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Article

Barring Married Same-Sex Couples from Joint Adoption: Comparative Perspectives and the Case of Taiwan

Holning Lau *

ABSTRACT

Taiwan is the first country in Asia to legalize same-sex marriage, but it forbids married same-sex couples from jointly adopting children. This article examines this restriction through the lens of comparative law, which brings into focus two main insights. First, we see that, out of all countries that have legalized same-sex marriage, Taiwan is one of only two that bar married same-sex couples from joint adoption. As this article will explain, the fact that Taiwan's policy is so anomalous should spur skepticism of the policy's appropriateness. Second, judicial opinions from around the world contain persuasive reasoning that further calls into question Taiwan's treatment of married same-sex couples. This article explains that these findings, taken together, cast enormous doubt on the constitutionality of Taiwan's exclusionary adoption policy.

Keywords: *Same-Sex Parents, Same-Sex Adoption, Marriage Equality, LGBTQ, Taiwan Constitutional Court, J.Y. Interpretation 748*

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Ms. Liu and Ms. Tsai are a loving couple in Taiwan. After dating for eight years, they married while surrounded by family and friends. Shortly after their joyous wedding, tragedy struck. Ms. Liu's brother and sister-in-law were killed in a car accident, leaving behind a four-year-old daughter. Everyone in Ms. Liu's extended family agrees that it would now be in the child's best interest to be adopted jointly by Ms. Liu and Ms. Tsai. They both have a close relationship with the child, and they could provide her with a warm, stable, and nurturing home.

This hypothetical scenario throws into stark relief restrictions on married same-sex couples' rights in Taiwan.¹ In 2019, Taiwan became the first country in Asia to legalize same-sex marriage.² Taiwan's laws, however, deprive married same-sex couples of adoption rights³ that the country gives to married different-sex couples.⁴ Ms. Liu and Ms. Tsai are legally prohibited from adopting a child together because they are both women.⁵ They would be eligible for joint adoption if one of them were a man.⁶

Should married same-sex couples be treated differently based solely on their sexual orientation? This article approaches this question through the lens of comparative law, which brings into focus two main insights. First, we see that Taiwan is extremely anomalous. Out of the 28 countries that have

1. This hypothetical is inspired partly by the first reported case of an openly gay or lesbian person filing for adoption in Taiwan. In that case from 2007, Ms. Lin and Ms. Wu sought to become parents to a baby who was the biological daughter of Ms. Lin's sister. Because joint adoption was not a legal option for the couple, Ms. Lin petitioned to adopt the baby as an individual with Ms. Wu serving as a *de facto* co-parent. The Taoyuan district court rejected the adoption and Ms. Lin decided not to appeal. For a critique of that case, see Yun-Hsien Diana Lin, *Lesbian Parenting in Taiwan: Legal Issues and the Latest Developments*, 14 *ASIAN-PAC. L. & POL'Y J.* 1, 8-15 (2013). While it is legally possible for gay men and lesbians to adopt children as individual persons in Taiwan, it remains difficult in practice due to biases among courts and adoption service providers. See *id.*; 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, 157 (2015); YI-CHEN HANG ET AL., 2017 TAIWAN LGBTI RIGHTS POLICY REVIEW 46-47 (2017), Taiwan Tongzhi Hotline Association, https://hotline.org.tw/sites/hotline.org.tw/files/2017_Taiwan_LGBTI_Rights_Policy_Review_pages.pdf [<https://perma.cc/V9RQ-MKVR>]. Meanwhile, joint adoption remains a legal impossibility for same-sex couples, and this impossibility is the present article's focus.

2. Chris Horton, *In Taiwan, First Same-Sex Marriages Are Celebrated*, *N.Y. TIMES*, May 25, 2019, at A7.

3. This article uses the phrase "adoption rights" to refer to being legally eligible to pursue adoption. A couple with adoption rights must undergo an application and screening process, and there is no guarantee of actual adoption.

4. *Id.*

5. The legislation that legalized same-sex marriage in Taiwan, i.e., Sifa Yuan Shizi Di Qisiba Hao Jieshi Shixingfa (司法院釋字第748號解釋施行法) [Act for Implementation of Judicial Yuan Interpretation No. 748] (2019) [hereinafter Implementation Act], did not extend joint adoption rights to same-sex couples. For elaboration on this point, see *infra* Part I. The Implementation Act is available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008> [<https://perma.cc/JZC3-BTZK>].

6. MinFa (民法) [Civil Code] § 1074 (amended 2019) [hereinafter Civil Code].

legalized same-sex marriage, Taiwan is one of only two that forbid married same-sex couples from jointly adopting children.⁷ As this article will explain, Taiwan's deviation from peer⁸ jurisdictions should spur skepticism toward Taiwan's policy. Second, judicial opinions from around the world contain persuasive reasoning that further calls into question Taiwan's treatment of married same-sex couples.⁹ This article will explain that these findings from comparative analysis cast enormous doubt on the constitutionality of Taiwan's exclusionary adoption policy.

This article proceeds in four steps. Part I presents the legal situation of married same-sex couples in Taiwan. Parts II and III perform comparative analyses. Part II provides a high-level comparison of all the countries that have legalized same-sex marriage. It illuminates similarities and differences across these jurisdictions with respect to married same-sex couples' adoption rights. Part III then performs a deeper analysis by examining persuasive reasoning in several judicial opinions from around the world.¹⁰ Part IV discusses how these comparative analyses support the view that Taiwan's adoption policy is constitutionally untenable. Part V concludes by reviewing this article's main contentions and commenting on their potential implications for countries beyond Taiwan.

I. BACKGROUND

The Taiwan Constitutional Court (TCC) was thrust into the spotlight when it ruled in 2017 that the exclusion of same-sex couples from marriage breached constitutional protections of equality and the freedom to marry.¹¹ The court ordered Taiwanese authorities to enact reforms within two years to legalize same-sex marriage.¹² In doing so, it set Taiwan on a path to become

7. This statistic reflects the situation in November 2020, when this article was finalized. *See infra* Part II & Appendix.

8. This article uses the term "peer jurisdictions" to refer to countries that have legalized same-sex marriage.

9. *See infra* Part III.

10. This Part examines cases from the United States, Inter-American Court of Human Rights, European Court of Human Rights, and South Africa. These cases were selected because, as will be discussed in Part III, factual or doctrinal aspects of these cases render them particularly instructive.

11. *See* J.Y. Interpretation No. 748 (2017), *Holding* para. 1, <https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748> [<https://perma.cc/YE8G-ERVR>] (stating that denying same-sex couples the ability to marry violated the freedom of marriage under Article 22 of the constitution and the right to equality under Article 7). For examples of international media coverage of this landmark ruling, *see* Jerome Cohen, *What Taipei's Same-Sex Ruling Can Teach China*, S. CHINA MORNING POST, May 30, 2017, at 11; Benjamin Haas, *Taiwan's Top Court Rules in Favour of Same-Sex Marriage*, *The Guardian* (May 24, 2017), <https://www.theguardian.com/world/2017/may/24/taiwans-top-court-rules-in-favour-of-same-sex-marriage> [<https://perma.cc/72WA-FDLR>].

12. J.Y. Interpretation No. 748, *id.* at *Holding* para. 1

the first country in Asia to legalize same-sex marriage.¹³

The TCC's judgment--*Judicial Yuan Interpretation No. 748 (J.Y. Interpretation No. 748)*--was remarkable not only because of its holding, but also because of its reasoning. The equality clause in Taiwan's constitution explicitly lists sex, religion, race, class, and party affiliation as protected categories.¹⁴ The TCC reasoned that this list of protected categories is not exhaustive, and that sexual orientation is protected as well.¹⁵ Accordingly, the TCC stated that governmental discrimination based on sexual orientation must satisfy a "heightened standard,"¹⁶ which the court also referred to as "heightened scrutiny."¹⁷ This rigorous standard of review makes it difficult for the government to justify treating people differently based on sexual orientation.¹⁸ The TCC concluded that the exclusion of same-sex couples from marriage could not satisfy heightened scrutiny.¹⁹ The court's adoption of heightened scrutiny set important *de facto* precedent. With Taiwan being a civil law jurisdiction, the TCC does not formally follow a system of *stare decisis*, but the TCC nonetheless treats its own decisions as *de facto* precedents that it follows in subsequent cases.²⁰

Supporters of lesbian, bisexual, gay, transgender, and queer (LGBTQ) rights across the world praised *J.Y. Interpretation No. 748*.²¹ Many

13. In response to the TCC's ruling, Taiwan enacted legislation in 2019 to legalize same-sex marriage. See Haas, *supra* note 11. For a discussion on how Taiwan's same-sex marriage case compares with court decisions regarding lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights in other parts of Asia, see Holning Lau, *Courts, the Law, and LGBT Rights in Asia*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (2020), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1230> [<https://perma.cc/5EJY-7AF5>].

14. ZHONGHUA MINGUO XIANFA (中華民國憲法) [CONSTITUTION OF THE R.O.C.] § 7 (1947) (Taiwan).

15. For elaboration on this point, see Stewart Chang, *Made in Taiwan: Alternative Global Models for Marriage Equality*, 34 CONN. J. INT'L L. 143, 151-52 (2019).

16. *J.Y. Interpretation No. 748*, *supra* note 11, at *Reasoning* para. 15.

17. *Id.* at *Reasoning* paras. 2-3.

18. According to *J.Y. Interpretation No. 748*, *supra* note 11, "heightened scrutiny" requires that exclusion of same-sex couples be "substantially related" to "furthering an important government interest." *Id.* at *Reasoning* para. 15. This formulation appears to have been inspired by the U.S. constitutional test of "intermediate scrutiny," which uses the same language. For background on intermediate scrutiny and other legal tests in U.S. equality jurisprudence, see Holning Lau & Hillary Li, *American Equal Protection and Global Convergence*, 86 FORDHAM L. REV. 1251, 1266-71 (2017). Commentators in the United States have suggested that differential treatment based on sexual orientation is very difficult to justify under intermediate scrutiny. See, e.g., Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1583-89 (2017).

19. *J.Y. Interpretation No. 748*, *supra* note 11, at *Reasoning* para. 16.

20. See Wen-Chen Chang, *The Constitutional Court of Taiwan*, in COMPARATIVE CONSTITUTIONAL REASONING 641, 649, 659-60 (András Jakab, Arthur Dyevre & Giulio Itzcovich eds., 2017).

