

COMING OUT OF THE CLOSET:
A COMPARATIVE ANALYSIS OF MARRIAGE
EQUALITY BETWEEN THE EAST AND WEST

JAE WON SHIN*

I.	INTRODUCTION	1119
II.	STATES THAT HAVE SUCCESSFULLY ACHIEVED MARRIAGE EQUALITY	1123
	A. <i>The Netherlands</i>	1123
	B. <i>The United States</i>	1127
III.	STATES THAT HAVE YET TO ACHIEVE MARRIAGE EQUALITY	1132
	A. <i>Japan</i>	1133
	B. <i>South Korea</i>	1136
IV.	CHALLENGES TO ACHIEVING MARRIAGE EQUALITY .	1143
	A. <i>Individual Rights in a Collectivist Society</i>	1145
	B. <i>In the Closet—Pre-“Covering”</i>	1150
V.	CONCLUSION	1154

I. INTRODUCTION

On June 26, 2015, the United States Supreme Court legalized same-sex marriage in all fifty states in the landmark case of *Obergefell v. Hodges*.¹ For the majority, Justice Kennedy wrote that a ban on same-sex marriage would violate both the Due Process and the Equal Protection clauses and held that mar-

* J.D. Candidate, New York University School of Law, 2017. I would first like to thank Professor Karen Shimakawa for her comments and continuous support while developing my thesis, Professor Kenji Yoshino for his insightful critiques that further expanded my views on this topic, and Judge Taehwan Kim for providing me with invaluable resources to help me shape and finish writing this Note. I would further like to thank my editors—Amy Lee Dawson, Christopher Terris, and Sumithra Naidoo—for their time and effort in helping me polish and perfect this Note until the very last minute of publication. Finally, I would like to thank my friends and family for their unwavering encouragement and enthusiasm throughout the writing and editing process. Through this Note, I hope to provide a voice for those who may be hidden away, and to inspire others to speak up for those who might not be able to do so themselves. All views expressed, as well as any errors, are my own.

1. See 135 S. Ct. 2584, 2608 (2015).

riage was a fundamental right because “the dynamic [of marriage] allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons.”² The decision made headline news, eliciting reactions and comments from across society. Millions took to the streets and the Internet to express their joy (or in some cases, their disappointment) about the decision. Then President Barack Obama remarked, “This ruling is a victory for America . . . [and] affirms what millions of Americans already believe in their hearts. When all Americans are treated as equal, we are all more free.”³ Though the responses to *Obergefell* ran the political gamut, the decision and its effects on the future of LGBT rights in the United States occupied the minds of many Americans.

Coincidentally, two days later, on June 28, 2015, LGBT activists in Korea held a parade for the Sixteenth Annual Korea Queer Culture Festival. The parade was born of controversy; it was the first time in the event’s history that the festival would be held at Seoul Plaza, concluding with a parade that would pass by City Hall in the heart of downtown Seoul. The plan drew heavy protests from conservative Christian groups—some of which demonstrated outside City Hall with signs calling the mayor of Seoul the “mayor of Sodom.”⁴ Responding to these protests, Seoul’s Namdaemun police office released a statement announcing that it would accept applications on a first-come-first-served basis starting at midnight on May 29th to use the proposed march site.⁵ This announcement transformed the police station into a campsite of competing applicants. At midnight on the 29th, the conservative Christians, who had been camping out for more than a week, submitted their applications first,⁶ leading the police to reject the festival orga-

2. *Id.* at 2594.

3. Mollie Reilly, *Obama Praises Supreme Court’s Decision to Legalize Gay Marriage Nationwide*, HUFFINGTON POST (June 26, 2015), http://www.huffingtonpost.com/2015/06/26/obama-scotus-gay-marriage_n_7671378.html.

4. Yoonjung Seo & Anna Fifield, *South Korea, at Behest of Conservative Christians, Bans LGBT March*, WASH. POST (June 3, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/06/03/south-korea-at-behest-of-conservative-christians-bans-lgbt-march/>.

5. John Power, *South Korean Gay Pride Event Sparks Bitter Standoff with Christians*, DIPLOMAT (May 29, 2015), <http://thediplomat.com/2015/05/south-korean-gay-pride-event-sparks-bitter-standoff-with-christians/>.

6. Seo & Fifield, *supra* note 4.

nizer's application by citing traffic disruptions and possible clashes with opponents during the parade.⁷ The decision was met with fury from LGBT supporters denouncing the police decision as "politically motivated."⁸ In response to this outcry, the Seoul Administrative Court eventually released a decision saying that the cancellation of the parade would constitute irrevocable harm to the organizers of the event and that police bans on public rallies "should be reserved as the last resort, when all the possible options are exhausted," allowing the parade to proceed as scheduled.⁹

While the American and South Korean rulings (and the public responses to these rulings) reflect a contrast of the present status of LGBT rights in both countries, even more interesting is the stark difference in media coverage in each country regarding the respective events. Despite the many controversies that plagued the Korea Queer Culture Festival and its parade, the Korean media barely covered the event. Unlike the *Obergefell* decision, which made front-page news, the controversy surrounding the Korea Queer Culture Festival and the actual event itself were merely a blip in the Korean mainstream news.¹⁰ As one foreign columnist wrote:

The Korean media . . . have either ignored [the festival] or made a hash of it. KBS [Korea's national broadcasting system] reported that last year, LGBT protesters blocked the street so Christians couldn't march. This was the exact opposite of what actually happened—Christian extremists lay [*sic*] down in

7. Hyun-ju Ock, *LGBT Parade to Go on Despite Opposition*, KOREA HERALD (June 21, 2015), <http://www.koreaherald.com/view.php?ud=20150618000999>.

8. Glenn Garner, *South Korean Police Bans LGBT Pride*, OUT (June 1, 2015), <http://www.out.com/news-opinion/2015/6/01/south-korea-bans-lgbt-pride>.

9. Kyung-Min Lee, *Gay Parade to Be Held as Planned*, KOREA TIMES (June 17, 2015), http://www.koreatimes.co.kr/www/news/nation/2015/06/116_181074.html.

10. The top news stories of the day revolved around the spread of the Middle East Respiratory Syndrome in Seoul. See, e.g., Duk-kun Byun, *S. Korea Reports One More Death from MERS with No Additional Case*, YONHAP NEWS (June 28, 2015), <http://english.yonhapnews.co.kr/search1/2603000000.html?cid=AEN20150628000352320>.

front of the Pride parade to stop it from moving forward.¹¹

The stark difference in media coverage demonstrates the vast disparity between the East and the West in terms of the level and sophistication of public discourse regarding the politics of sexual identity.

In fact, Asia as a whole seems to lag behind the rest of world regarding LGBT rights and discourse on sexual identity. With the addition of Finland on March 1, 2017, twenty-two countries worldwide now legally recognize same-sex marriage. According to polls, a large portion of the world—focused in the Americas, Australia, and Europe—now show rising public support for legally recognizing same-sex marriage.¹² Africa was able to introduce marriage equality to the continent with the recognition of same-sex marriage in South Africa in 2006.¹³ Asian countries however, which account for almost sixty percent of the world's population, fall severely behind in offering legal protection for same-sex marriage and other types of LGBT rights. Although Taiwan might possibly break this trend in 2017,¹⁴ it still remains surprising that given the broad spectrum of cultural backgrounds, levels of prosperity, and levels of political stability that run across the continent, not one Asian country's social or historical trajectory has yet been able to lead to marriage equality. This Note will examine this phenomenon, analyzing the possibility of advancing an LGBT rights movement in Asia in the near future.

11. Dave Hazzan, *Seoul's Pride Fiasco*, KOREA TIMES (June 15, 2015), http://www.koreatimes.co.kr/www/news/opinion/2015/06/162_180908.html.

12. See GERMÁN LODOLA & MARGARITA CORRAL, SUPPORT FOR SAME SEX MARRIAGE IN LATIN AMERICA (Mitchell A. Seligson & Elizabeth Zechmeister eds., 2010), <http://www.vanderbilt.edu/lapop/insights/I0844.enrevised.pdf>; A Majority of Australians Have Supported Marriage Equality for Several Years, AUSTRALIAN MARRIAGE EQUAL. (last visited July 18, 2016), <http://www.australianmarriageequality.org/who-supports-equality/a-majority-of-australians-support-marriage-equality>.

13. Clare Nullis, *Same-Sex Marriage Law Takes Effect in S. Africa*, WASH. POST (Dec. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113001370.html>.

14. Harriet Agerholm, *Taiwan on Verge of Becoming First Asian Country to Allow Same-Sex Marriage*, INDEPENDENT (Feb. 1, 2017), <http://www.independent.co.uk/news/world/asia/taiwan-first-asian-country-same-sex-marriage-end-of-year-lgbt-rights-a7555471.html>.

By examining the trajectory of certain countries that have achieved marriage equality (the Netherlands and the United States) and comparing those trajectories with countries that have yet to achieve marriage equality (Japan and South Korea), this Note in Parts II and III will identify the legal barriers, if any, preventing marriage equality in East Asia. After analyzing the contestability of these legal obstacles, the Note will analyze whether there are other social or cultural factors impeding East Asia's path towards marriage equality. Part IV will close the Note by presenting two arguments to explain East Asia's slow progression toward marriage equality. First, it will examine how the conception of rights in Asia as collective might impede the progress of marriage equality. Second, this section will demonstrate how LGBT rights in particular may require prior sequential development before East Asian countries can achieve marriage equality.

