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

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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. In 2019, Taiwan became the first country in Asia to legalize same-sex marriage. Taiwan’s laws, however, deprive married same-sex couples of adoption rights that the country gives to married different-sex couples. Ms. Liu and Ms. Tsai are legally prohibited from adopting a child together because they are both women. They would be eligible for joint adoption if one of them were a man.

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 Hsiao-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.


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].

legalized same-sex marriage, Taiwan is one of only two that forbid married same-sex couples from jointly adopting children. As this article will explain, Taiwan’s deviation from peer 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. 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. 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. The court ordered Taiwanese authorities to enact reforms within two years to legalize same-sex marriage. In doing so, it set Taiwan on a path to become

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

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.


commentators viewed the judgment not only as an affirmation of gay rights but also of Taiwan’s status as a pioneering jurisdiction in Asia. Others, however, rebuked the ruling, calling it judicial overreach. 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. 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.

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. 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.

Still, celebrations were tempered by the fact that the Implementation Act created differential treatment. Adoption is one domain in which same-sex couples are treated differently. Under Taiwan’s Civil Code, married
different-sex couples may jointly adopt children. They may also adopt each other’s children. 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. 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.

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. 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.

II. OVERVIEW OF PEER JURISDICTIONS

At the time of this writing in November 2020, 28 countries including Taiwan have legalized same-sex marriage countrywide. 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{38} In Portugal, the gap was roughly six years.\textsuperscript{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.\textsuperscript{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

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\textsuperscript{36} See id.

\textsuperscript{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.


\textsuperscript{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, 2ª 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, \textit{Judicial Restraint and Political Responsibility: A Review of the Jurisprudence of the Italian, Spanish and Portuguese High Courts on Same-Sex Couples}, in \textit{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. 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. The U.S. state of Mississippi, however, barred married same-sex couples from adopting together. 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. This brought Mississippi in line with the rest of the United States.

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. 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.
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/SZTB-5QP6].
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.

\[\text{https://perma.cc/WR5R-7YM5}]\]. 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.).


\(^{49}\) 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.
Figure 1: 28 countries have legalized same-sex marriage countrywide.51

Taiwan Ecuador

Figure 2: Of the 28 countries that have legalized same-sex marriage, only Taiwan and Ecuador withhold joint adoption rights from married same-sex couples

51. This map was made with mapchart.net under a Creative Commons license. For the names of countries that have legalized same-sex marriage countrywide, see infra Appendix. The number of countries that have legalized same-sex marriage changes slightly depending on the method used for counting. For information on this article’s methodology, see infra note 141.
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.”

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.”

Professor Lee explained that this dynamic at the individual level ought to extend to relations among states. 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...
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.

A. United States (Mississippi)

The U.S. federal district court decision in Campaign for Southern Equality v. Mississippi Department of Human Services 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. The court decided that the adoption ban violated constitutional equality rights. It prohibited Mississippi from enforcing the ban, and the state chose not to appeal.

The doctrinal analysis in Campaign for Southern Equality is

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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).
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.
The court interpreted and applied precedent from Obergefell v. Hodges, 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,” in other words some form of heightened scrutiny. The court went on to say, however, that the standard of review was not very important. 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.’” 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. 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.

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. 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. 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.
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.”

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. 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. 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. 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. 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.
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. 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.” 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. 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.

The IACtHR has a notable history of respecting diverse family forms. 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.” 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.
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. 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. 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. The ECtHR held in X and Others that Austria violated human rights because it offered second-parent adoptions to unmarried different-sex couples but not to unmarried same-sex couples. 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. It explained, however, that a blanket exclusion of same-sex couples from second-parent adoptions was not proportionately related to this goal. Instead, same-sex couples who seek

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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. A9 Austria provided no evidence to support a blanket ban. A90 Meanwhile, there were factors weighing against a blanket ban. For example, the Austrian adoption regime was marred by a “lack of coherence.” A91 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. A92 This acceptance cast doubt on the appropriateness of a blanket ban against same-sex second-parent adoptions. A93 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. A94 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. A95 The ECtHR also acknowledged in X and Others that the state has a valid interest in protecting “family in the traditional sense.” A96 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. A97 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. A98 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

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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).
92. Id.
93. Id. ¶¶ 144, 146.
94. Id. ¶¶ 10, 145-46.
97. Id. ¶ 139.
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. A spouse in a same-sex marriage can also adopt the other spouse’s biological child. 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. Additionally, as Austria’s ban risked harming children in de facto families, 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. 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. 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, and South Africa had not yet legalized same-sex marriage. The women underwent a standard screening and counselling process for adoption. Two siblings were eventually placed in the women’s care. Only one woman, however, could legally