21. See Hsiaowei Kuan, *LGBT Rights in Taiwan-The Interaction between Movements and the Law*, in TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION 593, 594 (Jerome A. Cohen, William P. Alford & Chang-Fa Lo eds., 2019); Agencies, Alice Yan & Lawrence Chung, *Taiwan's Gay Marriage Ruling Raises Hopes Across Asia*, S. China Morning Post (May 26, 2017),

commentators viewed the judgment not only as an affirmation of gay rights but also of Taiwan's status as a pioneering jurisdiction in Asia.²² Others, however, rebuked the ruling, calling it judicial overreach.²³ Opponents of same-sex marriage gathered enough signatures to place the issue on a national referendum, in which a majority of voters casted their ballots against same-sex marriage.²⁴ The referendum had no power to override the TCC's ruling, but it nonetheless conveyed discontent that cast a pall over Taiwan's progression toward same-sex marriage.²⁵

In 2019, one week before the deadline set by the TCC, Taiwan's legislature passed the Act for Implementation of J.Y. Interpretation 748 (Implementation Act) and President Tsai Ing-wen signed it into law.²⁶ As a result, same-sex couples in Taiwan may now marry. Supporters of marriage equality rejoiced. In the wake of this historic law reform, the 2019 Pride celebration in Taipei was especially jubilant and was the largest ever Pride in Asia.²⁷

Still, celebrations were tempered by the fact that the Implementation Act created differential treatment.²⁸ Adoption is one domain in which same-sex couples are treated differently. Under Taiwan's Civil Code, married

<https://www.scmp.com/news/china/article/2095742/taiwans-gay-marriage-ruling-raises-hopes-across-asia> [<https://perma.cc/Y9X9-NU9S>].

22. See Chao-Ju Chen, *Migrating Marriage Equality without Feminism: Obergefell v. Hodges and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L.J. 65, 102-07 (2019).

23. For information on such backlash, see *id.* at 85-86; Ming-Sung Kuo & Hui-Wen Chen, *The Brown Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light*, 31 COLUM. J. ASIAN L. 72, 141-42 (2017).

24. One referendum question asked whether voters agree "the definition of marriage in the Civil Code shall be a union of a man and a women," and another question asked if voters agree that legal protections of same-sex couples' relationships should be protected through means "other than the chapter on marriage in the Civil Code." See Chao-Ju Chen, *A Same-Sex Marriage that is Not the Same: Taiwan's Legal Recognition of Same-Sex Unions and Affirmation of Marriage Normativity*, 20 AUSTRAL. J. ASIAN L. 1, 1 (2019) (discussing the referendum and providing English translation of the referendum questions).

25. In the referendum's wake, "Secretary-General [of Taiwan's Judicial Yuan] Lu Tai-lang (呂太郎) clarified what [had] already been stressed by many keen legal observers: interpretations made by the Constitutional Court hold the highest rule of law and cannot be defeated by referendums." Ryan Drillsma, *Judicial Yuan SG: Constitutional Court Ruling on Same-Sex Marriage Cannot Be Overridden by Referendums*, Taiwan News (Nov. 29, 2018), <https://www.taiwannews.com.tw/en/news/3585861> [<https://perma.cc/88UH-89E7>].

26. See Implementation Act, *supra* note 5; Chen, *supra* note 24, at 1-3.

27. Dan Allen, *Taiwan Pride: Bigger than Ever and a Beacon for LGBTQ Rights in Asia*, NBC News (Oct. 30, 2017, 2:05 PM EDT), <https://www.nbcnews.com/feature/nbc-out/taiwan-pride-bigger-ever-beacon-lgbtq-rights-asia-n815641> [<https://perma.cc/3AAW-DH75>].

28. In an apparent compromise, lawmakers chose not to amend the existing Civil Code provisions on marriage to allow same-sex couples to marry. Instead, they enacted the Implementation Act as a new law. The Implementation Act references and extends most—but not all—of the legal consequences of marriage in the Civil Code to same-sex couples. For a list of the differences in legal consequence between same-sex and different-sex marriages in Taiwan, see Chen, *supra* note 24, at 4-5.

different-sex couples may jointly adopt children.²⁹ They may also adopt each other's children.³⁰ For example, if a man marries a woman who is a single mother, he can undergo a stepparent adoption to become the legal father of his wife's child. In contrast, when it comes to married same-sex couples, the Implementation Act only allows a spouse to adopt the other spouse's biological children.³¹ Thus, in the case of two women who marry each other, Wife A would not be allowed to adopt the child that Wife B previously adopted as a single woman. Moreover, married same-sex couples are never allowed to adopt jointly.³²

The following sections of this article examine whether treating married same-sex couples differently with respect to adoption is appropriate. For analytical clarity, the remainder of this article will focus on joint adoptions; however, much of this article is also relevant to stepparent adoptions. This article uses comparative law to evaluate the constitutionality of Taiwan's exclusionary adoption policy. Comparative law is fitting because Taiwan has a rich tradition of drawing legal inspiration from abroad. The TCC's justices and their staffs regularly consult foreign law.³³ Likewise, government leaders and lawmakers in Taiwan have long sought to present Taiwan as a cosmopolitan jurisdiction that takes seriously international standards of human rights.³⁴

II. OVERVIEW OF PEER JURISDICTIONS

At the time of this writing in November 2020, 28 countries including Taiwan have legalized same-sex marriage countrywide.³⁵ Do these countries

29. Civil Code, *supra* note 6, § 1074:

When the husband and the wife are to adopt a child, they shall do so jointly, except where one of the following conditions is met:

(1) Where he or she adopts the other party's child; or

(2) One of the parties cannot make and accept the declaration of intention or his/her life has been uncertain for three years.

30. *Id.* at § 1074(1).

31. The Implementation Act states that the Civil Code's provision on stepparent adoptions are to be applied to married same-sex couples when one spouse wishes to adopt the other spouse's biological child; the Act does not, however, apply the Civil Code's provisions to same-sex couples when one spouse wishes to adopt a child that the other spouse previously adopted individually. *See* Implementation Act, *supra* note 5, at § 20 ("In the event where one party to the union as stated in Article 2 adopts the genetic child of the other party, the provisions of Civil Code concerning adoption shall apply *mutatis mutandis*.").

32. No part of the Implementation Act purports to extend joint adoption rights to married same-sex couples. *See generally* Implementation Act, *supra* note 5. *See also* Chen, *supra* note 24, at 5.

33. Chang, *supra* note 20, at 667-68, 676-77; David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 976-86 (2015).

34. *See generally* Jacques DeLisle, "All the World's a Stage": Taiwan's Human Rights Performance and Playing to International Norms, in TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION 173 (Jerome A. Cohen, William P. Alford & Chang-Fa Lo eds., 2019).

35. For a complete list of these countries, see *infra* Appendix. The number of countries that have

also prohibit married same-sex couples from adopting children together? Surveying these peer jurisdictions shows that Taiwan is an extreme outlier.³⁶ When Taiwan enacted the Implementation Act in May 2019, it became the only country where same-sex couples could marry but could not adopt jointly afterwards. Ecuador subsequently also legalized same-sex marriage without making joint adoption available to married same-sex couples.³⁷

Taiwan, along with Ecuador, is an extreme outlier. This outlier status is even more striking after accounting for the fact that only two of the other 28 countries where same-sex marriage is legal--Belgium and Portugal--ever went through a lengthy period in which they barred married same-sex couples from joint adoptions. Belgium extended joint adoption rights to married same-sex couples around three years after legalizing same-sex marriage.³⁸ In Portugal, the gap was roughly six years.³⁹

These two countries are both bad examples for Taiwan to follow. Unlike Taiwan, Belgium and Portugal legalized same-sex marriage without any judicial prompting.⁴⁰ This distinction is significant. When Belgium and Portugal legalized same-sex marriage, neither of their constitutional courts had declared that sexual orientation discrimination warrants heightened scrutiny. In contrast, the TCC has stated that heightened scrutiny is

legalized same-sex marriage changes slightly depending on the method used for counting. For information on this article's methodology, *see infra* note 141.

36. *See id.*

37. The Constitutional Court of Ecuador legalized same-sex marriage through two rulings that took immediate effect. *See* Corte Constitucional [C.C.] [Constitutional Court], junio 12, 2019, Sentencia No. 10-18-CN/19 (Ecuador); Corte Constitucional [C.C.] [Constitutional Court], junio 12, 2019, Sentencia No. 11-18-CN/19 (Ecuador). The majority opinions in these judgments did not directly address the Ecuadorian constitution's provision restricting adoptions to different-sex couples (art. 68). A dissenting opinion, however, suggested that the majority's ruling has negative implications for the adoption ban. *See* Sentencia No. 11-18-CN/19, Voto Salvado de Juez Hernán Salgado Pesantes [Dissenting Opinion of Justice Hernán Salgado Pesantes], ¶ 9.

38. Belgium legalized same-sex marriage in 2003 and extended joint adoption rights to married same-sex couples in 2006. *See* Paul Borghs & Bart Eeckhout, *LGB Rights in Belgium, 1999-2007: A Historical Survey of a Velvet Revolution*, 24 INT'L J. L. POL'Y & FAM 1, 9, 15 (2010).

39. Portugal legalized same-sex marriage in 2010 and extended joint adoption rights to married same-sex couples in 2016. *See* Pedro Alexandre Costa & Markus Bidell, *Modern Families: Parenting Desire, Intention, and Experience Among Portuguese Lesbian, Gay, and Bisexual Individuals*, 38 J. FAM. ISSUES 500, 501-03 (2017).

40. The Portuguese Constitutional Court had ruled that same-sex couples do *not* have a constitutional right to marry. S.T.C., Acórdão No. 359/2009, 214 DIÁRIO DA REPÚBLICA, 2^a Série [D.R.] 4.11.2009, 44970 (Port.). Yet Portugal chose to extend marriage to same-sex couples anyway through Lei no. 9/2010. In abstract review of this law, the Portuguese Constitutional Court determined that lawmakers have the power to legalize same-sex marriage even though there was no obligation to do so. S.T.C., Acórdão 121/2010, 82 DIÁRIO DA REPÚBLICA, Série [D.R.] 28.4.2010, 22367 (Port.). For more information on Portugal, *see* Tiago Fidalgo de Freitas & Diletta Tega, *Judicial Restraint and Political Responsibility: A Review of the Jurisprudence of the Italian, Spanish and Portuguese High Courts on Same-Sex Couples*, in SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS 287, 304-13 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014). For more information on Belgium, *see* Borghs & Eeckhout, *supra* note 38.

required.⁴¹ Therefore, the background conditions for evaluating adoption rights is different in Taiwan. The withholding of adoption rights in Taiwan must be evaluated under an intense scrutiny that was not judicially required in Belgium or Portugal.