II. STATES THAT HAVE SUCCESSFULLY ACHIEVED MARRIAGE EQUALITY

The Netherlands and the United States are case studies in the successful battle for marriage equality. The Netherlands was the first country in the world to successfully legalize same-sex marriage,¹⁵ while the United States, on the other hand, has a long and well-documented history over the legal battle for LGBT rights and marriage equality. Furthermore, these two countries offer two distinct routes to successfully adopting marriage equality: the Netherlands achieved marriage equality through a series of legislative resolutions, while the United States achieved marriage equality through judicial action. By delineating the historical progression behind these two approaches, this section will offer insights into the ways countries can and have legalized same-sex marriage.

A. *The Netherlands*

In 2001, the Netherlands became the first country in the world to legally recognize same-sex marriage.¹⁶ The Netherlands achieved this historic step through a series of four bills

15. *Dutch Legislators Approve Full Marriage Rights for Gays*, N.Y. TIMES (Sept. 13, 2000), <http://www.nytimes.com/2000/09/13/world/dutch-legislators-approve-full-marriage-rights-for-gays.html>.

16. *Id.*

passed through the Dutch Parliament from 2000 to 2001.¹⁷ However, the movement towards achieving marriage equality in the country has much earlier origins.

The decriminalization of homosexual acts in the Netherlands occurred as early as 1811¹⁸ as a result of the state being integrated into the French Empire, which had developed laws decriminalizing homosexual acts in 1791.¹⁹ Due to a rising legal need to recognize same-sex relationships, the Dutch legislation began in the 1970s to introduce laws that pertained to non-marital cohabiting couples, which encompassed both different-sex and same-sex couples.²⁰ In 1979, the state increasingly afforded Dutch cohabiting couples legal rights and duties similar to those of married couples.²¹ These rights have since expanded into rent law, social security and income tax law, immigration laws, state pensions, and laws regarding trusts and estates.²² The only major area in which the state had continued differing treatment toward same-sex couples is in parental rights.²³

In the late 1980s and early 1990s, these remaining legal differences between married different-sex couples and cohabiting same-sex couples became the basis for pressure to change the existing Dutch marriage laws.²⁴ In 1990, the Dutch courts heard two major test cases regarding the right to marriage. In the first case, the Amsterdam District Court refused to rule on whether denying two men the right to marry violated their human rights.²⁵ Rather, it considered the Government and Parliament responsible for remedying the discrimination.²⁶ In

17. Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 *NEW ENG. L. REV.* 569, 573–574 (2004) [hereinafter Waaldijk, *Others*].

18. 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 (Robert Wintemute & Mads Andenaes eds., 2001) [hereinafter Waaldijk, *Small Change*].

19. *Id.*

20. Waaldijk, *Others*, *supra* note 17, at 569–70.

21. Waaldijk, *Small Change*, *supra* note 18, at 441.

22. *Id.*

23. *Id.* at 442.

24. Waaldijk, *Others*, *supra* note 17, at 578.

25. RA 13 februari 1990, *NJCM Bulletin* 456.

26. *Id.*

the other case, the Supreme Court ruled against two women, holding that the exclusion of same-sex couples from marriage in regard to parental rights was not unjustified²⁷ and, therefore, not discriminatory under Article 26 of the International Covenant on Civil and Political Rights.²⁸ However, the Supreme Court did suggest in dicta that there might be insufficient justification for the denial of other legal rights and privileges to same-sex couples related to marriage.²⁹

The publicity surrounding these two marriage cases led to public demand for action by the legislature. Within two weeks of the judgment, the Minister of Justice, pressed by a parliamentary majority, asked the Advisory Commission for Legislation to produce a report on this issue.³⁰ In 1992, the Commission recommended the introduction of a registered partnership regime that was modeled after Danish legislation enacted in 1989.³¹ A bill on registered partnership, along with a bill on joint authority and joint custody, was soon introduced in Parliament in 1994.³² That same year, the Dutch Parliament also expanded the *General Equal Treatment Act* to provide protection against discrimination based on sexual orientation.³³

Politically, 1994 proved to be a significant year for the marriage equality movement in the Netherlands, for it was the first time in eighty years that the Christian Democratic Appeal party, the main opponents to same-sex marriage in the country, did not occupy a majority position in Parliament.³⁴ Against this backdrop, LGBT-friendly members of Parliament pushed for something closer to equality for same-sex couples. In April 1996, the Second Chamber of the Dutch Parliament adopted

27. HR 19 oktober 1990, NJ 1990, 129 m.nt EAAL (Neth.).

28. See International Covenant on Civil and Political Rights art. 26, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

29. HR 19 oktober 1990, NJ 1990.

30. Waaldijk, *Small Change*, *supra* note 18, at 443.

31. *Kamerstukken II* 1991/1992, 22300-VI, nr. 36. Parliamentary papers are available at <http://www.overheid.nl/op/index.html>.

32. Waaldijk, *Small Change*, *supra* note 18, at 444.

33. Waaldijk, *Others*, *supra* note 17, at 578.

34. Waaldijk, *Small Change*, *supra* note 18, at 447.

several non-binding resolutions demanding the opening of marriage and adoption to same-sex couples.³⁵ The Government responded by establishing an advisory commission of eight legal experts called the “Commission on the Opening Up of Civil Marriage to Persons of the Same Sex” (also called the “Kortmann Commission”), which released its report in October 1997.³⁶ The Commission unanimously recommended that same-sex couples be allowed to adopt either jointly or as a stepparent to their partner’s child, and that all remaining parental rights be extended to them.³⁷ A majority of the Commission also recommended that same-sex couples be allowed to marry, suggesting that it would be discriminatory to exclude LGBT members from the institution of marriage.³⁸

Thus, four bills were introduced into Parliament. One bill, which became the *Adjustment Act of March 8, 2001*, was an omnibus bill that adjusted the language of legislation in sections other than the Civil Code, replacing gender-specific language such as “mother” and “husband” with gender-neutral language such as “parent” and “spouse.”³⁹ Another bill that became the *Act of October 4, 2001*, extended the presumption of paternity to children born to same-sex married couples by inserting Article 253sa⁴⁰ in Book 1 of the Dutch Civil Code.⁴¹ But perhaps the two more monumental bills were the *Act on the Opening Up of Marriage* and the *Act on Adoption by Persons of the Same Sex*.⁴² Passed by the Second Chamber of the Dutch Parliament on September 12, 2000, and by the First Chamber on December 19, 2000, these legislative acts amended Article

35. *Id.*

36. *Id.*

37. Waaldijk, *Others*, *supra* note 17, at 580.

38. *Id.*

39. *Id.* at 573.

40. Art. 1:253sa BW (Neth.) (“Joint authority of a parent together with another person by operation of law: Where a child is born during a marriage or registered partnership, its parent and this parent’s spouse or registered partner, who himself is not the parent of the child, shall jointly exercise authority over it, unless the child also stands in a legal familial relationship to its other parent.”). Under this provision, when a child is born to a lesbian couple, the birth mother and her married partner automatically obtain all the rights and obligations of joint parental authority towards that child unless a man has acknowledged the child as his own before its birth. *Id.*

41. Waaldijk, *Others*, *supra* note 17, at 573–74.

42. *Id.* at 573.

30 of Book 1 of the Civil Code regarding marriage.⁴³ A newly inserted Article 30(1) redefined civil marriage by providing, “A marriage can be contracted by two persons of different sex or of the same sex.”⁴⁴ As a result, when the two acts came into effect on April 1, 2001, the Netherlands became the first country in the world to legally recognize same-sex marriage.⁴⁵

B. *The United States*

The United States has one of the most prominently documented movements towards marriage equality. The gay rights movement erupted onto the American political scene in the early 1970s, following the Stonewall riots of 1969.⁴⁶ The riots arose out of an incident on June 28, 1969, when a group of patrons resisted a police raid at the Stonewall Inn, a famous New York City gay bar.⁴⁷ This pivotal event sparked huge reactions across the country, leading to the mobilization of different activist groups. It is often considered the turning point and single most significant event leading to the gay rights movement.⁴⁸

Although lawsuits seeking marriage equality began to slowly appear in the early 1970s, the topic of same-sex marriage did not gain momentum in U.S. politics until the late 1980s.⁴⁹ The focus of the movement for most activists during this period was decriminalizing consensual sex between same-sex partners and implementing legislation forbidding discrimination based on sexual orientation in public accommodations and employment.⁵⁰ Consequently, the more historically significant cases from these early stages are similar to *Bowers v. Hardwick*⁵¹ or *Romer v. Evans*.⁵² In fact, many gays and lesbians at

43. *Id.*

44. Art. 1:30 BW (Neth.).

45. Waaldijk, *Others*, *supra* note 17, at 573.

46. Michael J. Klarman, *How Same-Sex Marriage Came to Be—On Activism, Litigation, and Social Change in America*, HARV. MAG., Mar.–Apr. 2013, at 30.

47. *See generally*, DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004) (providing a detailed account of the night of the police raid and interviews with patrons).

