inadequacies.

Second, given litigation's natural constraint of engaging only within judicial limits, wider social movements engaged the larger public. Rather than pursue autonomous political lobbies, social movements consciously complemented legal tactics. Thus, where litigation's gains were diminished by unsupportive publics and electoral reverses, calculated campaigns were launched to marshal popular support. Litigation capitalized on the support that social movements delivered en route to securing decisive adjudication.

Third, marriage equality remained rooted in and appealed to transcendent democratic values. Advocates and institutions proceeded from a consciousness of how marriage equality mattered not only as its own end, but similarly as it

furthered communities built on rights and freedoms ultimately serving democratic ideals. Thus, an appreciation grew of marriage equality and LGBTQIA+ rights as inalienable components of the larger democratic tapestry.

Fourth, inclusivity and equality showed themselves to be capable of delivering definite social goods. Rights-based governance affirmed democratic identity, facilitated economic progress, and enhanced international standing.

There are potential foundational pronouncements in Philippine jurisprudence which can be maximized to carve inroads to greater rights and marriage equality. These pronouncements are borne by evolving jurisprudential notions of privacy, personal autonomy, inter-personal relations, marriage, and the plight of sexual minorities. However, the precise advanced state in the United States and Taiwan of premises upon which domestic litigation on due process and equal protection grounds can be built have yet to be reached. Efforts at litigating for marriage equality must come to terms with extant inadequacies. In the meantime, they can passively, though optimistically, anticipate the opportune time when more advanced premises are established, or actively pursue foundational litigation to strategically lay premises. An effort at immediate litigation under present conditions assumes the compounded burden of not only litigating marriage equality but also of addressing doctrinal gaps.

In the end, as the American and Taiwanese models show, litigation operates within the larger context of social and political realities. It must be conceded that, though queer and marriage equality movements in the U.S. and Taiwan similarly grappled with litigational rigidities, exclusionary religiosity, and questions of democratic legitimacy, their conditions can never be consummate representations of domestic challenges and realities. Philippine debilities are varied, in some ways more deep-seated or wide-ranging, in others, more tractable.

Rights and freedoms can be won, but what lies ahead is a path that demands hard work. Precise means may have to vary. But what the American and Taiwanese queer movements prove is that success is ultimately secured through firm commitment, unwavering discipline, thoughtful strategy, and fidelity to ideals. As Mary L. Bonauto affirmed,[477] the greatest strength of the LGBTQIA+ movement is in the authentic lives of individuals who have shown tenacity through rejection, and the transcendent, immutable truths of

477. Bonauto, *supra* note 11, at 27.

fairness and equality for which it stands. The Philippines' time will come, it can rise to the occasion. Love will win.[478]

478. *See* Jason Tengco, #LoveWins: A Historic Moment for LGBT Rights, *available at* https://*obamawhitehouse*.archives.gov/blog/2015/06/30/lovewins-historic-moment-lgbt-rights (last accessed July 31, 2021) [https://perma.cc/CV4S-84TK].