Belgium and Portugal are also bad examples because they both abandoned their original positions on adoption. Withholding adoption rights was perhaps a necessary political compromise for legalizing same-sex marriage in Belgium and Portugal. In terms of human rights principles, however, both countries came to see withholding adoption rights to be a mistake. When evaluating whether Taiwan's policy on adoption comports with constitutional protections, one ought to remember that the question is one of principle not politics. Taiwan should heed Belgium's and Portugal's dismantling of barriers to joint adoption.

The United States is also worth mentioning. In most parts of the U.S., married same-sex couples were never deprived of joint adoption rights. Many jurisdictions in the U.S. allowed same-sex couples to jointly adopt children even before same-sex marriage became legal.⁴² The U.S. state of Mississippi, however, barred married same-sex couples from adopting together.⁴³ Roughly a year after the legalization of same-sex marriage throughout the U.S., a federal court permanently stopped Mississippi from enforcing its adoption ban against married same-sex couples.⁴⁴ This brought Mississippi in line with the rest of the United States.⁴⁵

Some reports list a minority of provinces and territories in Canada--namely Alberta, Nunavut, New Brunswick, and Prince Edward Island--as having waited years after legalizing same-sex marriage before amending their laws to allow same-sex couples to adopt.⁴⁶ However, to the

41. J.Y. Interpretation No. 748, *supra* note 11, at *Reasoning* para. 15; *see also supra* notes 16-20 and accompanying text.

42. *See* Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 712-13 (2000).

43. Larrison Campbell, *Gay Adoption Now Legal in Mississippi*, MISS. TODAY (May 5, 2016), <https://mississippitoday.org/2016/05/05/gay-adoption-now-legal-in-mississippi> [<https://perma.cc/5ZTB-5QP6>].

44. Campaign for S. Equal. v. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691 (S.D. Miss. 2016) (granting preliminary injunction); Order Granting Motion to Convert Preliminary Injunction Order into Permanent Injunction and Final Judgment, Campaign for S. Equal. v. Miss. Dep't of Human Servs., No. 3:15-cv00578-DPJ-FKB (S.D. Miss. May 13, 2016).

45. Although all U.S. states now allow married same-sex couples to adopt children together, a small number of them permit state-licensed private adoption agencies to discriminate against same-sex couples based on religious beliefs. National Center for Lesbian Rights, *Legal Recognition of LGBT Families 4* (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [<https://perma.cc/U52J-LK3Z>].

46. *See, e.g.*, LUCAS RAMÓN MENDOS, STATE SPONSORED HOMOPHOBIA 280, 290 (13th ed. 2019), ILGA World-The International Lesbian, Gay, Bisexual, Trans and Intersex Association, https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf

extent these jurisdictions' statutes did not allow same-sex couples (whether married or not) to adopt, the statutes appear to have been a virtual dead letter by the time Canada legalized same-sex marriage nationwide in 2005.⁴⁷ By then, it was apparent from litigation in other provinces that barring same-sex couples from adoption would unjustifiably violate the Canadian Charter.⁴⁸ Indeed, there is some evidence that provinces and territories began allowing same-sex couples to adopt before they amended their laws to make that possibility explicit.⁴⁹ Unlike Mississippi, the provinces and territories at issue never went to court seeking to prevent married (or unmarried) same-sex couples from adopting. Had they done so, they almost certainly would have lost.⁵⁰ Considering these facts, this article does not count these parts of Canada as having actively prohibited married same-sex couples from adoption.

In sum, Taiwan is an extreme outlier among countries that have legalized same-sex marriage. It is currently one of only two countries that bar married same-sex couples from joint adoptions. Furthermore, only two additional countries--arguably three if you include the U.S. because of Mississippi--went through a previous period of actively barring married same-sex couples from joint adoptions. The figures below illustrate Taiwan's strikingly anomalous position.

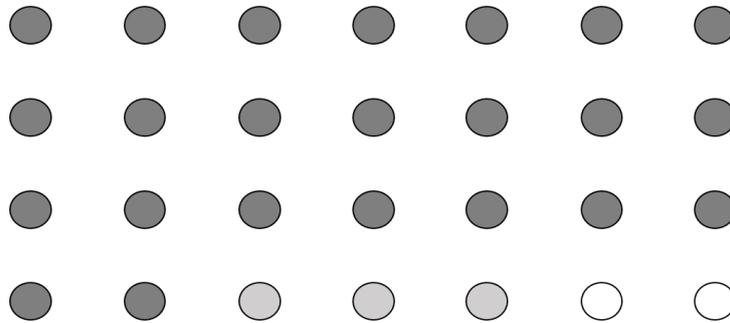
[<https://perma.cc/WR5R-7YM5>]. The extension of marriage to same-sex couples in Canada was a matter of exclusive federal power under the constitution; prior to the federal Civil Marriage Act of 2005, the legalization of same-sex marriage occurred province by province as various courts applied the Canadian Charter of Rights and Freedoms to federal law. In contrast, the expansion of parenting possibilities for same-sex couples is a matter of provincial power.

47. Civil Marriage Act, 2005 S.C., c. 33 (Can.).

48. See John Fisher, *Outlaws or In-Laws?: Successes and Challenges in the Struggle for LGBT Equality*, 49 MCGILL L.J. 1183, 1188 (2004); Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits*, 49 MCGILL L.J. 1143, 1157 (2004); Nicholas Bala & Robert Leckey, *Family Law and the Charter's First 30 Years: An Impact Delayed, Deep, and Declining but Lasting*, 32 CAN. FAM. L.Q. 21, 27-30 (2013).

49. For example, in 2004 the New Brunswick government said it would immediately begin recognizing the adoption rights of cohabiting same-sex couples. See *N.B. Government Accepts Human Rights Ruling in Same-Sex Adoption Case*, CANADIAN PRESS NEWS WIRE, Aug. 11, 2004. New Brunswick did not, however, revise its adoption statute until 2008. See Alison Bird, *Legal Parenthood and the Recognition of Alternative Family Forms in Canada*, 60 U.N.B.L.J. 264, 270 (2010). The *Edmonton Journal* reported that two men were approved for joint adoption through the Alberta government in 2004 and finalized the adoption of their son in 2006. See Mike Sadava, *Gay Couple Leaps 'Walls' to Adopt Son: Breakthrough Case Faced Gov't Obstacles*, EDMONTON J., Feb. 19, 2007, at A1. Alberta, however, is reported not to have amended its adoption law until 2008. See MENDOS, *supra* note 46, at 90.

50. See *supra* note 48 and accompanying text.



Belgium, Portugal, and Mississippi (U.S.)

Figure 3: Three jurisdictions went through periods of nearly a year or more in which married same-sex couples were barred from adopting children jointly⁵²

What should one make of Taiwan's outlier status? Anytime a country is extremely out of line with its peers, that aberrance should prompt the outlier to engage in serious critical self-reflection. As Professor Jeremy Waldron put it: "Sometimes becoming acquainted with the stark reality that one is an outlier in the world or part of a tiny, disreputable minority can administer a salutary epistemic jolt."⁵³ Professor Youngjae Lee articulated a similar point, evoking people's experiences as individuals. He noted that, "If people whose values I share and whose judgments I respect uniformly reach a conclusion different from mine, that is a reason for me to lose confidence in my own judgment and reexamine it."⁵⁴ Professor Lee explained that this dynamic at the individual level ought to extend to relations among states.⁵⁵ In this view, Taiwan should heed the positions taken by other countries that have legalized same-sex marriage because this peer group shares Taiwan's commitment to nondiscrimination. Because Taiwan has reached a position on adoption that differs from almost every other country in this peer group, Taiwan should lose confidence in its approach to joint adoption and reexamine it.

To be sure, no country should blindly follow foreign patterns of law. Just because peer jurisdictions have coalesced around a legal perspective

52. For discussion on why I do not include Canada in this category, see *supra* notes 46-50 and accompanying text.

53. JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW TO AMERICAN COURTS 85 (2012).

54. Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 100 (2007).

55. *Id.*

does not necessarily mean that perspective is correct. At the very least, however, Taiwan's divergence from its peers calls into question Taiwan's policy. Taiwan's outlier status compels us to delve deeper into comparative law to understand the reasons for extending joint adoption rights to same-sex couples. The following section pursues this aim.

III. PERSUASIVE REASONING FROM ABROAD

What can Taiwan learn from foreign judicial opinions? This section examines key cases from the U.S. District Court for the Southern District of Mississippi, Inter-American Court of Human Rights, European Court of Human Rights, and Constitutional Court of South Africa. These cases were selected because factual or doctrinal aspects of these cases render them particularly instructive for Taiwan. Additionally, these cases were decided by courts in jurisdictions that share Taiwan's grounding in liberal democratic principles, making them suitable for comparison. Upon examining these courts' opinions, one finds persuasive reasons for extending equal adoption rights to married same-sex couples.⁵⁶

A. *United States (Mississippi)*

The U.S. federal district court decision in *Campaign for Southern Equality v. Mississippi Department of Human Services*⁵⁷ calls for attention. Mississippi in 2016 was similar to present-day Taiwan because same-sex couples in Mississippi could marry, but Mississippi barred married same-sex couples from joint adoptions.⁵⁸ The court decided that the adoption ban violated constitutional equality rights.⁵⁹ It prohibited Mississippi from enforcing the ban, and the state chose not to appeal.⁶⁰

The doctrinal analysis in *Campaign for Southern Equality* is

56. Some foreign courts have upheld bans on gay men and lesbians adopting children. None of these cases, however, were selected for this article's analysis because they were decided under circumstances that render them impertinent to Taiwan. For example, in *Lofton v. Secretary of the Department of Children & Family Services*, a U.S. federal appeals court upheld Florida's ban against gay men and lesbians adopting children. The case was decided at a time when same-sex marriage was not yet legal in Florida, and the court did not apply heightened scrutiny to sexual orientation discrimination. This context renders *Lofton* impertinent to this article's main question of interest, namely whether barring married same-sex couples from joint adoptions can withstand heightened scrutiny. See *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005).

57. *Campaign for S. Equal. v. Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691, 709-10 (S.D. Miss. 2016).

58. *Id.* at 697.

59. *Id.* at 710.