48. *Id.*

49. Klarman, *supra* note 46.

50. *Id.*

51. 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia sodomy law criminalizing oral and anal sex between consenting adults).

the time were deeply ambivalent about marriage, considering it to be an oppressive institution that restricted them to traditional forms of social bondage.⁵³

The first lawsuit that directly concerned marriage equality was the 1993 case of *Baehr v. Lewin* in Hawaii.⁵⁴ Initiated in May 1991, the suit arose when three same-sex couples were denied marriage licenses by the Hawaii Department of Health, despite meeting the state law eligibility requirements for marriage.⁵⁵ Citing the opinion of the Hawaii Attorney General, state health director John C. Lewin denied the applications because marriage was a fundamental right limited to different-sex couples.⁵⁶ Following this decision, the couples initiated their lawsuit seeking to have the same-sex exclusion declared unconstitutional. The case made its way to the Supreme Court of Hawaii, which held that the right to privacy in Hawaii's Constitution did not include a fundamental right to same-sex marriage. However, the Court did find that, under the state's equal protection clause, denying marriage licenses to same-sex couples constituted discrimination based on sex that required justification by the state under strict scrutiny. On May 5, 1993, the Hawaii Supreme Court, in a split decision, decided to remand the case to the trial court to determine if the state could meet the strict scrutiny test by demonstrating that denying marriage licenses to same-sex couples furthers a compelling state interest and was narrowly drawn to avoid unnecessarily abridging constitutional rights.⁵⁷

The Hawaii Supreme Court's controversial decision was instantly met with responses at both the federal and state level to restrict marriage to male-female couples. Most notably, the case was cited extensively in the House Judiciary Committee's Report considering the passage of the Defense of Marriage Act (DOMA).⁵⁸ The proposed Act defined marriage for federal

52. 517 U.S. 620 (1996) (rejecting an amendment to the Colorado Constitution that would have prevented any city, town, or county in the state from taking any governmental action to protect citizens from discrimination on the basis of sexual orientation).

53. Klarman, *supra* note 46.

54. 852 P.2d 44 (1993).

55. *Id.* at 49–50.

56. *Id.* at 51–52.

57. *Id.* at 70.

58. H.R. REP. NO. 104-664 (1996).

purposes as the union of one man and one woman,⁵⁹ and allowed states to refuse recognition of same-sex marriages granted under the laws of other states.⁶⁰ The law had the effect of barring same-sex married couples from being recognized as “spouses” for federal law purposes, denying access to many federal marriage benefits such as social security survivors’ benefits, immigration, bankruptcy protection, and the filing of joint tax returns.⁶¹ In the House committee’s report, the committee argues that the Act “is a response to a very particular development in the State of Hawaii The prospect of permitting homosexual couples to ‘marry’ in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.”⁶² The proposed bill passed both houses of Congress by large majorities and was signed into law by President Bill Clinton in September 1996.⁶³

By the time of the law’s passage, marriage equality had become a hot-button issue in U.S. politics. Several LGBT activist groups increasingly started to focus on marriage equality in gay rights debates, making it a huge priority for the movement.⁶⁴ The increasing number of marriage equality suits had an effect on how the public perceived this issue, shaping the discourse of LGBT rights in America. As one scholar states, “Litigation alters politics by placing issues and claims for rights, blocked from genuine consideration in the

59. *See id.* (“In defining “marriage” as “only a legal union between one man and one woman as husband and wife,” and “spouse” as “only a person of the opposite sex who is a husband or a wife,” Section 3 merely restates the current understanding of what those terms mean for purposes of federal law.”).

60. *See id.* (“The federal government will continue to determine marital status in the same manner it does under current law. Whether and to what extent benefits available to married couples under state law will be available to homosexual couples is purely a matter of state law, and Section 3 in no way affects that question.”).

61. *See* *United States v. Windsor*, 133 S. Ct. 2675, 2694–96 (2013).

62. H.R. REP. No. 104-664, at 2 (1996).

63. John E. Yang, *Senate Passes Bill Against Same-Sex Marriage*, WASH. POST (Sept. 11, 1996), https://www.washingtonpost.com/archive/politics/1996/09/11/senate-passes-bill-against-same-sex-marriage/2287b624-fa50-467a-bacb-599b719a0a03/?utm_term=.79afe60640cb.

64. *See* KAREN TRACY, DISCOURSE, IDENTITY, AND SOCIAL CHANGE IN THE MARRIAGE EQUALITY DEBATES 10 (2016).

majoritarian political arena, on the public agenda.”⁶⁵ As more and more suits challenging state bans on same-sex marriages were brought, states began to change their policies, beginning with Massachusetts in 2004. “Between 2004 and 2013, the percentage of Republicans seeing the legalization of same-sex marriage as inevitable rose from 47% to 73%.”⁶⁶ As time went on, more and more people began to consider the legalization of same-sex marriage as inevitable, altering the question from *if* it would happen to *when* it would happen.

Then in June 2013, the United States Supreme Court released another monumental decision for the LGBT movement. In *United States v. Windsor*, the Supreme Court struck down Section 3 of DOMA as “a deprivation of the equal liberty . . . protected by the Fifth Amendment.”⁶⁷ Invoking the Equal Protection and Due Process Clauses, Justice Kennedy, who authored the majority opinion, wrote, “[T]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁶⁸ The decision gave significant impetus to the progress of lawsuits that challenged state bans on same-sex marriage in federal courts. Immediately, the Obama Administration began extending federal benefits and privileges such as federal tax benefits, Medicare, and social security benefits to same-sex couples.⁶⁹ After the decision—with only a few exceptions—

65. JASON PIERCESON, *SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT AND BEYOND* 240 (2013).

66. TRACY, *supra* note 64, at 4.

67. 133 S. Ct. 2675, 2680 (2013).

68. *Id.* at 2696.

69. See Matt Apuzzo, *More Federal Privileges to Extend to Same-Sex Couples*, N.Y. TIMES (Feb. 8, 2014), <https://www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html>; Chris Doering, *Justice Dept. will extend benefits to same-sex couples*, USA TODAY (Feb. 8, 2014), <https://www.usatoday.com/story/news/politics/2014/02/08/justice-department-privileges-same-sex-couples/5314885/>; Josh Hicks, *Obama administration extends federal-employee benefits to same-sex couples*, WASH. POST (July 1, 2013), https://www.washingtonpost.com/news/federal-eye/wp/2013/07/01/obama-administration-extends-federal-employee-benefits-to-same-sex-couples/?utm_term=.2076aefc3b96; Sari Horowitz, *Justice Department to give married same-sex couples sweeping equal protection*, WASH. POST (Feb. 8, 2014), https://www.washingtonpost.com/world/national-security/justice-department-to-give-married-same-sex-couples-sweeping-equal-protection/2014/02/08/36eafcae-90cc-11e3-b227-12a45d109e03_story.html?utm_term=.9010129de9ff; Chris

U.S. district courts and courts of appeals, as well as several state courts, found state bans on same-sex marriage unconstitutional.⁷⁰

Finally, on June 26, 2015, the United States Supreme Court released its opinion in *Obergefell v. Hodges*. With that opinion, the Court struck down all state bans on same-sex marriage and effectively legalized same-sex marriage in all fifty states by requiring states to honor out-of-state same-sex marriage licenses.⁷¹ Once again writing for the majority, Justice Kennedy confirmed there was a fundamental right to marriage guaranteed by both the Due Process Clause and the Equal Protection Clause, finding:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.⁷²

Johnson, *Social Security to process survivor benefits for gay couples*, WASH. BLADE (Dec. 16, 2013), <http://www.washingtonblade.com/2013/12/16/social-security-to-process-survivor-benefits-for-gay-couples/>; Annie Lowrey, *Gay Marriages Get Recognition from the I.R.S.*, N.Y. TIMES, (Aug. 29, 2013), <http://www.nytimes.com/2013/08/30/us/politics/irs-to-recognize-all-gay-marriages-regardless-of-state.html>.

70. See, e.g., David S. Cohen & Dahlia Lithwick, *It's Over: Gay Marriage Can't Lose in the Courts*, SLATE (Feb. 14, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/virginia_s_gay_marriage_ban_ruled_unconstitutional_a_perfect_record_for.html (describing how, at the time of its writing, all eighteen cases post-*Windsor* that challenged same-sex marriage bans and other related LGBT issues were found to be successful. The states involved in these cases were Virginia, Kentucky, New Mexico, Oklahoma, Utah, West Virginia, Illinois, New Jersey, and Ohio.).

71. See 135 S. Ct. 2584 (2015).

72. *Id.* at 2608.

With those touching words, the forty-year fight for marriage equality in America was won.

III. STATES THAT HAVE YET TO ACHIEVE MARRIAGE EQUALITY

Given that both Japan and Korea maintain civil law systems, legal rulings rely heavily on the interpretations of express language in the countries' legal codes. Not only are both countries close geographically, but they also share similarities in their levels of globalization, development in democracy and economic prosperity, and cultural basis in strong collectivist and Confucian traditions. Thus, by comparing these somewhat similar countries together, this Note seeks to more easily extrapolate common factors that might affect the lack of acceptance of marriage equality in East Asia.

The following sections will primarily focus on same-sex relationships between men. The reason for this is simply that there are no significant documentations of same-sex relationships between women in East Asian countries. As one scholar writes, "Female sexuality was paid very little attention to, and even though female same-sex practices existed in arts and literature, it was usually constructed and consumed *by* and *for* men."⁷³ In general, lesbianism is often rendered invisible in most patriarchal societies, for often in these cultures, women's sexuality exists only for men's sexual pleasure, or for reproductive purposes.⁷⁴ As such, while there exists some literature regarding same-sex relationships between women in both Japan and South Korea, for the purposes of focusing on major legal and social barriers to marriage equality in this Note, the following discussion will revolve mainly around male same-sex relationships.

