Marriage Equality Trajectories in the United States and Japan

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Abstract

The path to marriage equality in the United States is a tortuous one that began in 1970 and concluded with two landmark Supreme Court rulings in 2013 and 2015: United States v. Windsor and Obergefell v. Hodges, respectively. The trajectory to marriage equality currently in progress in Japan bears some similarities to the United States’ trajectory; as such, some lessons from the United States might be applicable in Japan.
Marriage Equality Trajectories in the United States and Japan

Marriage equality within the United States is a product of cultural, religious, legal, and constitutional efforts. On all of those fronts, it appears that Japan is mirroring the progress made in the United States, if at a slower pace. The significance of marriage equality for both the United States and Japan is profound in its simplicity: Citizens of both countries have a right to equal treatment and protection under their respective constitutions. Such equal protection confers greater equity to everyone’s lives.

Japan’s progress toward marriage equality is of particular significance to me, a queer American man with a gay Japanese husband. The lack of recognition in Japan for our relationship is a major hindrance, especially during a pandemic. My inability to qualify for a spouse visa in Japan is a formidable hurdle when it comes to decisions specific to the care of my husband’s parents.

Marriage Equality in the United States

Rainbow¹ liberation in the United States began as a movement well before the Stonewall riots in 1969, but it was not until the 1970s that marriage equality entered the liberation perspective. The first gay couple to seek a marriage license in the United States was Jack Baker and Michael McConnell.² They were denied by a Hennepin County clerk in Minnesota in 1970. The following year, the Gay Activists Alliance included marriage equality in their list of liberation demands.³

Marriage equality has been an important aspect for rainbow liberation for several reasons. In turn, liberation has brought those reasons to the fore. Primary among them are the hundreds and hundreds of federal benefits for married couples in the United States.⁴ These extend to Social Security and IRS benefits, visitation and inheritance rights, and immigration.

Separate-but-not-Equal Solutions and Their Limitations

From the religious perspective, the acceptance of marriage equality was an important corollary within the United States, given the predominance of the religious experience here. In moves

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¹ Throughout this article, I use rainbow to refer to communities of people who claim queer, trans, bisexual, non-binary, two-spirited, lesbian, gay, intersex, questioning, pansexual, demisexual, genderqueer, asexual, and aromantic identities.


that echoed the separate-but-not-equal legal approaches taken by some states, such as civil unions and domestic partnerships, some religious groups began their path to marriage equality with similar approaches. Some denominations blessed same-sex unions but not same-sex marriages until the United Church of Christ promulgated true marriage equality in 2005.⁵

The legal and constitutional paths to marriage equality in the United States were intertwined. Although the United States Constitution included no reference to marriage when it was adopted in 1787, the Fourteenth Amendment, adopted in 1868, offered unexpected support for the future drive to marriage equality. When that amendment specifically stated that all citizens of the United States are afforded equal protection under the law, the foundation for refuting all arguments against marriage equality was laid. As early as 1973, an article in the Yale Law Journal prophetically put forth the idea that the equal protection clause should apply to marriage equality as well.⁶

The first state to explicitly ban marriage equality was Virginia in 1975. The first state court to put forth equal protection clause arguments in favor of marriage equality was Hawai‘i in 1993.⁷ From that point forward, there was a confused braid of progress and regress, with state courts siding in favor of marriage equality and state legislatures attempting remedies like civil unions and domestic partnerships (separate-but-not-equal) while amendments to state constitutions passed in many states to explicitly deny marriage equality. For example, The State of California experienced a particularly convoluted path, veering back and forth between legality and illegality several times until 2010, when the US District Court invalidated Proposition 8,⁸ the 2008 ballot initiative that revoked marriage equality after intense lobbying by both the Roman Catholic Church and the Mormons.⁹

Within such a patchwork, the limits of the separate-but-not-equal solutions like civil unions and domestic partnerships become clear. To offer a concrete example, Washington State began a domestic partnership system in 2008. Although my longtime partner Hiro and I were living in British Columbia at that point, where the Canadian government had already offered recognition of our coupled status as a common-law marriage, we could have easily had a domestic partnership

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⁸ “Judge strikes down Prop 8, allows gay marriage in California,” Los Angeles Times, August 4, 2010.

performed in our then-former home state of Washington.

The benefits of domestic partnership in Washington State were not insignificant. Under state law, more than 400 rights and obligations were accorded to marriage. All of those rights and obligations were then extended to those who registered for a domestic partnership. They included community property rights, inheritance rights, the right to care for a partner under the state’s Family Leave Act, and the rights of hospital visitation and durable power of attorney when a partner is incapacitated.¹⁰

Nevertheless, those rights evaporate when crossing state lines. For example, rights conferred in Washington vanished in neighboring Idaho. Had a Washington domestic partner fallen ill in Boise, the hospital could legally deny visitation rights to the other partner. In 2008, forty states had laws against marriage equality.

Worse still was the lack of any federal benefits. Hiro and I refused to file for domestic partnership in Washington State because, among other concerns, we would have been unable to jointly file US taxes and I would have been unable to sponsor Hiro for permanent residency (a green card) as my domestic partner. Under US federal law, Hiro and I remained strangers.