60. The court first issued a preliminary injunction. *Id.* at 711. It then made the injunction permanent. See *Campaign for S. Equal.*, No. 3:15-cv-00578-DPJ-FKB; Campbell, *supra* note 43.

illuminating.⁶¹ The court interpreted and applied precedent from *Obergefell v. Hodges*,⁶² the U.S. Supreme Court's landmark case that struck down same-sex marriage bans. First, the court in *Campaign for Southern Equality* interpreted *Obergefell* as requiring sexual orientation discrimination to be subjected to "something greater than rational-basis review,"⁶³ in other words some form of heightened scrutiny.⁶⁴ The court went on to say, however, that the standard of review was not very important.⁶⁵ More important was the fact that *Obergefell* described marriage as encompassing a bundle of existing rights and responsibilities. The court derived from *Obergefell* the rule that "marriage and those varied rights associated with it are recognized as a 'unified whole.'"⁶⁶ Granting same-sex couples the right to marry therefore entails giving married same-sex couples all the existing "rights and responsibilities intertwined with marriage," including adoption rights.⁶⁷ To deny married same-sex couples any of the rights that the state confers upon married different-sex couples would breach the constitutional guarantee of equal protection.⁶⁸

Much like *Obergefell* (as it was interpreted by *Campaign for Southern Equality*), *J.Y. Interpretation 748* applied a "heightened standard" of review to sexual orientation discrimination.⁶⁹ This standard of review, however, is not necessarily relevant to the controversy over joint adoptions. Like *Obergefell*, the TCC's opinion described marriage as encompassing a bundle of rights and responsibilities. The TCC understood that a marriage between two persons of the same sex would make them "subject to the rights and obligations" of marriage.⁷⁰ Indeed, if Taiwan's legislature were to fail at

61. This article discusses *Campaign for Southern Equality* even though it was decided by a district court, which is a lower-level court within the U.S. judicial hierarchy, because the judgment's doctrinal reasoning is persuasive. District court decisions do not constitute formally binding precedent in the United States.

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

63. *Campaign for S. Equal.*, 175 F. Supp.3d at 710.

64. The court acknowledged that *Obergefell* did not clearly articulate a legal test for evaluating sexual orientation discrimination, but *Obergefell*'s analysis resembled something more rigorous than rational basis review. In the United States, courts are extremely deferential to the state when they exercise rational basis review. *See id.*

65. *Id.*

66. *Id.* at 709 (quoting *Obergefell*, 576 U.S. at 667).

67. *See id.* at 710 (quoting *Obergefell*, 576 U.S. at 677) (internal quotation marks omitted).

68. The Supreme Court echoed this point in *Pavan v. Smith*, 137 S.Ct. 2075 (2017) (per curiam), which concerned married lesbian couples who brought children into their families through artificial insemination. The Arkansas Department of Health barred the lesbian couples from having both spouses' names listed on their children's birth certificates even though it would list both spouses when married different-sex couples have children through artificial insemination. The Supreme Court held that this differential treatment was unconstitutional because it "infringe[d] *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage . . .'" *Id.* at 2077 (quoting *Obergefell*, 576 U.S. at 644).

69. *J.Y. Interpretation No. 748*, *supra* note 11, at *Reasoning* para. 15.

70. *Id.*

legalizing same-sex marriage, the TCC said its default remedy would allow married same-sex couples to “enjoy the rights and bear the obligations arising on couples.”⁷¹

The TCC did not explicitly say that joint adoption is part of the bundle of rights tied to marriage, but this inclusion should be understood because in Taiwan only married couples can pursue adoption together--unmarried couples cannot.⁷² It is also worth noting that the Ministry of Justice had argued to the TCC that marriage serves the social function of child-rearing, and the TCC did not refute this claim.⁷³ Therefore, the TCC implicitly endorsed the idea that child-rearing rights are within the bundle of rights encompassed by marriage. In an earlier case concerning adoption rights of different-sex couples in cross-border marriages, the TCC acknowledged that “people’s freedom to adopt children” is tied to human dignity and is covered by the constitution’s protection of unenumerated rights.⁷⁴ The fact that adoption holds such great significance renders it all the more important that joint adoption not be left out of the bundle of rights extended to married same-sex couples.

In sum, the U.S. case from Mississippi advances the notion that marriage is intertwined with an existing bundle of rights and responsibilities forming a unified whole. In this view, extending marriage rights to same-sex couples must entail giving same-sex couples who marry the full set of rights and responsibilities that different-sex marriages encompass. This understanding fits well with the language in *J.Y. Interpretation 748*.

B. *Inter-American Court of Human Rights*

Taiwan could also learn from the Inter-American Court of Human Rights (IACtHR). In 2018, the IACtHR issued a groundbreaking advisory opinion concerning nondiscrimination toward same-sex couples and issues regarding gender identity.⁷⁵ For the purposes of this article, the most important component of the advisory opinion was its conclusion that states

71. *Id.* at *Reasoning* para. 17.

72. Civil Code, *supra* note 6, §§ 1074, 1075.

73. See *J.Y. Interpretation No. 748*, *supra* note 11, at *Reasoning* para. 4.

74. *J.Y. Interpretation No. 712 (2013)*, *Reasoning* para. 1,

https://www2.judicial.gov.tw/FYDownload/en/p03_01.asp?expno=712 [https://perma.cc/NQ8H-PDFD] (stating that the freedom to adopt children is protected by Article 22 of the constitution). This case concerned married couples with one spouse from Taiwan and the other spouse from mainland China. The TCC invalidated a rule that prohibited Taiwanese persons who already have their own children from adopting the children of a spouse from mainland China. *Id. Holding* at para. 1.

75. State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) [hereinafter IACtHR Advisory Opinion OC-24/17].

must grant same-sex couples access to marriage. According to the IACtHR, the legalization of same-sex marriage is required by states' obligations to protect rights to nondiscrimination, equal protection, privacy, and family life.⁷⁶ The IACtHR is the only international human rights tribunal to date to decide that states must legalize same-sex marriage.

In its discussion of marriage, the IACtHR's advisory opinion supported the idea that marriage is intertwined with an existing bundle of rights and responsibilities. For example, it stated: "States must ensure access to *all the legal institutions that exist* in their domestic laws to guarantee the protection of *all the rights* of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples."⁷⁷ Note that the court did not say that same-sex couples must be granted access to all the legal institutions that exist *except adoption*, or all the rights of families *except adoption*. Put simply, all means all. In the quoted sentence, the definite article "the" and the phrase "that exist" underscore that states must grant same-sex couples access to the existing bundle of rights and responsibilities rather than create a new bundle for same-sex couples.⁷⁸ Indeed, the court's advisory opinion is similar to the U.S. opinion in *Campaign for Southern Equality*. Both cases say that married couples must receive the same set of existing rights and responsibilities regardless of the couple's sexual orientation.⁷⁹

The IACtHR has a notable history of respecting diverse family forms.⁸⁰ It is therefore unsurprising that the IACtHR did not carve apart adoption rights from same-sex marriage. In the landmark case of *Atala Riffo and Daughters v. Chile*, concerning a lesbian's custody of her biological children, the IACtHR remarked that "sexual orientation is part of a person's intimacy, and is not relevant when examining aspects related to an individual's suitability as a parent."⁸¹ This recognition that sexual orientation is

76. The IACtHR grounded its conclusion regarding marriage in the following provisions of the American Convention on Human Rights: Articles 1(1) (obligation to respect rights without discrimination), 2 (domestic legal effects), 11(2) (privacy), 17 (rights of the family), and 24 (equal protection). IACtHR Advisory Opinion OC-24/17, ¶ 229.

77. *Id.* at ¶ 228 (emphasis added).

78. The IACtHR also said that a state breaches equality rights if it only offers same-sex couples access to a separate institution that provides the "identical effects" as marriage without the label "marriage" (e.g., civil partnership). *Id.* at ¶ 224. It should logically follow that depriving same-sex couples of marriage's legal effects—including adoption rights—violates equality because the substantive effects of marriage are even more consequential than the label "marriage."

79. It is worth noting that neither *Campaign for Southern Equality* nor the IACtHR's advisory opinion suggests that the state can never modify the bundle of rights and responsibilities encompassed by marriage. Instead, the main point is that granting same-sex couples marriage rights entails giving them access to the bundle of rights and responsibilities that exists for different-sex couples.

80. See generally Macarena Sáez, *In the Right Direction: Family Diversity in the Inter-American System of Human Rights*, 44 N.C. J. INT'L L. 317 (2019).

81. *Atala Riffo and Daughters v. Chile*, Judgment (Merits, Reparations, and Costs), Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 167 (Feb. 24, 2012).

irrelevant to one's suitability to parent undergirds the idea that parenting rights--including adoption rights--should not be excluded from the set of legal consequences attached to same-sex marriage.

C. *European Court of Human Rights*

Unlike the TCC, the European Court of Human Rights (ECtHR) has not ruled that same-sex couples have the right to marry.⁸² Yet there are good reasons to look to the ECtHR for insights. Under ECtHR case law, differential treatment based on sexual orientation can be justified only by "very weighty reasons," and the differential treatment must be proportionately related to the government's goals.⁸³ This justification test is roughly akin to the TCC's test of heightened scrutiny. This similarity makes the ECtHR worth examining. Moreover, the ECtHR has decided several cases concerning adoption rights of gays and lesbians, culminating in *X and Others v. Austria*.⁸⁴ The ECtHR held in *X and Others* that Austria violated human rights because it offered second-parent adoptions⁸⁵ to unmarried different-sex couples but not to unmarried same-sex couples.⁸⁶ Taiwan can draw lessons from this case's condemnation of differential treatment based on sexual orientation.

In *X and Others*, the ECtHR acknowledged that protecting children's interests is a valid government goal.⁸⁷ It explained, however, that a blanket exclusion of same-sex couples from second-parent adoptions was not proportionately related to this goal.⁸⁸ Instead, same-sex couples who seek

82. The ECtHR has rejected arguments that excluding same-sex couples from marriage violates the European Convention on Human Rights ("ECHR"). See *Chapin and Charpentier v. France*, 2016-II Eur. Ct. H.R. 215; *Schalk & Kopf v. Austria*, 53 Eur. Ct. H.R. 20 (2010).

83. See *X and Others v. Austria*, 57 Eur. Ct. H.R. 14 ¶¶ 98-99(2013); see also Rory O'Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211, 214, 224-26 (2009) (summarizing and quoting case law). Commentators have argued that the ECtHR did not take this requirement as seriously as it should have in its same-sex marriage cases. See, e.g., Emmanuelle Bribosia, Isabelle Rorive & Laura Van den Eynde, *Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the U.S. Experience*, 32 BERKELEY J. INT'L L. 1, 15, 17 (2014); Loveday Hodson, *A Marriage by Any Other Name? Schalk and Kopf v Austria*, 11 HUM. RTS. L. REV. 170, 175 (2011). In same-sex marriage cases, the ECtHR has reduced the intensity of its scrutiny based on its consensus doctrine. See *Chapin & Charpentier*, 2016-II Eur. Ct. H.R. 215, at ¶ 51; *Schalk & Kopf*, 53 Eur. Ct. H.R. 20, at ¶ 105.