73. Elise Fylling, *Her Story: Lesbians in Japan and South Korea*, 24 (Spring 2012) (published Master's thesis, University of Oslo), <https://www.duo.uio.no/bitstream/handle/10852/24407/Fylling.pdf?sequence=3&isAllowed=Y>.

74. See, e.g., Nino Kharchilava & Nino Javakhishvili, *Representation of 'Lost Orientation,' or, Lesbianism in Georgian Print Media*, 28 *ANTHROPOLOGY OF EAST EUR. REV.* 83 (2010) (examining how lesbianism is portrayed in Georgian media).

A. *Japan*

While modern day Japan does not recognize same-sex marriage, it has a long and rich history of recognizing same-sex activity and relationships in pre-modern times, primarily amongst men. The term *nanshoku* (“男色”, which translates to “male eroticism”) is used to refer to the types of male same-sex relationships that existed commonly in pre-modern Japan.⁷⁵ The oldest recorded same-sex relationship in Japan dates back a thousand years to the Kamakura period, which lasted from 1185 to 1333.⁷⁶ The forms of *nanshoku* at this time generally consisted of master-servant type relationships mostly between priests and temple boys, or between samurai and their pageboys.⁷⁷ Unlike modern conceptions of homosexual relationships, however, these relationships were based more on principles of loyalty or devotion between the parties than sexual attraction.⁷⁸ Rather than being understood as a sexual relationship based on love, these *nanshoku* relationships were considered to be significant symbols of culture and tradition in society.⁷⁹

Towards the end of the Edo period in the early nineteenth century, as marriages and interactions across different social classes became more prevalent, the privilege and dignity associated with the samurai class (and consequently, *nanshoku* relationships) started to erode.⁸⁰ By the Meiji period (1868–1912)—often considered the beginning of Westernization in Japan—long cherished traditions and customs such as *nanshoku* were replaced with Western values.⁸¹ These Western values were imported into various areas of Japanese society, including the modern legal system. The Meiji Legal Code of 1873 made sodomy a criminal act under Article 266, marking the first and only time in Japanese legal history that same-sex

75. See generally HAJIME SHIBAYAMA, *EDO DANSHOKU KO* [MALE-MALE SAME SEX RELATIONSHIPS IN THE EDO PERIOD] (1992) (describing the development of homosexuality during the Edo period).

76. Yuki Arai, *Is Japan Ready to Legalize Same-Sex Marriage?*, 16 *ASIAN-PAC. L. & POL'Y J.* 122, 124 (2014).

77. SHIBAYAMA, *supra* note 75, at 37.

78. *Id.*

79. Arai, *supra* note 76, at 126.

80. GARY P. LEUPP, *MALE COLORS: THE CONSTRUCTION OF HOMOSEXUALITY IN TOKUGAWA JAPAN 167-93* (1997).

81. Arai, *supra* note 76, at 126.

activity was criminalized.⁸² However, because there was a lack of social stigma in Japanese society against same-sex relationships, few arrests were made under this statute, and the statute did not function in practice.⁸³ As a result, this provision was soon repealed without much protest through the enactment of the Penal Code of 1880 in accordance with the Napoleonic Code, which was adopted as a basis for the country's modern legal code.⁸⁴

Today, same-sex marriage is not recognized under Japanese law. Although there are no provisions that expressly provide a definition of "marriage" in Japanese law, Article 24 of the Japanese Constitution states that "marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis."⁸⁵ This article was part of the new postwar constitution that was enacted in 1947, drafted to reflect the changes in reality in Japanese society.⁸⁶

Prior to the new constitution, the institution of marriage was highly affected by the *koseki seido*, the Japanese "family register system."⁸⁷ Under the *koseki* system, male heads of the household would hold title to family property and had significant rights, responsibilities, and authority regarding most family decisions.⁸⁸ Accordingly, decisions to marry heavily involved important issues of family lineages.⁸⁹ As a result, family members, usually the parents, often strictly controlled the marriage matching process through arranged marriages.⁹⁰ While the *koseki* system still remains in effect today, traditional conceptions of marriage have weakened over the past few decades.⁹¹ With the enactment of Article 24, consenting adults now have

82. MARK J. McLELLAND, *MALE HOMOSEXUALITY IN MODERN JAPAN: CULTURAL MYTHS AND SOCIAL REALITIES* 29 (1999).

83. *Id.*

84. GREGORY M. PFLUGFELDER, *CARTOGRAPHIES OF DESIRE: MALE-MALE SEXUALITY IN JAPANESE DISCOURSE 1600–1950* 173 (1996).

85. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 24, para. 1 (Japan).

86. Kurt Steiner, *The Revision of the Civil Code of Japan: Provisions Affecting the Family*, 9 *Far E.Q.* 169, 173–74 (1950).

87. Arai, *supra* note 76, at 132.

88. *Id.*

89. *Id.* at 133.

90. *Id.*

91. *Id.* at 134.

the freedom to choose their own spouses without the permission of their respective heads of households.⁹² Also, the article had the effect of greatly eliminating the inequality between male and female successors within the family.⁹³

Because of the history behind the passage of this provision, some proponents of marriage equality have argued that a constitutional amendment is not required to recognize same-sex marriage.⁹⁴ Since the intent behind the provision was to “liberalize marriage from Japan’s feudalistic ‘family system’”, some legal scholars argue that “the Constitution [does not exclude] the notion of same-sex marriage.”⁹⁵ They also argue that not recognizing same-sex marriage would be problematic when read in conjunction with Article 14 of the Constitution, which states “all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”⁹⁶ However, conservative lawmakers and literalist legal scholars contend that, because same-sex marriage was not contemplated in the writing of the Constitution, significant constitutional revision would be required to recognize same-sex marriage.⁹⁷

Though same-sex marriage is not recognized, certain districts of Japan have recognized same-sex partnerships.⁹⁸ While on the surface, this seems like a progressive trend, partnership

92. Steiner, *supra* note 83, at 177–79.

93. *Id.* at 179–81.

94. Yuki Nikaido, *Abe: Gay Marriage Not an Option Under the Constitution*, ASAHI SHIMBUN (Feb. 19, 2015), available at <http://archive.is/Xzufz>.

95. *Id.*

96. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, para. 1 (Japan).

97. Nikaido, *supra* note 94. See also Macarena Sáez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” is So Different*, 19 AM. U.J. GENDER SOC. POL’Y & L. 1, 35 (explaining that the Japanese Constitution, which defines marriage as between “husband and wife,” would require a constitutional amendment to recognize same-sex couples).

98. See Martin Fackler, *District in Tokyo Plans to Extend Rights of Gay Couples*, N.Y. TIMES (Feb. 13, 2015), http://www.nytimes.com/2015/02/13/world/asia/tokyo-ward-plans-to-extend-rights-of-gay-couples.html?_r=2; Justin McCurry, *Tokyo’s Shibuya Ward is First in Japan to Recognise Same-Sex Marriage*, GUARDIAN (Mar. 31, 2015), <https://www.theguardian.com/world/2015/mar/31/tokyos-shibuya-ward-same-sex-marriage>; Shusuke Murai, *Tokyo’s Shibuya and Setagaya wards issue first same-sex partnership papers*, JAPAN TIMES (Nov. 5, 2015), <http://www.japantimes.co.jp/news/2015/11/05/national/>

certificates are not legally binding. These certificates merely request that hospitals and businesses such as real estate firms treat certificate holders in the same way as married couples, with violating businesses being publicly disclosed on the district's website.⁹⁹ In fact, although there are a number of gay rights groups in Japan, such as the Japan Association for the Lesbian and Gay Movement (commonly known as "Occur"¹⁰⁰), there are no widely visible movements towards marriage equality in the general public discourse of Japan today. One possible reason for this relative invisibility is that gays and lesbians in Japan do not face systematic opposition from the government, churches, or the legal system, unlike many gays and lesbians in other countries.¹⁰¹ Unlike many other places in the world, Japanese legislation takes a very "hands-off" approach to male-male sexuality—similar in spirit to "Don't Ask, Don't Tell" policies—and men can meet and form a variety of sexual interactions without legal recrimination.¹⁰² Furthermore, because sexuality, regardless of orientation, is considered to be a highly private matter in Japanese society, issues of sexual rights are rarely discussed in public forums.¹⁰³ Consequently, "most gays and lesbians have not been very interested in establishing legal acknowledgement of their identities and advocating for the recognition of their rights affirmatively" and thus "no significantly influential degree of gay and lesbian rights activism has taken place in Japan."¹⁰⁴

B. *South Korea*

Like its neighbor, South Korea also takes a fairly tight-lipped approach toward the LGBT community. There is a distinct lack of official or historical documents regarding homosexuality within South Korea.¹⁰⁵ Although some sources in an-

social-issues/shibuya-set-issue-first-certificates-recognizing-sex-couples/#.V2DEuVcihgs.

99. McCurry, *supra* note 98.

100. OCCUR, <http://www.occur.or.jp> (last visited Mar. 20, 2017).

101. McLELLAND, *supra* note 82, at 255.

102. *Id.* at 230.

103. *Id.* at 211.