Swift Changes

But a tipping point was reached in 2013, and the arc to marriage equality began rising to its 2015 acme. The US Supreme Court ruling in 2013’s United States v. Windsor invalidated section three of the 1990s Defense of Marriage Act and allowed federal marriage benefits for citizens, whether married in any of the more than ten states where marriage equality was then available or in foreign countries where marriage equality was already recognized.¹¹ Aware of the significance of the ruling, I proposed anew to Hiro on June 26, 2013 (the date of the ruling), and we filed marriage paperwork in our then-home province of British Columbia. We were married within two weeks of that ruling, by a BC marriage commissioner on July 7, just a few months shy of the twentieth anniversary of our first date and the fifteenth anniversary of our new life together in North America. His green card paperwork was submitted early in September of 2013.

The crowning moment for the United States arrived in June of 2015. The US Supreme Court decision in Obergefell v. Hodges brought marriage equality to all fifty states at once.¹² Shortly after

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that ruling, my husband’s US green card was at last issued and we began the process of moving back to Washington State after nine years in British Columbia.

**Marriage Equality in Japan**

Japan’s first constitution, the Seventeen Articles of Prince Shōtoku, makes no mention of marriage. Neither does the Meiji Constitution of 1889. Japan’s postwar constitution, devised mainly by members of the American Occupation with limited input from Japanese scholars, included articles on both equal protection (Article Fourteen) and on marriage (Article Twenty-Four). Article Twenty-Four was meant to put an end to involuntary marriage, a practice common throughout the Edo period, where the head of the household arranged all marriages. Article Twenty-Four therefore emphasizes the right of choice for both partners although the text in Japanese reads partners of *both sexes*.

As was the case in the United States, local governments have attempted to recognize same-sex relationships with a separate-but-not-equal approach. More than a hundred municipal and prefectural governments offer certificates for relationship status, but they differ from marriage in key respects. Such relationships are not entered into family records. The certificates cost money whereas filing a marriage record is free. And the certificates are considered unofficial and are not recognized beyond the jurisdiction in which they are issued. As was true in the United States, these recognitions are localized and lose applicability in any other municipality or prefecture. The benefits are also sparse.

Shibuya Ward in the Tōkyō Metropolitan District was one of the first municipalities to offer this benefit. The ward offers a form of recognition termed a partnership and can note such partnerships within family registries. Benefits end there, however. Partners cannot claim health and welfare benefits and, of personal significance to me, partnership extends no benefits to immigration.

In March of 2021, a district court ruling in Sapporo brought the equal protection clause of Article Fourteen to the forefront. Although the justices ruling in the case refused the plaintiffs’

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12 Kratz, “Milestones.”


claim for monetary damages—the plaintiffs sought damages of one million yen per plaintiff for the hardships they have endured as a result of having been unable to marry—they did agree with the lawyers’ arguments with regard to both Article Fourteen and Article Twenty-Four and ruled that Japan’s refusal to allow for marriage equality was unconstitutional.

For Article Twenty-Four, lawyers for the plaintiffs reminded the court that the intent of that article was not to prevent marriage equality but rather to ensure freedom to marry without a household fiat. The justices in their ruling confirmed that both Article Fourteen and Article Twenty-Four are interpreted to offer equal protection to all citizens of Japan. On that basis, the denial of marriage equality in Japan was ruled to be unconstitutional.

This was the first ruling in a set of cases filed by thirteen same-sex couples in different district courts across Japan on Saint Valentine’s Day in 2019.¹⁸ The other court rulings have yet to be delivered, but even if each ruling supports the unconstitutionality of denying marriage equality, there is no evidence yet that the Diet will move ahead with marriage equality legislation. In my conversations with Japanese citizens, all agree that a combination of a conservative bureaucracy and legislative inertia has prevented the Diet from acting to date.

Options Moving Forward

Different nations have forged paths to marriage equality in different ways. For the United States, it required a Supreme Court ruling. For Chile, the latest country to offer marriage equality to its citizens, the path was legislative and not judicial.¹⁹ Given the lack of Diet consideration to date, the most likely path for Japan rests in the judicial realm. If the district courts rule for all of the other twelve couples as they did in Sapporo, the likelihood of marriage equality in Japan will be exponentially higher.

Criticism has been levied at the Japanese government for its inaction on marriage equality, both from within Japan and from abroad. Such criticism is justified. Japan is the only member of the Group of Seven advanced economies (the G7) without marriage equality.²⁰ Many within the rainbow communities around the world had high hopes that Japan would follow in Taiwan’s wake

¹⁹ Vanessa Romo, “Chile’s Congress Approves Same-Sex Marriage by an Overwhelming Majority,” NPR.org, December 7, 2021.
when the latter recognized marriage equality in 2019.²¹ However, as of this writing, Japan’s national government has yet to join either its economic equals in the G7 or its neighbor within Asia.

Rainbow-dwellers, both in Japan and around the world, hope that marriage equality becomes reality for Japan sooner rather than later. I join that hope. One of the most critical benefits of life within a constitutional democracy is the equal application of the benefits of the constitution. Equal protection ensures that all can experience the same dignity and the same respect under the law. The equal application of justice ensures equity for all citizens. The opportunities for personal safety and security—hospital visitations, tax equity, immigration equity, among other rights and obligations—that marriage equality encompasses would extend the happiness of marriage to all who seek it.

Author Biography

Brian is currently revising his first memoir, *Crying in a Foreign Language: Pink Lady, Fictional Girlfriends, and the Deity that Answered My Plea*. It has yet to be published.

Originally from New York State, he now lives in the Seattle area after years in Massachusetts, Saitama, Tōkyō, and British Columbia. He spends his days with his partner/spouse of twenty-eight years, Hiro. Brian also spent ten years living in Japan, three of which were as an Assistant Language Teacher for the Saitama Prefectural Board of Education, and three of which were as a Programme Coordinator for the Council of Local Authorities for International Relations.

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