84. *X and Others*, 57 Eur. Ct. H.R. 14. See also *Gas and Dubois v. France*, App. No. 25951/07, (Mar 15, 2012), <http://hudoc.echr.coe.int/eng?i=001-109572>; *E.B. v. France*, App. No. 43546/02, (Jan. 22, 2008), <http://hudoc.echr.coe.int/eng?i=001-84571>; *Fretté v. France*, App. No. 36515/97, (Feb. 26, 2002), <http://hudoc.echr.coe.int/eng?i=001-60168>.

85. In *X and Others*, second-parent adoptions involved "the adoption of one partner's biological child by the other partner." *X and Others*, 57 Eur. Ct. H.R. 14, at ¶ 31.

86. The ECtHR held that Austria's policy violated Article 14 (prohibition on discrimination) of the ECHR taken in conjunction with Article 8 (right to private and family life). *Id.* at ¶ 153.

87. *Id.*

88. *Id.* ¶ 146.

second-parent adoptions should be evaluated on a case-by-case basis, just as different-sex couples are.⁸⁹ Austria provided no evidence to support a blanket ban.⁹⁰ Meanwhile, there were factors weighing against a blanket ban. For example, the Austrian adoption regime was marred by a “lack of coherence.”⁹¹ Austria permitted gay men and lesbians to adopt as individuals, which showed that the state already accepted that gay men and lesbians could be suitable parents.⁹² This acceptance cast doubt on the appropriateness of a blanket ban against same-sex second-parent adoptions.⁹³ The ECtHR also said the two women in *X and Others* presented a compelling case for adoption because they had already formed a *de facto* family in which they had been jointly raising one of the women’s biological child.⁹⁴ Creating a legal relationship between the child and his biological mother’s partner, through second-parent adoption, could provide important stability that benefits the child.⁹⁵

The ECtHR also acknowledged in *X and Others* that the state has a valid interest in protecting “family in the traditional sense.”⁹⁶ According to the court, however, this interest is “rather abstract,” must be broadly defined, and could not justify a blanket ban against same-sex couples.⁹⁷ Perhaps because the notion of traditional family is so abstract and contested, the court gave much more attention to the protection of children’s interests as a government goal.⁹⁸

The reasoning in *X and Others v. Austria* is translatable to Taiwan. Much like the situation in *X and Others*, Taiwan’s exclusion of same-sex

89. *Id.*

90. *Id.* ¶ 142. Indeed, it would be difficult to find evidence to support a blanket ban. Studies overwhelmingly show that same-sex couples are capable of being good parents. See Jennifer Power, *FactCheck: Are Children ‘Better Off’ with a Mother and Father than with Same-Sex Parents?*, THE CONVERSATION (Sept. 6, 2017, 4:15 PM EDT), <https://theconversation.com/factcheck-are-children-better-off-with-a-mother-and-father-than-with-same-sex-parents-82313> [<https://perma.cc/D64P-GLJ3>]; see also Corte Constitucional [C.C.] [Constitutional Court], noviembre 4, 2015, Sentencia C-683/15, Expediente D-10371, § VI 8.4 (Colom.) (concluding that scientific research supports extending adoption rights to same-sex couples); *Professional Organizations on LGBTQ Parenting*, Hum. Rts. Campaign, <https://www.hrc.org/resources/professional-organizations-on-lgbt-parenting> [<https://perma.cc/285W-2ZX3>] (last visited Nov. 21, 2020) (listing child welfare, psychological, and health organizations that have issued statements in support of LGBTQ parenting).

91. *X and Others*, 57 Eur. Ct. H.R. 14, at ¶ 144.

92. *Id.*

93. *Id.* ¶¶ 144, 146.

94. *Id.* ¶¶ 10, 145-46.

95. The South African case of *Du Toit v. Minister of Welfare & Population Development* elaborates on this point regarding stability. See *infra* notes 110-113, 124, and accompanying text.

96. *X and Others*, App. No. 19010/07 ¶¶ 138-39.

97. *Id.* ¶ 139.

98. See Junko Nozawa, *Drawing the Line: Same-Sex Adoption and the Jurisprudence of the ECtHR on the Application of the “European Consensus” Standard under Article 14*, 29 UTRECHT J. INT’L. & EUR. L. 66, 74 (2013).

couples from joint adoptions is not substantially related to important government goals. Same-sex couples who wish to adopt jointly should be evaluated on a case-by-case basis. Like Austria's earlier adoption regime, Taiwan's adoption regime lacks coherence. Gay men and lesbians in Taiwan are already legally capable of adopting children as individuals.⁹⁹ A spouse in a same-sex marriage can also adopt the other spouse's biological child.¹⁰⁰ The fact that gay men and lesbians can pursue individual adoptions and certain stepparent adoptions in Taiwan suggests that maintaining a blanket ban against same-sex joint adoptions is inappropriate.¹⁰¹ Additionally, as Austria's ban risked harming children in *de facto* families,¹⁰² Taiwan's ban on joint adoptions may harm certain children by depriving them of suitable adoptive families. For example, in the case of the hypothetical Ms. Liu and Ms. Tsai, they are barred from adopting their niece even if that adoption is best for her well-being.¹⁰³ Although Ms. Liu, Ms. Tsai, and their niece have not formed a *de facto* nuclear family the way the family in *X and Others* had, the hypothetical aunts and their niece share a deep existing familial bond that make the aunts uniquely well-suited for adopting the child. Barring the aunts from adoption undermines the government goal of promoting children's well-being.

D. South Africa

South Africa is another jurisdiction that is instructive on how to apply heightened scrutiny. The case of interest is *Du Toit v. Minister for Welfare and Population Development*.¹⁰⁴ It involved two women in a committed relationship who sought to adopt children together. Suzanne du Toit and Anne-Marié de Vos were unable to jointly adopt because South Africa limited joint adoptions to married couples,¹⁰⁵ and South Africa had not yet legalized same-sex marriage.¹⁰⁶ The women underwent a standard screening and counselling process for adoption.¹⁰⁷ Two siblings were eventually placed in the women's care.¹⁰⁸ Only one woman, however, could legally

99. *See supra* note 1.

100. Implementation Act, *supra* note 5, § 20 (2019).

101. *See supra* notes 91-93 and accompanying text (critiquing the similar lack of coherence in Austria's previous adoption regime).

102. *See supra* notes 94-95 and accompanying text.

103. *See supra* note 1 and accompanying text.

104. *Du Toit v. Minister of Welfare & Population Development* 2003 (2) SA 198 (CC) (S. Afr.).

105. *Id.* at ¶¶ 7-14.

106. The South African Constitutional Court decided *Du Toit* in 2002. In 2005, it ruled that exclusion of same-sex couples from marriage was unconstitutional. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.). The following year, same-sex marriage was legalized through enactment of the Civil Union Act 17 of 2006 (S. Afr.).

107. *Du Toit*, 2003 (2) SA 198 (CC) at ¶ 5.

108. *Id.* at ¶ 6.

adopt the children, and Ms. de Vos was made the adoptive parent.¹⁰⁹ The lack of joint adoption put the family in a precarious situation. Ms. du Toit served as the children's primary caregiver and spent more time with them on weekdays.¹¹⁰ Yet, because she was not a legal parent, she had no right to make medical decisions if she took a child to the doctor.¹¹¹ She had no right to sign school forms for the children.¹¹² If Ms. du Toit and Ms. de Vos were to separate, or if Ms. de Vos were to die, Ms. du Toit's claims to custody and guardianship would be uncertain.¹¹³ In light of risks such as these, the women mounted a constitutional challenge against the adoption restriction.

The Constitutional Court of South Africa held that the restriction on joint adoptions violated constitutional rights to equality¹¹⁴ and dignity, as well as the paramount principle of protecting children's interests, which is enshrined in the South African constitution.¹¹⁵ The court ordered South Africa to allow same-sex life partners to adopt children jointly.¹¹⁶ Although *Du Toit* concerned *unmarried* same-sex couples, it also offers insights on how to think about *married* same-sex couples in Taiwan.¹¹⁷ There are two main takeaways from *Du Toit*. First, the court said that the government could not justify barring all same-sex couples from joint adoptions.¹¹⁸ This observation is significant to Taiwan because South Africa's justification test is similar to the heightened scrutiny test adopted by the TCC.¹¹⁹ There was no dispute in *Du Toit* that gays and lesbians could make suitable parents; indeed, the court acknowledged that South Africa already permitted gay men and lesbians to adopt as individuals.¹²⁰ Accordingly, rather than bar all same-sex couples from jointly adopting children, the state should screen

109. *Id.* at ¶ 7.

110. *Id.* at ¶ 14.

111. *Id.*

112. *Id.*

113. *Id.*

114. The court stated that the adoption restriction unfairly discriminated based on a combination of sexual orientation and marital status, both of which are protected categories under South African constitutional law. *Id.* at ¶ 26.

115. *Id.* at ¶¶ 22, 26, 29, 37.

116. *Id.* at ¶ 44.

117. This article focuses on married same-sex couples. For a discussion on non-marital couple relationships in Taiwan, see Chen, *supra* note 24, at 7-8.

118. *Du Toit*, 2003 (2) SA 198 (CC) at ¶¶ 31-37.

119. According to section 36 of the South African Constitution, whether limitations on a constitutional right are justified is to be determined by considering all relevant factors, including (1) the nature of the right, (2) the importance of the purpose of limiting the right, (3) the nature and extent of the limitation, (4) the relation between the limitation and its purpose, and (5) the existence of less restrictive means to achieve the purpose. S. AFR. CONST., 1996 § 36. Many of these factors are relevant to Taiwan's test of heightened scrutiny, which requires that differential treatment (i.e., limitation on the right to equality) be "substantially related" to "furthering an important government interest." See J.Y. Interpretation 748, *supra* note 11, at *Reasoning* para. 15.

120. See *Du Toit*, 2003 (2) SA 198 (CC) at ¶ 32.

couples on a case-by-case basis.¹²¹ This criticism against South Africa's blanket restriction now applies to Taiwan's blanket restriction.¹²²

The second important takeaway from *Du Toit* is the court's observation that barring same-sex couples from joint adoptions "deprive[d] children of the possibility of a loving and stable family life . . ."¹²³ The court said that the exclusion "surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development which can be offered by suitably qualified persons."¹²⁴ In other words, banning same-sex joint adoptions could harm children.¹²⁵ This observation is relevant to Taiwan because, according to the heightened scrutiny required by the TCC, one must ask whether Taiwan's ban on same-sex joint adoptions is substantially related to the important goal of protecting children's interests.¹²⁶

One can imagine scenarios in which it is in a child's best interests to be adopted by a couple who happen to be of the same sex, yet Taiwanese law prohibits such adoptions. For example, in the hypothetical concerning Ms. Lin and Ms. Tsai,¹²⁷ even if all family members and relevant child experts agree that it is in the child's best interest to be adopted by the two women, the law would bar the adoption. It is also worth noting that some research from other parts of the world suggests that same-sex couples are more likely than different-sex couples to adopt children that agencies have difficulty finding homes for--such as older children and children with special needs--perhaps because same-sex couples can empathize with these children's experiences of stigma.¹²⁸ Banning same-sex joint adoptions might deprive such children of suitable adoptive homes.