104. Arai, *supra* note 76, at 130. See also McLELLAND, *supra* note 82, at 243–44, 254–56.

105. Hyun-young Kwon Kim & John (Song Pae) Cho, *The Korean Gay and Lesbian Movement 1993-2008: From 'Identity' and 'Community' to 'Human Rights'*,

cient or medieval Korean history suggest that homosexual acts existed, these sources represent nothing more than “historical footnotes,” and “even these brief accounts are exceedingly rare.”¹⁰⁶ Given the country’s strongly hetero-normative culture, this dearth of documents on the subject is not surprising.¹⁰⁷ In fact, during the height of the AIDS epidemic that swept Western civilizations in the 1980s, one Korean news anchor went as far as to say, “South Korea has nothing to worry about since we have no homosexuals.”¹⁰⁸ As evidenced by this statement, sexual minorities and homosexuality are perceived as a foreign phenomenon—a movement imported from the “decadent” culture of the West.¹⁰⁹

That said, an active gay subculture has existed in South Korea for quite some time. The area behind Tapgol Park in Jongno, Seoul, specifically, the Nagwon-dong area anchored by the infamous Pagoda Theater, was well known since the 1970s for being an area where middle-aged gay men could meet and congregate anonymously.¹¹⁰ As more and more bars catering to the gay demographic opened around the area, the neighborhood became the focus of a series of media exposés in the 1980s and 1990s that attracted even more gay men to this cruising spot.¹¹¹ Later in the mid-1990s as Westernized gay bars and dance clubs began to appear around the U.S. military base in the Itaewon area of Seoul, gays and lesbians in their twenties also began to take part in the LGBT scene.¹¹² Today, these areas still remain very open to gay and lesbian patrons, and establishments catering to the LGBT demographic have begun to pop up in many metropolitan areas around South Korea.

Despite these developments, which suggest wider recognition of gays and lesbians in society, the LGBT movement in Korea has been distinctly quiet until recent years. The first Ko-

in SOUTH KOREAN SOCIAL MOVEMENTS: FROM DEMOCRACY TO CIVIL SOCIETY 209 (2011).

106. Dong-Jin Seo, *Mapping the Vicissitudes of Homosexual Identities in South Korea*, 40 J. HOMOSEXUALITY, no. 3-4, 2001, at 65, 68.

107. Kim & Cho, *supra* note 105, at 209.

108. *Id.* at 206–207.

109. *Id.* at 210.

110. Seo, *supra* note 106, at 69.

111. Kim & Cho, *supra* note 105, at 210.

112. *Id.*

rean LGBT organizations, such as *Chingusai* (“Between Friends”) and *KiriKiri* (“Amongst Ourselves”), began emerging around the early 1990s.¹¹³ However, due to differences in ideological goals and objectives, these groups were initially unsuccessful in gathering a broad following or garnering much attention. It was not until Dong-Jin Seo and Jung-woo Lee, two students who attended elite colleges in Korea, publicly came out of the closet in the summer of 1995 that the public became more aware of homosexuality.¹¹⁴ As some academics point out, “[S]tudents have played a leading role in the pro-democracy movement in South Korea Following this tradition, Seo and Lee—both students at the elite colleges of Yonsei and Seoul National University, respectively—became the first faces to present ‘gay issues’ to the public.”¹¹⁵ Soon after, gay and lesbian groups began to appear on several university campuses across the country.

The public response was sensational, with the representatives of these university groups, including Seo and Lee, becoming instant media celebrities invited to television talk shows, radio programs, and university lectures. However, although these campus groups were successful in starting conversations and bringing attention to LGBT issues, the public response was not entirely positive. Some people believed these groups to be “sex clubs,” and one newspaper bemoaned the formation of these groups as a “diseased ivory tower.”¹¹⁶ Furthermore, this publicity did not have a huge impact on the visibility of the LGBT community in Korea, as many activists were “caught between the family and the state,” meaning many were bound by constraints in the family while realizing that they were not yet recognized as a meaningful voice by the state.¹¹⁷ As a result, few came out as gay or lesbian, and during rallies or protests, mainstream media were prohibited from taking pictures of

113. *Id.* at 211.

114. Sarom Bahk, *Viewing the Invisible Minority: The State of LGBT Persons in Korea*, PEAK (Sept. 9, 2002), <http://newspapers.lib.sfu.ca/peak-1068/peak>.

115. Kim & Cho, *supra* note 105, at 212.

116. *Id.*

117. See John Nguyet Erni & Anthony J. Spires, *Glossy Subjects: ‘G&L Magazine’ and ‘Tongzhi’ Cultural Visibility in Taiwan*, 4 *SEXUALITIES* 25, 25–49 (2001) (describing expectations placed by Taiwanese society that come in conflict with LGBT identities. These social expectations are similar to that of many East Asian countries).

participants—who often wore masks and sunglasses to conceal their identities—from the front.¹¹⁸ Still, these groups provided a small yet important rallying point for many Korean gays and lesbians who were previously without an active community.

Same-sex marriage is currently not recognized by the South Korean government. The only reference to homosexual conduct survives in laws pertaining to armed forces in South Korea.¹¹⁹ This absence is not surprising, considering Korea's long history of adherence to Confucian traditions that value structured social relationships and familial piety. In fact, "Korean culture is generally regarded as the most Confucian of all Asian cultures,"¹²⁰ and "in a Confucian patriarchal family, the family as an entity takes precedence over its individual members."¹²¹ Because "Confucian culture provides the tools with which Koreans interpret and give order to the world around them," it also influences legal and constitutional discourse.¹²² The individual rights approach often assumed by advocates to fight for modern same-sex relationships and LGBT rights in other countries seems woefully out of tune with the traditional, heterosexual models of family structures defined by Confucianism and, consequently, without a place in a government based on this foundation.

This dissonance makes even more sense when considering other aspects of Korea's social landscape—particularly the heavy influence of Christianity and the long standing emphasis on masculinity and heteronormativity. Christian missionaries and Christianity began to gain major influence in Korea around the early twentieth century, introducing, along with its value system, Western technology, education, and medicine.¹²³ As such, Christianity was embedded in Korean historical narra-

118. Kim & Cho, *supra* note 105, at 216.

119. Article 92 of the Military Penal Code criminalizes sodomy, punishable by a maximum of three years. See Douglas Sanders, *What's Law Got to Do with It? Sex and Gender Diversity in East Asia*, in *ROUTLEDGE HANDBOOK OF SEXUALITY IN EAST ASIA* 127 (Mark McLelland & Vera Mackie eds., 2014).

120. Chaihark Hahm, *Law, Culture and the Politics of Confucianism*, 16 *COLUM. J. ASIAN L.* 253, 257 (2003).

121. *Korea - Traditional Korean Families*, *MARRIAGE FAM. ENCYCLOPEDIA*, <http://family.jrank.org/pages/1020/Korea-Traditional-Korean-Families.html> (last visited Apr. 25, 2017).

122. Hahm, *supra* note 120, at 257–58.

123. See Hyaewol Choi, *Christian Modernity in the Missionary Discourse of Korea, 1905-10*, 29 *E. ASIAN HIST.*, June 2005, at 39.

tive as synonymous with progress and modernity.¹²⁴ The spread of the Christian church's influence also coincided historically with the beginnings of the Japanese occupation and a reactionary nationalist movement that called for a rise of Korean masculinity,¹²⁵ which became infused with the aforementioned elements of nationalism, Christianity, and Confucianism. Contemporary documents from the time began to describe the masculine ideal as "an individual who is inseparably related to the state, which he either serves in a self-sacrificial manner . . . or rules The church . . . appears as a functional equivalent of the state . . . the object of an absolute, unqualified devotion. This relationship [was represented] partly by the terms borrowed from the standard Confucian rhetoric."¹²⁶ As these ideas and conceptions of manhood were passed on throughout history, so persisted the expectation that the respectable man should "practice strict sexual restraint, avoiding 'corrupting, sinful, and unhealthy' practices (homosexuality, masturbation, sexual 'perversions,' and so on) and generally confiding himself to the limits of the 'normal' heterosexual life, which was built on piety and centered around childrearing."¹²⁷ Today, more than fifty percent of South Koreans identify as either Protestant or Catholic,¹²⁸ and conservative Christian groups remain the main opponent of LGBT rights and marriage equality.¹²⁹

124. *See id.*

125. *See* Vladimir Tikhonov, *Masculinizing the Nation: Gender Ideologies in Traditional Korea and in the 1890s-1900s Korean Enlightenment Discourse*, 66 J. OF ASIAN STUD. 4 (2007).

126. *Id.* at 1032.

127. *Id.* at 1046.

128. *Religion*, KOREA.NET, <http://korea.net/AboutKorea/Korean-Life/Religion> (last visited Feb. 11, 2017).

129. *See* Chol Baik, '인권'의 마지노선' 차별금지법은 먼 나라 이야기 [*The Maginot Line of Human Rights: Anti-Discriminatory Laws Are Stories From Afar*], KYUNGHYANG SHINMUN (Apr. 27, 2013), http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201304271414511&code=940100 (S. Kor.) (describing the views of conservative Christian organizations seeking to prevent an anti-discrimination bill including sexual orientation discrimination from moving forward in the National Assembly); Youngdae Yoo, *국회-국가조찬기도회-의회선교연합 등 교계 5단체, 동성애 특별대책위 구성 총력대응 나섰다* [*Five Christian Organizations Including the National Assembly-National Prayer Breakfast Meeting and the Alliance for Missionary Activity at National Assembly Mount a Full-Force Response Including a Special Committee on Homosexuality*], KUKMIN DAILY (Aug. 22, 2013), <http://news.kmib.co.kr/article/>

However, circumstances appear to be changing within Korean society. After nationwide protests spread throughout the country in 1987, the longstanding military dictatorship of the country collapsed, and democracy was formally institutionalized.¹³⁰ As a result of these massive protests, the South Korean Constitution was revised and an independent Constitutional Court was created.¹³¹ In contrast to the labor and national liberation movements that rocked the country during the 1970s and 1980s, the social movements of this era placed less emphasis on securing state power and more on the deepening of democracy in everyday life.¹³² With these movements, Koreans began to displace the traditional Confucian language that percolated throughout the country with the language of individual rights. An example of this phenomenon is the abolishment of the *hoju* system, a family registry similar to the Japanese *koseki* system. After attracting controversy for being innately patriarchal and, hence, representing a violation of the right to gender equality, this system was abolished on January 1, 2008.¹³³ Since then, Korea has modified its system in favor of a personal registry system.