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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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{111} She had no right to sign school forms for the children.\textsuperscript{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.\textsuperscript{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 equality\textsuperscript{114} and dignity, as well as the paramount principle of protecting children’s interests, which is enshrined in the South African constitution.\textsuperscript{115} The court ordered South Africa to allow same-sex life partners to adopt children jointly.\textsuperscript{116} Although \textit{Du Toit} concerned \textit{unmarried} same-sex couples, it also offers insights on how to think about \textit{married} same-sex couples in Taiwan.\textsuperscript{117} There are two main takeaways from \textit{Du Toit}. First, the court said that the government could not justify barring all same-sex couples from joint adoptions.\textsuperscript{118} This observation is significant to Taiwan because South Africa’s justification test is similar to the heightened scrutiny test adopted by the TCC.\textsuperscript{119} There was no dispute in \textit{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.\textsuperscript{120} Accordingly, rather than bar all same-sex couples from jointly adopting children, the state should screen

\begin{itemize}
\item [109.] \textit{Id.} at ¶ 7.
\item [110.] \textit{Id.} at ¶ 14.
\item [111.] \textit{Id.}
\item [112.] \textit{Id.}
\item [113.] \textit{Id.}
\item [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. \textit{Id.} at ¶ 26.
\item [115.] \textit{Id.} at ¶¶ 22, 26, 29, 37.
\item [116.] \textit{Id.} at ¶ 44.
\item [117.] This article focuses on married same-sex couples. For a discussion on non-marital couple relationships in Taiwan, \textit{see} Chen, \textit{supra} note 24, at 7-8.
\item [118.] \textit{Du Toit}, 2003 (2) SA 198 (CC) at ¶¶ 31-37.
\item [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.” \textit{See} J.Y. Interpretation 748, \textit{supra} note 11, at Reasoning para. 15.
\item [120.] \textit{See} \textit{Du Toit}, 2003 (2) SA 198 (CC) at ¶ 32.
\end{itemize}
couples on a case-by-case basis. This criticism against South Africa’s blanket restriction now applies to Taiwan’s blanket restriction.

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 . . .” 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.” In other words, banning same-sex joint adoptions could harm children. 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.

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, 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. Banning same-sex joint adoptions might deprive such children of suitable adoptive homes.

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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.
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 right—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. 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.
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marriage—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. 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. 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. Taiwan’s adoption regime now bears similar incoherence.

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. Indeed, in some circumstances, a same-sex couple may be best suited to adopt a particular child. 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

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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.
to be evaluated on a case-by-case basis for joint adoption.\textsuperscript{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

\textit{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{138} Du Toit, 2003 (2) SA 198 (CC) at ¶¶ 42-43.

\textsuperscript{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.

\textsuperscript{140} Cf. Fergus Ryan, \textit{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

<table>
<thead>
<tr>
<th>Countries that have legalized same-sex marriage countrywide</th>
<th>Year same-sex marriage became legal countrywide</th>
<th>Year joint adoptions became available to married same-sex couples countrywide</th>
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<tbody>
<tr>
<td>1 Netherlands (^{141})</td>
<td>2001</td>
<td>2001</td>
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<td>2 Belgium (^{142})</td>
<td>2003</td>
<td>2006</td>
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<td>3 Canada (^{143})</td>
<td>2005</td>
<td>2005</td>
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<tr>
<td>4 Spain (^{144})</td>
<td>2005</td>
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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/7N51-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.


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

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<td>5 South Africa(^{147})</td>
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<td>6 Norway(^{148})</td>
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<td>7 Sweden(^{149})</td>
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<td>2009</td>
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<td>8 Argentina(^{150})</td>
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<td>2010</td>
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<td>9 Iceland(^{51})</td>
<td>2010</td>
<td>2010</td>
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<td>10 Portugal(^{152})</td>
<td>2010</td>
<td>2016</td>
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<td>11 Denmark(^{53})</td>
<td>2012</td>
<td>2012</td>
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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).


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

Barring Married Same-Sex Couples from Joint Adoption

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<td>Uruguay¹⁵⁷</td>
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<td>Ireland¹⁵⁸</td>
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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).


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.)).


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<td>21 Germany¹⁶³</td>
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<tr>
<td>22 Malta¹⁶⁴</td>
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[https://perma.cc/3SGS-3NE4]. Prior to the referendum, the Children and Family Relationships Act 2015 (Act No. 9/2015) [I], 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) [I], http://www.irishstatutebook.ie/eli/2017/act/19/enacted/en/index.html [https://perma.cc/86SA-LQHL].


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) (Austrl.), 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].


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/64b5657ce884d86a1d5f5ec3a0624ce0.
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<td>Finland&lt;sup&gt;165&lt;/sup&gt;</td>
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<td>Austria&lt;sup&gt;166&lt;/sup&gt;</td>
<td>2019</td>
<td>2019</td>
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<tr>
<td>Taiwan&lt;sup&gt;167&lt;/sup&gt;</td>
<td>2019</td>
<td>n/a</td>
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<tr>
<td>Ecuador&lt;sup&gt;168&lt;/sup&gt;</td>
<td>2019</td>
<td>n/a</td>
</tr>
<tr>
<td>United Kingdom&lt;sup&gt;169&lt;/sup&gt;</td>
<td>2020</td>
<td>2020</td>
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<tr>
<td>Costa Rica&lt;sup&gt;170&lt;/sup&gt;</td>
<td>2020</td>
<td>2020</td>
</tr>
</tbody>
</table>


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/en/details/supreme-court-refuses-appeal-on-adoption-law [https://perma.cc/H8JX-9AGZ].

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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

劉浩寧 (Holning Lau)

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 )，臺灣憲法院、司法院釋字第748號解釋