121. *Id.* at ¶ 43.

122. The court in *Du Toit* also considered whether restricting joint adoptions to married couples was justified because the dissolution of unmarried relationships, being unregulated, posed a greater risk of instability for children than do divorces of married couples. The court rejected this potential justification after noting that there are legal tools other than the adoption ban that are suitable for addressing this risk. *Id.* at ¶¶ 33-37.

123. *Id.* at ¶ 22. The Constitutional Court of Colombia made a similar observation when it ruled that same-sex couples can jointly adopt children. *See* Corte Constitucional [C.C.] [Constitutional Court], noviembre 4, 2015, Sentencia C-683/15, Expediente D-10371, § VI 9.2 (Colom.).

124. *Id.* at ¶ 21.

125. *See id.* at ¶¶ 21-22.

126. *See supra* notes 16-20 and accompanying text.

127. *See supra* note 1 and accompanying text.

128. *See e.g.*, Fiona Tasker & Clifford Bellamy, *Adoption by Same-Sex Couples--Reaffirming Evidence: Could More Children Be Placed?*, 49 FAMILY L. 171, 177 (2019) (discussing research from the United Kingdom and the United States); DAVID M. BRODZINSKY & EVAN B. DONALDSON ADOPTION INSTITUTE, EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 16, 54 (2011) (citing research from the United States); Mary O'Hara, *The LGBT Couples Adopting 'Hard to Place' Children*, Guardian (Mar. 4, 2015), <https://www.theguardian.com/social-care-network/2015/mar/04/the-lgbt-couples-adopting-hard-to-place-children> [https://perma.cc/M95A-LKJJ] (discussing data from the United Kingdom).

Du Toit shares similarities with *X and Others*. Both cases suggest that adoption bans based on sexual orientation cannot withstand rigorous scrutiny. They both suggest that bans based on sexual orientation are especially unjustified if the state already allows gays and lesbians to pursue some forms of adoption but not others (e.g., individual adoptions versus joint adoptions). Both cases also illuminate the fact that bans against same-sex adoption can be harmful to children.

IV. TAKING STOCK OF IMPLICATIONS FOR TAIWAN

The preceding comparative analyses cast enormous doubt on the constitutionality of Taiwan's policy barring married same-sex couples from joint adoption. Three main takeaways emerged from the comparative analyses: (1) same-sex couples' constitutional right to marry in Taiwan should encompass the same bundle of rights and responsibilities that is conferred upon married different-sex couples, including adoption rights; (2) Taiwan's exclusionary adoption policy is likely to fail the heightened scrutiny that the TCC applies to differential treatment based on sexual orientation; and (3) Taiwan's adoption policy is dubious because it is extremely anomalous among countries that have legalized same-sex marriage. Taken together, these takeaways strongly suggest that the "freedom to adopt children"--which the TCC has already recognized as a constitutionally protected right¹²⁹--should be construed to encompass married same-sex couples' eligibility to adopt jointly. This Part will recap each of these three ways in which comparative law casts doubt on the constitutionality of Taiwan's exclusionary adoption policy.

First, as the U.S. case from Mississippi and the advisory opinion from the IACtHR help to explain, marriage encompasses a bundle of rights and responsibilities. Extending marriage to same-sex couples thus requires extending the existing bundle of rights and responsibilities that the state confers upon different-sex married couples. This understanding of marriage should apply in Taiwan because *J.Y. Interpretation 748* stated expressly that same-sex couples should be granted the "rights and obligations" of marriage.¹³⁰ In this vein, same-sex couples' constitutional right to marry--which *J.Y. Interpretation 748* derived from the Taiwanese constitution's protection of equality and the fundamental right of

129. Recall that in *J.Y. Interpretation No. 712*, the TCC stated that the freedom to adopt children is covered by the protection of unenumerated rights in Article 22 of the constitution. See *supra* note 74 and accompanying text. That case concerned the adoption rights of different-sex couples in cross-border marriages.

130. *J.Y. Interpretation No. 748*, *supra* note 11, at *Reasoning* para. 15; see also *supra* notes 69-71 and accompanying text.

marriage¹³¹ --encompasses a right to joint adoption.

The second lesson from comparative law is that excluding same-sex couples from joint adoptions likely fails heightened scrutiny, which the TCC has said must be applied to differential treatment based on sexual orientation.¹³² The relevant cases from the ECtHR (*X and Others*) and the Constitutional Court of South Africa (*Du Toit*) suggest that a blanket ban against same-sex couples is not substantially related to important government goals.¹³³ Instead of employing a blanket ban, Taiwan's adoption system should screen same-sex couples on a case-by-case basis to determine their suitability for joint adoption.

Note that, although *X and Others* and *Du Toit* were brought by same-sex couples who had already formed *de facto* families with their children, the reasoning in these decisions can be applied beyond *de facto* families to joint adoptions generally. For example, the ECtHR and the Constitutional Court of South Africa observed that the adoption policies of Austria and South Africa were dubious because both countries had already accepted that gays and lesbians can be suitable parents. These countries allowed gays and lesbians to adopt as individuals; yet they completely barred gays and lesbians from second-parent adoptions (the subject in *X and Others*) and joint adoptions (the subject in *Du Toit*). This incoherence casted doubt on the blanket bans' relation to children's well-being.¹³⁴ Taiwan's adoption regime now bears similar incoherence.¹³⁵

Du Toit is particularly relevant to Taiwan because it concerned joint adoptions. The Constitutional Court of South Africa explained that South Africa's blanket ban against same-sex joint adoptions was harmful because it deprived some children of the loving and stable family life that same-sex adoptive parents could provide.¹³⁶ Indeed, in some circumstances, a same-sex couple may be best suited to adopt a particular child.¹³⁷ Notably, even though Ms. du Toit and Ms. De Vos were *de facto* co-parents, the court did not say that only *de facto* parents are entitled to be considered for joint adoption. Instead, the court ruled that *all* same-sex life partners are entitled

131. J.Y. Interpretation No. 748, *supra* note 11, at *Holding* para. 1 (stating that denying same-sex couples the ability to marry violated the freedom of marriage under Article 22 of the constitution and the right to equality under Article 7).

132. *Id.* at *Reasoning* paras. 15, 2-3.

133. *See supra* Parts III.3-III.4.

134. *See supra* notes 88-93, 120, 121 and accompanying text.

135. *See supra* note 1, 99, 100 and accompanying text.

136. *See Du Toit*, 2003 (2) SA 198 (CC) at ¶ 22.

137. *See id.*; *supra* notes 127-128 and accompanying text. *See also* Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, The Williams Institute & Urban Institute, 17 (2007),

<http://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF> [<https://perma.cc/56MA-D9BB>] (discussing the fact that gays and lesbians may be best suited for serving as foster parents to certain children).

to be evaluated on a case-by-case basis for joint adoption.¹³⁸ *Du Toit's* reasoning suggests that Taiwan's blanket ban against same-sex joint adoptions cannot survive heightened scrutiny.

Finally, for the third insight from comparative law, let us circle back to where this article's comparative analysis started: a macro-level view of Taiwan's peers. As one of only two countries where same-sex couples can marry but cannot jointly adopt children after marriage, Taiwan is a glaring anomaly. The fact that Taiwan's peers have almost unanimously disagreed with Taiwan's position on joint adoptions casts doubt on Taiwan's position. This doubt is not determinative, and Taiwan should not blindly follow foreign trends. However, upon combining this doubt with the two other insights from comparative law, one sees that comparative law strongly favors the view that Taiwan's joint adoption ban is unconstitutional.

V. CONCLUSION: JOINT ADOPTIONS BY MARRIED SAME-SEX COUPLES IN TAIWAN AND BEYOND

J.Y. Interpretation 748 and the Implementation Act are rightly celebrated as important steps in the dismantling of sexual orientation discrimination. There remains, however, lingering inequality between same-sex and different-sex couples within the context of marriage. This article's analyses suggest that Taiwan's exclusion of married same-sex couples from joint adoptions is constitutionally untenable.¹³⁹ Looking beyond Taiwan, many of this article's analyses and recommendations are also applicable to Ecuador, the only other country where same-sex couples can marry but cannot adopt children together. Additional countries are likely to open marriage to same-sex couples in the years ahead.¹⁴⁰ Comparative law suggests that these countries should grant equal adoption rights to same-sex couples who marry. Taiwan's outlier approach to adoption ought to be rejected, not only by Taiwan but by other countries as well.

138. *Du Toit*, 2003 (2) SA 198 (CC) at ¶¶ 42-43.

139. This article has focused on comparative analysis. For an overview of other analytical lenses that one can apply to constitutional issues in Taiwan, see Chang, *supra* note 20, at 649-76.

140. Cf. Fergus Ryan, *Same-Sex Couples Before National, Supranational and International Jurisdictions (book review)*, 14 INT'L J. CON. L. 310, 310, 315 (2015) (book review) (observing "the trend toward legal recognition of same-sex couples" and noting "the momentum for change is undeniable").

APPENDIX

Legalization of same-sex marriage and married same-sex couples' access to joint adoptions (as of November 2020): By country and year

	Countries that have legalized same-sex marriage countrywide¹⁴¹	Year same-sex marriage became legal countrywide	Year joint adoptions became available to married¹⁴² same-sex couples countrywide
1	Netherlands ¹⁴³	2001	2001
2	Belgium ¹⁴⁴	2003	2006
3	Canada ¹⁴⁵	2005	2005
4	Spain ¹⁴⁶	2005	2005

141. In this table, I include the United Kingdom as one country instead of counting England, Northern Ireland, Scotland, and Wales as separate countries. I have not included overseas territories, regions, departments, or possessions (e.g., Bermuda, Greenland) as countries. My tally does not include Mexico. In 2015, the Supreme Court of Mexico ruled that bans on same-sex marriage are unconstitutional. This ruling did not, however, automatically invalidate state-level bans against same-sex marriage. In many Mexican states, same-sex couples who wish to marry still need to file lawsuits seeking injunctions based on the 2015 Supreme Court ruling. For this reason, Human Rights Watch has classified Mexico as a country where the legalization of same-sex marriage is "partial." *During Pride Month, A Look at LGBT Rights: New Map Shows Same-Sex Marriage, Civil Unions, and Domestic Partnerships Worldwide*, HUM. RTS. WATCH (June 2020), http://internap.hrw.org/features/features/marriage_equality/ [<https://perma.cc/ZCL9-83T2>]; see also Murphy Woodhouse, *Despite 2015 Supreme Court Ruling, Mexican Gay Marriage Varies State to State*, FRONTERAS, <https://fronterasdesk.org/content/1092436/despite-2015-supreme-court-ruling-mexican-gay-marriage-varies-state-state> [<https://perma.cc/7N5J-V3LP>] (last updated Aug. 1, 2019).