Regarding marriage, the South Korean Constitution maintains in Article 36, which governs “Marriage, Family, Mothers, Health,” that “marriage and family life are entered into and sustained on the basis of individual dignity and equality of the sexes, and the State must do everything in its power to achieve that goal.”¹³⁴ The language referring to “equality of the sexes” is often taken to mean that both a male and female are required to constitute a legal marriage. On July 6, 2015, the Court held the first South Korean trial contesting this language. Film director Kim-Jho Gwang-soo and his husband Kim Seung-hwan filed a lawsuit against Seodaemun-gu, Seoul for

view.asp?arcid=0007487610 (S. Kor.) (detailing the efforts of five Christian organizations to assemble a special committee against pro-LGBT legislation).

130. Kim & Cho, *supra* note 105, at 207.

131. Hahm, *supra* note 120, at 260–61.

132. Kim & Cho, *supra* note 105, at 207.

133. Eunkang Koh, *Gender Issues and Confucian Scriptures: Is Confucianism Incompatible with Gender Equality in South Korea?*, 71 BULL. SCH. ORIENTAL & AFR. STUD. 345, 346 (2008).

134. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 36 (S. Kor.).

denying their marriage on the grounds that “same-sex marriage does not satisfy the definition of husband and wife in civil law.”¹³⁵ They argued that the language of the Constitution does not specifically bar same-sex marriage and that an interpretation of the Constitution that bans same-sex marriage violates Article 10 (“Dignity, Pursuit of Happiness”), which states, “All citizens shall be assured of human worth and dignity and have the right to pursue happiness,” and Article 11 (“Equality”), which states, “All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status,” of the Korean Constitution.¹³⁶

On May 25, 2016, however this appeal against the city’s decision was denied. In his ruling, Chief Judge Lee Tae-jong of the Seoul Western District Court said, “Even though circumstances surrounding marriage have changed socially and internationally, a same-sex union cannot be accepted as a marriage only with a legal interpretation under the current legal system—without any legislative step.”¹³⁷ The judge pointed out that the country’s current legal system stipulates a marriage as a union between people of different sexes, noting that in terms of Constitutional and civil law, “the basic premise is that a marriage is a union between a male and a female.”¹³⁸ Regarding the argument that a refusal to accept a same-sex marriage contravenes the constitutional principle of equality, the judge’s ruling states, “Given that through the process of a marriage, child delivery and upbringing, a foundation is formed to continuously sustain and develop society, same-sex unions cannot be seen as the same as marriages between a man and a woman.”¹³⁹ The judge then concluded the ruling by arguing that the legality of recognizing same-sex marriage is an issue

135. Seoul Western District Court [Dist. Ct.], 2016Ga-Hap1842, May 25, 2016 (S. Kor.). The posture of this case was an administrative decision appeal.

136. *Id.*

137. *Id.*

138. Hong-seok Ahn, *Court Dismisses Same-Sex Marriage Appeal*, YONHAP NEWS (May 25, 2016), <http://www.yonhapnews.co.kr/bulletin/2016/05/25/0200000000AKR20160525100651004.HTML>.

139. *Id.*

that should be settled through public discussions and “legislative” determination.¹⁴⁰

IV. CHALLENGES TO ACHIEVING MARRIAGE EQUALITY

This Note offered two successful cases of countries that have achieved marriage equality, and delineated major current and historical factors of two countries that have yet to achieve it. Based on the facts presented, the legal challenges blocking the road towards Japan and Korea’s achievement of marriage equality do not appear particularly novel. The crux of this debate is the legal interpretation of the institution of marriage as understood by each country’s constitution. In South Korea, the first challenge against the ban on same-sex marriage was denied precisely because of the legal interpretation of marriage. As determined by the judicial ruling, the Korean Constitution premises marriage as a union between a man and a woman.¹⁴¹ In the case of Japan, incumbent Prime Minister Shinzo Abe explicitly made a statement to Parliament in 2015 that “extremely careful consideration” is necessary when discussing revisions to the Constitution to recognize same-sex marriage because the topic “was not contemplated” when the constitution was written.¹⁴²

Although these are certainly not easy challenges to overcome, they are also not insurmountable challenges. The Netherlands was able to modify language in Book 1 of their Civil Code with regard to marriage to specifically include the possibility that both same-sex and different-sex couples could be legally married under Dutch law.¹⁴³ As described previously, this amendment was achieved through a series of legislative acts following robust demand from the public. The United States had an even larger obstacle to overcome, for there, the federal government went so far as to pass legislation purposefully designed to limit legal marriage to unions between “one man and one woman.”¹⁴⁴ However, even in the face of this

140. *Id.*

141. *Id.*

142. Andy Sharp & Nao Sano, *Japan’s Gay Marriage Push Faces Constitutional Barrier*, BLOOMBERG (Feb. 22, 2015), <http://www.bloomberg.com/news/articles/2015-02-19/japan-s-gay-marriage-push-faces-constitutional-barrier>.

143. Waaldijk, *Others*, *supra* note 17, at 573.

144. H.R. REP. NO. 104-664 (1996).

challenge, the United States was able to attain marriage equality through the judiciary when the Supreme Court found the legislation unconstitutional.¹⁴⁵ This example showcases the possibility that in scenarios of grave injustice, different branches of the government might step in to change the laws and policies so that equality can be effectuated. This possibility may appear to be a hopeful sign to those in Japan and South Korea seeking to realize marriage equality, although neither country seems anywhere near to accomplishing this goal in the immediate future.

The recentness of the aforementioned statements¹⁴⁶ representing government positions on same-sex marriage suggests that both countries are years away from marriage equality. This is a peculiar situation, considering there are no significant laws that expressly discriminate against the LGBT community in either country. Japan has not had laws criminalizing homosexual activity since the nineteenth century and has actually begun issuing same-sex partnership certificates in certain districts.¹⁴⁷ In Korea, the only law directly affecting same-sex activity is one sodomy law that is confined to military personnel.¹⁴⁸ Compared to the United States, where cases such as *Bowers v. Hardwick*¹⁴⁹ and *Lawrence v. Texas*¹⁵⁰ were first initiated to repeal sodomy laws and decriminalize the mere conduct of same-sex activity, Japan and Korea are on a smoother path to marriage. Given the lack of roadblocks—but simultaneously the lack of legal progress that has been made in either countries with regard to this issue—it seems that the impediments to Japan and Korea’s move towards marriage equality are not legal challenges, but challenges that are cultural and social in nature.

First, as is commonly accepted by many legal scholars and social theorists, societies affect laws and vice-versa.¹⁵¹ As Korean constitutional law scholar Chaihark Hahm recognizes, “Culture is inflected in the terms that inform the legal dis-

145. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

146. See *supra* notes 139–42 and accompanying text.

147. See Section III.A. of this Note.

148. Sanders, *supra* note 119.

149. 478 U.S. 186 (1986).

150. 539 U.S. 558 (2003).

151. See generally, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

course, and in the way that law is represented and given meaning in the political and social discourse of the people.”¹⁵² Thus, the types of laws that germinate from a particular society are viewed as a reflection of the values, ideologies, and traditions by which the culture abides. Second, marriage is just as much a social concept as it is a legal concept. Although marriage can be seen as an institution with many legal consequences attached to it, it similarly has just as much cultural and social significance. Therefore, given the lack of major legal barriers on the road to marriage equality, it is perhaps more important to focus on the social and cultural challenges afflicting marriage equality in Asia.

The following section of this Note will proffer two social challenges that pertain particularly to the situations of Japan and Korea. It will analyze how the language and framework of marriage equality and LGBT rights might be incompatible with the collectivist and Confucian group ethos that is deeply rooted in both countries’ cultures. Then, it will assert that the lack of public discourse regarding LGBT rights and homosexuality in general may be stunting growth of awareness and progress.

A. *Individual Rights in a Collectivist Society*

One of the main tenets of Western culture involves the significance of and the focus on the individual—a notion that fits well into the discourse of liberal democracy. After the fall of communism in Eastern Europe in the late 1980s, many scholars¹⁵³ in the West began to argue that liberal democracy was the best form of government for the modern age.¹⁵⁴ According to liberal democracy, “individuals are defined as choosers” with their “capacities, qualities of character, deepest beliefs, goals, loyalties and allegiances . . . as their properties.”¹⁵⁵ Thus, “the individual is a master of himself or herself, owning his or her body and having proprietary rights over its

152. Hahm, *supra* note 120, at 274.

153. *See generally*, FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (arguing that liberal democracy is the most efficient and final form of political organization devised by man).