142. Some countries gave unmarried same-sex couples the right to adopt jointly before they legalized same-sex marriage. When same-sex marriage became legal in these countries, there was no doubt that married same-sex couples could jointly adopt as well. For these countries, this table lists the year of marriage legalization as also the year in which joint adoptions became available to married same-sex couples.

143. The Dutch Parliament passed legislation in 2000 to legalize same-sex marriage and joint adoptions by married same-sex couples. The legislation went into effect in 2001. See Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 438, 453-62 (Robert Wintemute & Mads Andenæs eds., 2001) (citing and translating Wet Openstelling Huwelijk [Act on the Opening Up of Marriage] Dec. 21, 2000, Stb. 2001, 9 (Neth.)).

144. Belgium legalized same-sex marriage in 2003 and then extended joint adoption rights to married same-sex couples in 2006. See Borghs & Eeckhout, *supra* note 38, at 9, 15 (citing Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil [Law Opening Marriage to Persons of the Same Sex and Amending Certain Provisions of the Civil Code] of Feb. 28, 2003, MONITEUR BELGE [M.B.] [OFFICIAL GAZETTE OF BELGIUM], Feb. 28, 2003, 3d. ed., 9880; Loi modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe [Law to Amend Certain Provisions of the Civil Code to Allow Adoption by Persons of the Same Sex] of May 18, 2006 MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jun. 20, 2006, 31128).

145. See *supra* notes 46-50 and accompanying text.

146. In 2005, Spain's legislature passed Ley 13/2005 (B.O.E. 2005, 157) (Spain), which legalized same-sex marriage and gave married same-sex couples access to joint adoptions. See Raquel Platero, *Outstanding Challenges in a Post-Equality Era: The Same-Sex Marriage and Gender Identity Laws in Spain*, 21 INT'L J. IBERIAN STUD. 41, 43 (2008); Omar G. Encarnación, *A Latin American Puzzle: Gay*

	Countries that have legalized same-sex marriage countrywide	Year same-sex marriage became legal countrywide	Year joint adoptions became available to married same-sex couples countrywide
5	South Africa ¹⁴⁷	2006	2006
6	Norway ¹⁴⁸	2009	2009
7	Sweden ¹⁴⁹	2009	2009
8	Argentina ¹⁵⁰	2010	2010
9	Iceland ¹⁵¹	2010	2010
10	Portugal ¹⁵²	2010	2016
11	Denmark ¹⁵³	2012	2012

Rights Landscapes in Argentina and Brazil, 40 HUM. RTS. Q. 194, 205 (2018).

147. In 2005, the Constitutional Court of South Africa held that excluding same-sex couples from marriage was unconstitutional and ordered Parliament to remedy the situation. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.). The following year, Parliament passed the Civil Union Act 17 of 2006 (S. Afr.), which legalized same-sex marriage. Same-sex partners already had the right to joint adoption after the case of *Du Toit*, 2003 (2) SA 198 (CC).

148. In 2008, Norway adopted legislation to legalize same-sex marriage and extend joint adoption rights to same-sex couples. These reforms went into effect in 2009. *See* Torstein Frantzen, *National Report: Norway*, 19 AM. U.J. GENDER SOC. POL'Y & L. 273, 273-74 (2011) (citing Lov om endringer i ekteskapsloven, barnelova, adopsjonsloven, bioteknologiloven mv. (felles ekteskapslov for heterofile og homofile par) [Act Amending the Marriage Act, Children Act, Adoption Act, Biotechnology Act, etc. (Common Marriage Law for Heterosexual and Homosexual Couples)] 27. juni 2008 nr. 53. (Nor.); Norman Anderssen & Tone Hellesund, *Heteronormative Consensus in the Norwegian Same-Sex Adoption Debate?*, 56 J. HOMOSEXUALITY 102, 105 (2009).

149. Sweden's Parliament legalized same-sex marriage in 2009. *See* Anna Singer, *Equal Treatment of Same-Sex Couples in Sweden*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 2010 393, 398 (Bill Atkin ed., 2010) (citing ÅKTENSKAPSRÅGOR [ÅKTB] [MARRIAGE CODE] 09:80 (Swed.)). Same-sex domestic partners already had the right to adopt jointly since 2003. *See id.* at 396-98; *see also* Lina Aldén et al., *Effect of Registered Partnership on Labor Earnings and Fertility for Same-Sex Couples: Evidence from Swedish Register Data*, 52 DEMOGRAPHY 1243, 1244 (2015).

150. In 2010, Argentina enacted Law No. 26618, July 21, 2010 [CXVIII] B.O. 31949 (Arg.), which legalized same-sex marriage and extended joint adoption rights to married same-sex couples. *See* Cecilia P. Grossman & Marisa Herrera, *Family, Pluralism and Equality: Marriage and Sexual Orientation in Argentine Law*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 2011, 27, 28, 40-43 (Bill Atkin ed., 2011).

151. Iceland enacted legislation in 2010 to legalize same-sex marriage; earlier, in 2006, it had passed law reform allowing same-sex couples to adopt jointly. *See* Guðný Björk Eydal & Ingólfur V. Gíslason, *Family Policies: The Case of Iceland*, in HANDBOOK OF FAMILY POLICIES ACROSS THE GLOBE 109, 114 (Mihaela Robila ed., 2014) (citing Þingskjal 1302. Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist o.fl. (ein hjúskaparlög) [Law on Amendments to the Marriage Act and the Removal of Registered Partnership (One Marriage)]. Alþingistiðindi, A-deild, 138 (2010); Þingskjal 1445. Lög um breytingu á lagaákvæðum er varða réttarstöðu samkynhneigðra (sambúð, ættleiðingar, tæknifrjóvgun) [Act Amending Legal Provisions Concerning the Legal Status of Homosexuals (Cohabitation, Adoption, Artificial Insemination)]. Alþingistiðindi A-deild, 132 (2005-2006)).

152. *See supra* notes 39-40 and accompanying text.

153. Denmark legalized same-sex marriage legislatively in 2012. *See* Annette Kronborg, *Family Formation in Scandinavia: A Comparative Study in Family Law*, 12 UTRECHT L. REV. 81, 86 (2016) (citing Lov nr 532 af 12.6.2012 Lov om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab (Ægteskab mellem to personer af samme køn) [Law Amending the Law on Marriages and Dissolution, the Act on the Legal Effects of Marriage, and the Justice Act, and Repealing the Registered

	Countries that have legalized same-sex marriage countrywide	Year same-sex marriage became legal countrywide	Year joint adoptions became available to married same-sex couples countrywide
12	Brazil ¹⁵⁴	2013	2013
13	France ¹⁵⁵	2013	2013
14	New Zealand ¹⁵⁶	2013	2013
15	Uruguay ¹⁵⁷	2013	2013
16	Ireland ¹⁵⁸	2015	2015

Partnership Act (Marriage Between Two People of the Same Sex)). Same-sex couples already had the right to adopt together as registered domestic partners since 2010. *See* Christina Jeppesen de Boer & Annette Kronberg, *National Report: Denmark*, 19 AM. U.J. GENDER SOC. POL'Y & L. 113, 118 (2011) (citing Lov nr 537 af 26.5.2010 Lov om ændring af lov om registreret partnerskab, lov om en børnefamilieydelse og lov om børnetilskud og forskudsvis udbetaling af børnebidrag [Act Amending the Registered Partnership Act, the Child Family Benefit Act and the Child Allowance, and Advance Payment of Child Allowances Act]).

154. In 2013, the National Justice Council of Brazil ordered civil authorities around the country to perform same-sex marriages. *See* José Miguel Cabrales Lucio, *Same-Sex Couples before Courts in Mexico, Central and South America*, in SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS 93, 117 (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014). Before same-sex marriage was legalized, Brazil's Superior Court of Justice and Supreme Court had issued rulings allowing same-sex couples to adopt jointly. *See id.*; Helena Campos Refosco & Martha Maria Guida Fernandes, *Same-Sex Parents and Their Children: Brazilian Case Law and Insights from Psychoanalysis*, 23 WM. & MARY J. WOMEN & L. 175, 180 (2017).

155. In 2013, the French Parliament passed legislation that made marriage and joint adoptions available to same-sex couples. *See* Ivana Isailovic, *Same Sex but Not the Same: Same-Sex Marriage in the United States and France and the Universalist Narrative*, 66 AM. J. COMP. L. 267, 272 (2018) (citing Loi 2013-404 du mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 Opening Marriage to Same-Sex Couples], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2013, p. 8253).

156. New Zealand amended legislation in 2013 to allow same-sex couples to marry; this reform also allowed married same-sex couples to adopt jointly. *See* Mark Henaghan & Ruth Ballantyne, *Past, Present, and Future New Zealand Developments: The Family Court System, Adoption, and Relationship Property*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 2016 323, 335 (Bill Atkin ed., 2016) (citing the Marriage (Definition of Marriage) Amendment Act 2013 s 5 (N.Z.)).

157. In 2013, Uruguay enacted legislation that legalized same-sex marriage and made clear that same-sex couples could jointly adopt. *See* Law No. 19075 arts. 1 & 25, Mayo 9, 2013 DIARIO OFICIAL [OFFICIAL GAZETTE] [D.O.] (Uru.); Felipe Arocena & Sebastián Aguiar, *Tres Leyes Innovadoras en Uruguay: Aborto, Matrimonio Homosexual y Regulación de la Marihuana [Three Innovative Laws in Uruguay: Abortion, Homosexual Marriage and Marijuana Regulation]*, 30 REVISTA DE CIENCIAS SOCIALES [JOURNAL OF SOCIAL SCIENCES] REV. CIENC. SOC. 43, 48-49 (2017). Many commentators have said that same-sex couples could jointly adopt ever since Uruguay passed a revised adoption law in 2009, but there has been some disagreement on whether that law clearly applied to same-sex couples. *See* Walter Howard, *National Report: Uruguay*, 19 AM. U.J. GENDER SOC. POL'Y & L. 343, 364 (2011).