154. Bhikhu Parekh, *The Cultural Particularity of Liberal Democracy*, 40 *POL. STUD.* 160, 160 (Special Issue) (1992).

155. *Id.* at 162.

constituents,” and as such, “they relate to their thoughts, feelings, opinions, rights and so on in similar proprietary terms.”¹⁵⁶ Immanuel Kant eloquently describes these tenets underlying liberal democracy, stating, “It is a fundamental principle of moral politics that in uniting itself into a nation a people ought to subscribe to freedom and equality as the sole constituents of its concept of right, and this is not a principle of prudence, but is founded on duty.”¹⁵⁷ F.A. Hayek further elucidates this concept, arguing that law and government, “by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans” and pursue individual liberty.¹⁵⁸ In summary:

[F]or the liberal, the government’s primary task is to create and maintain a system of rights and to undertake activities required by this. . . . Since democracy as understood by the liberal is grounded in, and derives its legitimacy from, sovereign individuals, it is conceptually prevented from violating individual rights.¹⁵⁹

As a result, a government that violates the right to liberty, property, or freedom of expression is considered not only illiberal but also undemocratic.¹⁶⁰

In contrast, many Asian, and particularly Confucian, cultures take a very different approach to the individual. Confucianism is a moral code of ethics that emphasizes personal virtues rather than individual rights. In this virtue-based morality, the concept of rights is not deemed essential for the well-being of a person. Consequently, “any talk of rights is discouraged while the sense of community is stressed.”¹⁶¹ As Professor Herbert H.P. Ma of the National Taiwan University describes:

The cultivation of individual virtues is attained when an individual fulfills his or her duties as required by

156. *Id.*

157. Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch*, in *PERPETUAL PEACE AND OTHER ESSAYS* 133 (Ted Humphrey trans., Hackett Publ’g Co. 1983).

158. F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME I: RULES AND ORDER* 85–86 (1973).

159. Parekh, *supra* note 154, at 164–66.

160. *Id.* at 162.

161. Chong-Min Park & Doh Chull Shin, *Do Asian Values Deter Popular Support for Democracy in South Korea?*, 46 *ASIAN SURV.* 343 (2006).

the specific relationships in which he or she is involved. . . . It is therefore difficult to extract from Confucianism a concept of the individual in the abstract, entirely separate from other individuals, as people are defined and classified by relationships more so than their individual beings.¹⁶²

As a result, “contrary to Western notions of individual rights, social rights mainly serve the purpose of private ordering rather than protection of the individual from government intrusion.”¹⁶³ Therefore, in the Confucian notion of governance, there is no place for the concept of individual rights in society and politics. In these communities, “the rule of virtue, not the rule of law, is advocated and justified as the ideal mode of governance.”¹⁶⁴

These conflicting approaches to the conception of the individual help explain the difference in how these societies view marriage equality and LGBT rights. LGBT rights, and human rights in general, are often conveyed in languages revolving around the individual. As legal theorist David Richards asserts, underlying any concept of human rights are “two crucial assumptions: first, that persons have the *capacity* to be autonomous in living their life; second, that persons are entitled, as persons, to equal concern and respect in exercising their capacities for living autonomously.”¹⁶⁵ This foundational principle was employed and displayed in the case of the LGBT rights movement in the United States, where the Due Process and Equal Protection Clauses—both of which in essence protect rights of individuals and classes of individuals—were invoked to protect the rights of citizens to make individual, autonomous choices with regard to their sexual relationships and choices of whom to marry. Since, in the liberal view, the individual is conceptually prior to society, liberty becomes conceptually more of a priority than morality.¹⁶⁶ In terms of the gay

162. Herbert H.P. Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207, 211 (1995).

163. Dean J. Gibbons, *Law and the Group Ethos in Japan*, 3 INT’L LEGAL PERSP. 98, 113 (1990).

164. Park & Shin, *supra* note 161, at 344.

165. David Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 964 (1979).

166. Parekh, *supra* note 154, at 162.

rights movement in particular, “the individualistic approach to marriage and children expressed in terms of an individual’s ‘right’ to choose his or her own partner (irrespective of gender) and to produce or adopt children irrespective of marital status has arisen in Anglo-American and northern European societies due to the gay movement’s development along lines similar to that of the American sixties civil rights movement.”¹⁶⁷

This approach, however, is foreign to Confucian societies, where decisions impacting family, workplace, and society (such as lifestyle choice) are taken with regard to the individual’s wider social network rather than based solely upon his or her preference.¹⁶⁸ As Samuel P. Huntington wrote, “classic Chinese Confucianism and its derivatives in Korea, Vietnam, Singapore, Taiwan, and (in diluted fashion) Japan emphasized the group over the individual, authority over liberty, and responsibilities over rights.”¹⁶⁹ Given this foundational framework on how Confucian societies operate and how individuals situate themselves within this society, scholars have noted that “individuals do not have a source of legitimate authority on the basis of which they can revolt against their families and the web of social ties into which they are born.”¹⁷⁰ Moreover, any deviation from these predetermined relations would be viewed as disruptive and out of sync with acceptable social norms.

Such cultural norms perhaps explain why many Japanese, Korean, and other Asian gays and lesbians are reluctant to come out of the closet in their home societies. Not only would they be rebuked and ostracized by the community for coming out, but they themselves would also view the act of coming out as counter-intuitive and against all of their social and cultural customs. For many LGBT Asians, if they lie low and maintain a discreet profile, they can live the lives they want without reprimand. In fact, one cultural theorist made the following obser-

167. McLELLAND, *supra* note 82, at 128; *see also*, BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* (1987) (providing a historical, cross-cultural analysis of gay rights movements that align with concurrent economic and social developments).

168. McLELLAND, *supra* note 82, at 112.

169. Samuel P. Huntington, *Democracy’s Third Wave*, *J. DEMOCRACY*, Spring 1991, at 24.

170. Francis Fukuyama, *Confucianism and Democracy*, *J. DEMOCRACY*, Apr. 1995, at 29.

vation regarding Japan's attitude towards homosexuality: "As long as an individual's sexual practices do not interfere with or challenge the legitimacy of the twinned institutions of marriage and household, Japanese society accommodates—and in the case of males, even indulges—a diversity of sexual behaviors."¹⁷¹

Compounding this problem even further is the interplay of cultural notions of "masculinity" and "femininity" that are linked with the perception of individualist and collectivist behavioral traits. A study conducted by Harvard Business School found that depending on the cultural values of the society, certain individualistic and collectivist behavior could be perceived as masculine or feminine.¹⁷² The study began with the hypothesis that because men possess higher status in virtually every society, each society's core cultural values would match that of male stereotypes.¹⁷³ Surveying participants from South Korea and the United States, the results showed that Korean participants would perceive collectivist behavior (such as consideration, loyalty, and modesty) to be more "masculine", while they found individualistic behavior (such as independence, assertion, and self-confidence) to be more "feminine."¹⁷⁴ In contrast, the American participants in the study perceived these behaviors in the opposite way. If the study's results are to be believed, this may provide further insight as to why gays and lesbians in collectivist societies are deterred from asserting their rights. This gendered view of "collectivism" and "individualism" may further entrench gays and lesbians from deviating from dominant social norms by disrupting communal order. In the case of gay men, this may make the problem more complex, for coming out might also require them to renounce and act counter to the expectations that are placed on their gender.

Thus, while on an individual micro level, not coming out as openly gay may appear to be a reasonable method of survival, on a macro level, it becomes problematic as the whole

171. JENNIFER ROBERTSON, TAKARAZUKA: SEXUAL POLITICS AND POPULAR CULTURE IN MODERN JAPAN 145 (1998).

172. Amy J. C. Cuddy et al., *Men as Cultural Ideals: Cultural Values Moderate Gender Stereotype Content*, 109 J. PERSONALITY & SOC. PSYCHOL. 622 (2015).

173. *Id.*

174. *Id.*

class eventually ends up systematically subjugating itself to a life of hiding. With no one stepping out to assert discrimination against their identity, the LGBT community falls woefully under the radar in terms of rights and social, political presence. The further implications of this problem will be discussed in the following section.

B. *In the Closet—Pre-“Covering”*

Although it may be easy to attribute the West’s relative success over East Asian countries in affording marriage rights to same-sex couples to differences in societal structures, this assertion leaves many questions unresolved. First, if the success of marriage equality merely relies on the difference between an individual-based and group-based social ethos, it raises the question of why individualistic Western societies did not achieve marriage equality from the beginning. Furthermore, even taking into consideration the possibility that the right to marriage simply is like many other rights that were similarly denied to minorities but later established with time, this individual and group dichotomy still leaves some questions unanswered. For instance, this framework does not effectively explain why the West had to first go through a sequential progression of establishing separate distinct rights (such as outlawing discrimination based on sexual orientation and repealing sodomy laws) for LGBT citizens before arriving at marriage equality. These probing questions thus suggest there may have been some deterring characteristics of society shared by Eastern and Western countries that Western societies were able to overcome sooner.

These inquiries may be answered by leading gay rights theorists who proposed various theories on the trajectory of successful gay rights movements. For instance, Professor William Eskridge of Yale University and Dutch law professor Kees Waaldijk both observed a pattern in the legal progression towards marriage equality in many European countries. In a survey of twenty-five different countries, Professor Eskridge has found that “legal recognition of unions—or, ultimately, marriages—are a step-by-step process.”¹⁷⁵ Further expanding on

175. William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 McGEORGE L. REV. 641, 647 (2000).

this point, Eskridge states that this process is sequential and incremental, proceeding by “little steps that are taken in a particular order.”¹⁷⁶ Professor Waaldijk, whose research yielded similar results, dubbed this process the “law of small change.”¹⁷⁷ The typical pattern that was observed by both Eskridge and Waaldijk generally conforms to the following sequence of legislative stages: (1) the decriminalization of same-gender sexual behavior, (2) equalizing the age of consent for sexual conduct, (3) prohibition of discrimination based upon sexual orientation, (4) limited recognition characterized by bestowing certain rights and obligations on cohabiting same-sex couples, (5) recognition of same-sex partnerships, and, finally, (6) legalization of joint adoption of children by gay and lesbian couples.¹⁷⁸

This observation on the progress accomplished in gay rights movements in different countries parallels the sequence that legal scholar Kenji Yoshino delineates in his book “Covering.”¹⁷⁹ Professor Yoshino describes “covering” as when an individual tones down or “covers” a disfavored character trait of an identity to fit into the mainstream.¹⁸⁰ According to Yoshino’s model, the gay rights movement of America has faced a series of sequential demands from society that somewhat mirror Waaldijk’s and Eskridge’s findings of a step-by-step movement towards marriage equality. First, Yoshino points out that the gay community was asked to assimilate to the norms of contemporary society. These demands were forced upon the LGBT community in the form of the various conversion therapies and lobotomies that had become widespread in the 1950s prior to the Stonewall Riots.¹⁸¹ As the gay rights movement gained strength, the demand for assimilation decreased, while gays and lesbians were merely asked to “pass” as straight. This, as Yoshino illustrates, is manifested through the military’s adoption of the “Don’t Ask, Don’t Tell” policy which allows gays and lesbians to serve in the armed forces as

176. *Id.* at 647–48.

177. Waaldijk, *Others*, *supra* note 17, at 577.

178. *See id.*; Eskridge, *supra* note 175, at 647.

179. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2007).

180. *Id.* at 18–19.

181. *Id.* at 34–42.

long as they do not come out as openly gay.¹⁸² The final stage that Professor Yoshino describes are the demands to cover; that is, gays and lesbians are now permitted to be out of the closet as long as they do not “flaunt” their “gayness” in public.¹⁸³

Although Yoshino’s model tracks the progress of the gay rights movement through the social demands made against the LGBT community, the underlying framework he promotes is in harmony with Eskridge’s and Waaldijk’s theories that there is a particular sequential element to the development of gay rights. What is consequentially implied in these models is that, with regards to gay rights, one step becomes possible “only . . . after the previous step has been taken.”¹⁸⁴ This sequential and incremental process plays a crucial role in the frameworks of all three scholars, and in essence, all three describe the exact same phenomenon in different narratives—Eskridge describes the step-by-step movement in terms of acclimation; Waaldijk depicts these incremental changes as a negotiation with dominant, mainstream society; and Yoshino illustrates the sequence as something that emerges with the maturation of public discourse. What it boils down to for all three scholars is that these changes and “small steps” can only be made when accompanied by favorable public opinion. As Eskridge aptly puts, “Law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law.”¹⁸⁵

Thus, what appears to be most pivotal to the success of a country’s marriage equality movement is the level of societal discourse regarding the subject. The absence of this discourse may be fatal to the gay rights movement in Japan and Korea (and many other Asian countries) as gays and lesbians do not have much social presence in those countries. Japanese gay rights groups like Occur fail to make significant impacts on contemporary Japanese society because people do not find it necessary to come out of the closet,¹⁸⁶ and thus gay rights actors lack the critical mass to instigate any major reform. In

182. *Id.* at 69–71.

183. *Id.* at 91–93, 101–04.

184. Waaldijk, *Small Change*, *supra* note 18, at 440.

185. Eskridge, *supra* note 175, at 648.

186. McLELLAND, *supra* note 82, at 250–52.

South Korea's case, as Dong-Jin Seo, the student who became famous for publicly coming out of the closet in Korea, once remarked:

In Korea, homosexuality does not have any social existence. [I]n public discourse aimed at forming the laws and regulations . . . homosexuality is not mentioned. In Korea, the 'civil rights' of homosexuals are not threatened on account of their homosexuality. This is not due to tolerance of homosexuals. To the contrary, it is because they are not seen as representing members of the society who can exercise the power to effect social changes. In other words, their existence is ignored.¹⁸⁷

It is imperative to take note of this social reality in Asia since "discourse concerning laws has defined how homosexuals in particular see themselves, and in accordance with the way they have been treated, they have developed their sense of themselves as an autonomous group."¹⁸⁸ If it turns out that the sequential, step-by-step model proposed by scholars is necessary to achieve marriage equality, it is a critical problem for the future of LGBT rights in Asia that people are not coming out of the closet. As Seo states, "[T]hrough any form of government control and legal regulations, homosexuals have the opportunity to see themselves as a recognized group and by means of counter-discourse, they obtain the possibility of resistance."¹⁸⁹ Because the gays and lesbians of Asia are not coming out of the closet, there are no parties to step out and challenge the injustices that are perpetrated against this class. In a dangerous chain of events, since no one challenges this systematic discrimination, discourse regarding marriage equality and LGBT rights in general remains stunted.

This vicious circle explains why, despite the lack of legal barriers standing in the way of legalizing same-sex marriage in most Asian countries (in comparison to their Western counterparts), these countries are failing at making any significant movement towards achieving marriage equality, or obtaining any other significant protection for members of the LGBT community in their jurisdictions. In an odd twist of events, the

187. Seo, *supra* note 106, at 66–67.

188. *Id.* at 67.

189. *Id.*

lack of oppressive laws discriminating against the LGBT community—which initially seemed to clear the path towards equality—actually mires LGBT individuals and advocates in their countries with complacency, apathy, and oblivion. Ironically, because of the obstacles they had to overcome, including coercive demands to cover one’s homosexuality, LGBT groups in the West ended up progressing further in their battle against discrimination. Meanwhile gays and lesbians in the East are still struggling to get out of the closet, trapped in an oddly self-imposed, pre-covering stage of oppression that further deters others from coming out. Thus, it seems that for Asian countries to truly move forward in terms of the improvement of LGBT rights, the first step that needs to be accomplished is a society-wide “coming out” of sorts, where a platform is created for parties to discuss the issue, and advocates can push for further change to ensure social and legal equality for the LGBT community.

V. CONCLUSION

As the cases of the Netherlands and the United States make clear, marriage equality can be achieved through different branches of the government. However, looking at the history and culture of countries such as Japan and Korea, it is clear that cultural challenges may stand in the way of marriage equality in Asia. First, the collectivist tendencies that are deeply rooted within most Asian cultures make it hard for individuals to argue for a right that is primarily centered on the individual. Second, because both countries lack significant public awareness regarding LGBT rights and homosexuality, activists are unable to create a platform where people can not only further talk about this issue, but also develop a discourse through which the gay rights movement can garner more support and instigate governmental action.

Although thus far, the situations described in this Note regarding Asia make the prospect of marriage equality being achieved soon seem dim, there is some hope for the East. Taiwan, also a traditionally collectivist and conservative country, is optimistically setting up to become the first Asian country to legalize same-sex marriage.¹⁹⁰ A draft bill regarding same-sex

190. Agerholm, *supra* note 14.

marriages passed a committee hearing in Parliament on December 26, 2016, meaning that a final proposal will be presented and voted on by lawmakers in 2017.¹⁹¹ In addition, the Taiwanese Constitutional Court heard arguments for its first same-sex marriage case on March 24, 2017, which many supporters hope will provide a turning point for the discourse of same-sex marriage and LGBT rights in the country.¹⁹²

Even in the case of one of the countries mentioned in this Note, according to Reuters, more than 11,000 people came together for the Seventeenth Annual Korea Queer Culture Festival, which organizers say is meant to send supportive messages to sexual minorities.¹⁹³ This number is a huge increase from the mere fifty participants that marched in the inaugural parade in 2000.¹⁹⁴ There may be another sliver of hope in the considerable rate at which these countries seem to be shifting towards a more individualized conception of liberal democracy. The amendments made to Japan's Constitution regarding family laws have a distinct individualistic flavor to them, and the country *has* started to recognize same-sex partnerships in districts across the country. Meanwhile, the constitutional courts of Korea also seem to be moving towards a more individualized approach to civil rights, blending long-held Confucian notions of order with more individualized ideals of rule of law. If similar changes in these societies continue to occur, perhaps marriage equality can arrive in Asia sooner than previously imagined.

However, even if the ways in which these countries start to view themselves and their surroundings might change, the internal values and content held by the societies might not adjust accordingly. In other words, though the *way* East Asian countries view their societies might change (e.g., a shift from a collectivist to an individualist viewpoint), *what* these countries

191. Victoria Ho, *Marriage Equality Could Finally Happen in Asia Thanks to Taiwan*, MASHABLE (Dec. 27, 2016), <http://mashable.com/2016/12/27/taiwan-same-sex-marriage-draft/#Z0WKHQBP6Zqj>.

192. *Taiwan Top Court Hears Landmark Gay Marriage Case*, BBC NEWS (Mar. 24, 2017), <http://www.bbc.com/news/world-asia-39376423>.

193. *South Koreans March for Gay Pride*, REUTERS (June 11, 2016), <http://www.reuters.com/video/2016/06/12/south-koreans-march-for-gay-pride?videoId=368880398>.

194. KOREA QUEER CULTURE FESTIVAL, http://www.kqcf.org/xs/page_ywQR38 (last visited March 20, 2017).

normatively think about these changes (e.g., individualist changes are not good for the community) might take more time. Thus, while some cultural values can quickly change to follow the global shift towards recognizing individualized rights, laying the groundwork for advocates to push for more equality, the level of public discourse directly regarding LGBT rights needs to significantly mature before any meaningful changes can be realized.