158. In 2015, the people of Ireland amended the Irish constitution by referendum to legalize same-sex marriage. *See* Maebh Harding, *Marriage Equality: A Seismic Shift for Family Law in Ireland*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 2016 255, 263-66 (Bill Atkin ed., 2016) (citing the Constitution of Ireland 1937 art. 41.4, <http://www.irishstatutebook.ie/eli/cons/en/html> [<https://perma.cc/9K96-6JSN>] as amended by the thirty-fourth (Marriage Equality) Act of 2015). This reform made joint adoptions available to married same-sex couples. *See* Bryan Tobin, *Parenting and Legal Family Formats in Ireland*, in THE LAWS AND FAMILIES DATABASE-ASPECTS OF LEGAL FAMILY FORMATS FOR SAME-SEX AND DIFFERENT-SEX COUPLES, question 3.10 (Kees Waaldijk et al. eds., 2017), <https://www.ined.fr/Xtradocs/lawsandfamilies/LawsAndFamilies-IE-Section3.pdf>

	Countries that have legalized same-sex marriage countrywide	Year same-sex marriage became legal countrywide	Year joint adoptions became available to married same-sex couples countrywide
17	Luxembourg ¹⁵⁹	2015	2015
18	United States ¹⁶⁰	2015	2016
19	Colombia ¹⁶¹	2016	2016
20	Australia ¹⁶²	2017	2018
21	Germany ¹⁶³	2017	2017
22	Malta ¹⁶⁴	2017	2017

[<https://perma.cc/35GS-3NE4>]. Prior to the referendum, the Children and Family Relationships Act 2015 (Act No. 9/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/9/enacted/en/html> [<https://perma.cc/52RM-ECGH>], was signed into law; it would have extended joint adoption rights to same-sex civil partners and cohabiting couples, but the relevant parts of that law never went into force. Joint adoptions were eventually extended to unmarried same-sex couples via the Adoption (Amendment) Act 2017 (Act No. 19/2017) (Ir.), <http://www.irishstatutebook.ie/eli/2017/act/19/enacted/en/index.html> [<https://perma.cc/US6A-LQHL>].

159. In 2014, Luxembourg enacted law reforms to make marriage and joint adoption available to same-sex couples; the reforms went into force in 2015. Loi du 4 juillet 2014 relative au réforme du mariage [Law of July 4, 2014 on Marriage Reform], JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG [OFFICIAL GAZETTE OF THE GRAND DUCHY OF LUXEMBOURG], July 17, 2014, Memorial A No. 125; *see also* Nicholas Tomsho, *Luxembourg Legalizes Same-Sex Marriage, Adoption*, Jurist (June 19, 2014), <https://www.jurist.org/news/2014/06/luxembourg-legalizes-same-sex-marriage-adoption/> [<https://perma.cc/ELB9-PYMD>].

160. *See supra* notes 42-45 and accompanying text; Part III.1.

161. In 2016, the Constitutional Court of Colombia held in Sentencia SU-214/16 that notaries could no longer refuse to register same-sex marriages. Corte Constitucional [C.C.] [Constitutional Court], abril 28, 2016, Sentencia SU-214/16, Expediente T-4.167.863 AC (Colom.). In 2015, the Court ruled in Sentencia C-683/15 that same-sex couples are eligible to jointly adopt children. Corte Constitucional [C.C.] [Constitutional Court], noviembre 4, 2015, Sentencia C-683/15, Expediente D-10371 (Colom.); *see* Bruce M. Wilson & Camila Gianella-Malca, *Overcoming the Limits of Legal Opportunity Structures: LGBT Rights' Divergent Paths in Costa Rica and Colombia*, 61 LATIN AMER. POL. & SOC'Y 138, 149-50 (2019).

162. Same-sex marriage was legalized by Australia's Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth) (Austral.), which went into effect in December 2017. At that time, all of Australia's states and territories already allowed same-sex couples to adopt except for the Northwest Territory, and there was already a pending bill in the Northwest Territory to make joint adoptions available to same-sex couples. Roughly three months after Australia legalized same-sex marriage, the Northwest Territory enacted its adoption equality legislation, which went into effect in April 2018. *See Australia Now Has Adoption Equality*, Hum. Rts. L. Ctr. (Apr. 20, 2018), <https://www.hrlc.org.au/news/2018/4/20/australia-now-has-adoption-equality> [<https://perma.cc/G7SH-868T>].

163. In 2017, the Bundestag opened marriage and joint adoptions to same-sex couples. Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts [Law Introducing the Right to Marriage for Persons of the Same Sex], July 28, 2017, BUNDESGESETZBLATT, Teil I [BGBl I] Nr. 52 at 2787 (Ger.); *see also* Ursula Kania, *Marriage for All ('Ehe fuer Alle')?! A Corpus-Assisted Discourse Analysis of the Marriage Equality Debate in Germany*, 17 CRIT. DISCOURSE STUD. 138, 140-41 (2020).

164. Malta legalized same-sex marriage when the Marriage Act and Other Laws Amendment Act 2017 went into effect in 2017. Same-sex couples could adopt jointly ever since civil unions became available in 2014. *See* Stephen Calleja, *Malta OKs Same-Sex Marriages over Catholic Church Protest*, APNEWS (July 12, 2017), <https://apnews.com/f4ba5657ef884586a1df5ec3a0624ce0>

	Countries that have legalized same-sex marriage countrywide	Year same-sex marriage became legal countrywide	Year joint adoptions became available to married same-sex couples countrywide
23	Finland ¹⁶⁵	2017	2017
24	Austria ¹⁶⁶	2019	2019
25	Taiwan ¹⁶⁷	2019	n/a
26	Ecuador ¹⁶⁸	2019	n/a
27	United Kingdom ¹⁶⁹	2020	2020
28	Costa Rica ¹⁷⁰	2020	2020

[<https://perma.cc/BA7W-2524>].

165. In 2014, the Finnish Parliament passed legislation to make marriage and joint adoptions available to same-sex couples; this legislation was signed into law in 2015 and entered into force in 2017. See 156/2015 Laki avioliittolain muuttamisesta [Act Amending the Marriage Act] (Fin.); *Finnish Parliament Confirms Same-Sex Marriage Law*, REUTERS (Feb. 17, 2017), <https://uk.reuters.com/article/uk-finland-politics-gaymarriage-vote-idUKKBN15W13H> [<https://perma.cc/4V43-VJAB>].

166. Pursuant to an Austrian Constitutional Court judgment in 2017 (G 258-259/2017), same-sex marriages became available on January 1, 2019. Verfassungsgerichtshof [VfGH] [Constitutional Court], Dec. 4, 2017, ERKENNTNISSE UND BESCHLÜSSE DES VERWALTUNGSGERICHTSHOFES [VFSLG] No. 20225/2017 (Austria). See also Christa Pail, *Austrian Constitutional Court Somewhere under the Rainbow: Marriage Equality and the Role of the Austrian Constitutional Court*, 12 VIENNA J. INT'L CON. L. 225, 231 (2018). In 2014, the Constitutional Court ruled that barring same-sex couples from joint adoptions was unconstitutional, prompting legislative reforms that opened joint adoptions to same-sex couples in 2016. See *Austria: Court Allows Marriage Equality*, Hum. Rts. Watch (Dec. 6, 2017 12:00 AM EST), <https://www.hrw.org/news/2017/12/06/austria-court-allows-marriage-equality> [<https://perma.cc/F6QU-2ASE>].

167. See *supra* notes 26-32 and accompanying text.

168. See *supra* note 37 and accompanying text.

169. Same-sex marriage was legalized in England and Wales through the Marriage (Same-Sex Couples) Act 2013 (Eng. & Wales), which entered into force in 2014, and in Scotland through the Marriage and Civil Partnership (Scotland) Act 2014 (Scot.). The Northern Ireland (Executive Formation etc) Act 2019 (N. Ir.) prompted regulations that made same-sex marriages available in Northern Ireland in January 2020. Same-sex joint adoptions were available throughout the United Kingdom prior to the legalization of same-sex marriage. Section 144 of the Adoption and Children Act 2002 (Eng. & Wales), which entered into force in England and Wales in 2005, extended joint adoptions to same-sex couples. Section 2 of the Adoption Agencies (Scotland) Regulations 2009 made joint adoptions available to same-sex couples in Scotland. In 2013, the Court of Appeal in Northern Ireland ruled that same-sex partners can jointly adopt, and an appeal to the Supreme Court was rejected. See *Supreme Court Refuses Appeal on Adoption Law*, N. Ir. Hum. Rts. Comm'n (Oct. 24, 2013), <https://www.nihrc.org/index.php?/news/detail/supreme-court-refuses-appeal-on-adoption-law> [<https://perma.cc/H8JX-9AGZ>].

170. Prompted by a constitutional court ruling, Costa Rica legalized same-sex marriage on May 26, 2020. Oscar Lopez, *Costa Rica Allows Same-Sex Marriages in a First for Central America*, Reuters (May 26, 2020), <https://www.reuters.com/article/us-costarica-lgbt-marriage-trfn/costa-rica-allows-same-sex-marriages-in-a-first-for-central-america-idUSKBN23217L> [<https://perma.cc/3UWZ-6D99>]. A government representative from the Adoption Department of Patronato Nacional de la Infancia has stated that, as of May 26, 2020, same-sex couples may adopt children jointly. *Costa Rica Continues to Strive Towards Equality: Same-Sex Couples May Adopt Children*, COSTA RICA NEWS, <https://thecostaricanews.com/costa-rica-continues-to-strive-towards-equality-same-sex-couples-may-a-dopt-children/> [<https://perma.cc/QY2U-RD4X>] (last visited Nov. 21, 2020).

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禁止同性婚姻配偶共同收養： 以比較法為中心分析臺灣法制

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摘 要

臺灣雖然是亞洲第一個承認同性婚姻的國家，但其禁止同性婚姻配偶共同收養小孩。本文從比較法的觀點檢視前開限制，得出以下兩個觀察：首先，在所有承認同性婚姻的國家之中，臺灣是限制共同收養中僅有的兩個國家。本文認為此反常的事實將造成此政策是否合適的質疑。再者，全球關於同性婚姻的司法論證，皆進一步質疑前開限制的正當性。前開兩個觀察皆顯示了臺灣對於共同收養的限制有違憲的疑慮。

關鍵詞：同性婚姻配偶、同性婚姻收養、婚姻平權、女同性戀—男同性戀—雙性戀—跨性別—酷兒 (LGBTQ)、臺灣憲法法院、司法院釋字第748號解釋